THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

TRUST DOCKET
7TH CIRCUIT COURT
PROBATE DIVISION

JOHN MARK HALLETT, AMY HALLETT HEBERT, HANNAH R. HEBERT, RACHAEL M. HEBERT, PATRICIA HALLETT SANDERSON, JOHN A. HALLETT, AND AMANDA C. HALLETT

v.

WILLIAM E. BRENNAN, AND BARBARA D. HALLETT, INDIVIDUALLY AND AS CO-TRUSTEES OF THE RICHARD S. HALLETT 1996 REVOCABLE TRUST AND ITS SUB-TRUSTS KNOWN AS THE HALLETT FAMILY TRUST AND HALLET MARITAL QUALIFIED TERMINABLE INTEREST PROPERTY (QTIP) TRUST

WILLIAM E. BRENNAN AND BARBARA D. HALLETT, IN THEIR CAPACITY AS CO-TRUSTEES OF THE RICHARD S. HALLETT 1996 REVOCABLE TRUST AND ITS SUB-TRUSTS KNOWN AS THE HALLETT FAMILY TRUST (FAMILY TRUST) AND HALLET MARITAL QUALIFIED TERMINABLE INTEREST PROPERTY (QTIP) TRUST

v.

JOHN MARK HALLETT, AMY HALLETT HEBERT, HANNAH R. HEBERT AND RACHAEL M. HEBERT (HALLETT QTIP TRUST)

AND

HANNAH R. HEBERT, RACHAEL M. HEBERT JOHN A. HALLETT, AMANDA C. HALLETT AND PATRICIA HALLETT SANDERSON (HALLETT FAMILY TRUST)

317-2013-EQ-865

DECREE ON MERITS OF PETITIONS

John Mark Hallett ("Mark"), Rachael Hebert, and Patricia Hallett Sanderson (Ms. Sanderson) (collectively, the "Petitioners")[1] have filed a *Verified Petition for a*

[1]Amy Hallett Hebert and Amanda C. Hallett were also originally named petitioners; however, they were allowed to take non-suit with prejudice before commencement of trial.

Preliminary Safe Harbor Ruling, a Preliminary Injunction, the Removal of Trustees, Request for Damages, Surcharges, other Relief and Attorney's Fees (Index #1) that was later supplanted by a *First Amendment to Verified Petition* (Index #58) (collectively, the "*Hallett Beneficiaries' Petition*") on grant of a *Motion to Amend* (Index #57) under an order entered on May 26, 2015 (Index #68 at 7). William E. Brennan and Barbara D. Raskin Hebert Hallett ("Barbara" as an individual or beneficiary)(collectively, the "Co-trustees" or "Respondents" and, separately, "Respondent Brennan" and "Respondent Hallett") have countered with a *Petition for Declaratory Judgment*, see Docket No. 317-2013-EQ-00877 (Index #1) ("*QTIP Trust Petition*") and another *Petition for Declaratory Judgment*, see Docket No. 317-2013-EQ-00878 (Index #1) ("*Hallett Family Trust Petition*"). The two cases initiated by the Co-trustees' petitions were later merged for litigation purposes into the case commenced under the Hallett Beneficiaries' Petition by agreement and order of the Court. See Order dated November 20, 2014 on an *Assented-to Motion to Substitute Parties and Consolidate* (Index # 30).[2]

At issue under the *Hallett Beneficiaries' Petition* are certain asserted actions and inactions of the Co-trustees in the course of their service under The Richard S. Hallett 1996 Revocable Trust, see The Richard S. Hallett 1996 Revocable Trust Agreement, Agr'd Exh. 4, as amended, see First Amendment to the Richard S. Hallett Revocable Trust Agreement, Agr'd Exh. 6 (the "Amendment") (collectively, the "Trust"), for which remedial relief is sought against each of the Respondents both in their capacity as Co-trustees and individually. The claims are that the Respondents as Co-trustees violated

[2] For purposes of convenience and simplification, unless otherwise indicated, case index numbers cited or referenced are to the Petitioners' case file into which the Co-trustees' *QTIP Trust Petition* and *Hallett Family Trust Petition* were merged after the November 20, 2014 granted consolidation of the three cases.

their duties: (1) to administer, invest, otherwise manage and distribute the trust property; (2) to inform and report to the Hallett Beneficiaries; (3) of recordkeeping and trust property identification; (4) of loyalty; and (5) of impartiality.

For their part, in their own petitions, the Respondents request approval of their submitted accountings and enforcement of the no contest or *in terrorem* forfeiture provision of Article 13 of the Trust against the Petitioners.

For the reasons set forth below, the Court GRANTS prayers of the *Hallett Beneficiaries' Petition* so far only as they are consistent with the findings, rulings and orders *infra*; it is otherwise DENIED. The Court DISMISSES the Respondents' *QTIP Trust Petition* and *Hallett Family Trust Petition* and DENIES the prayers of each. Consistent with the foregoing dispositional order, and for reasons also set out infra, the Court declines the Co-trustees requests for approval of their accounts and to enforce the forfeiture provisions of Article 13 of the Trust.

I. Facts

The pertinent facts essential to the rulings and orders entered on the evidence adduced over the course of the five-day trial follow.

A. *Trust Establishment and Relevant Terms*

In 1996, doctors diagnosed the Richard S. Hallett ("Dick" or the "Grantor"), with terminal cancer. Following that diagnosis, he began the process of post-mortem estate planning. To that end, he consulted his attorney and personal friend, Respondent Brennan, who in turn, referred him to Attorney Ruth Ansell on January 8, 1997, owing to his own lack of professional experience, expertise or practice in that field of the law.[3]

[3] Respondent Brennan testified that he not only lacked experience or expertise in that field of the law, but further represented that he was a trial lawyer who had never served as a trustee before.

Attorney Ansell drafted the initial, pre-amended version of the Trust that Dick proceeded to execute. It specified that upon his death, two sub-trusts were to come into existence: the Hallett Family Trust (the "HFT") and the Hallett Marital QTIP Trust (the "QTIP Trust") (collectively, at times "the sub-trusts"). Each of the sub-trusts was predominantly funded with a single, though separate, real estate asset. On November 1, 1996, Dick conveyed a commercial property in Newington, New Hampshire (the "Newington Property") to the Trust. See Agr'd Exh. 7. On that same date, he conveyed another commercial property located in Milford, New Hampshire (the "Milford Property") to the Trust. See Agr'd Exh. 8. Under the Trust as originally cast, on Dick's death, the Newington Property was designated for allocation to the QTIP Trust, and the Milford Property was to be distributed to wife Barbara[4] outright, free of any trust; while what later remained of assets of the Trust was made distributable to the HFT. See Agr'd Exh. 4. Further, all annual net income from the QTIP Trust was made distributable to Barbara during her lifetime. See Agr'd Exh. 4, Art. 8, ¶ a. In addition, if the net income of the QTIP Trust should be less than $75,000 within any such annual period, the Co-trustees were conferred discretionary authority to distribute QTIP Trust principal of up to an amount that when added to the annual net income, would equal $75,000 (the, "Minimum Annual Distribution"), subject to increase every five years "by the cumulative CPI . . . for the City of Boston, Massachusetts". See Agr'd Exh. 4, Art. 8, ¶ b. Still further, if the QTIP Trust should not generate annual net income or have sufficient principal available to otherwise fully fund the Minimum Annual Distribution as determined by the Co-trustees, then they were directed to make up the difference from

[4] Barbara and Dick were married in March of 1987, after his 1986 divorce from his first wife, Marilyn. Those of the Petitioners who are Dick's children, as well as those who are not but constitute Hallett beneficiaries under the sub-trusts, are the issue of Dick's marriage to Marilyn.

so much of the HFT net income and principal as they determined to be needed. See Agr'd Exh. 4, Art 7, ¶ b. The Co-trustees were further conferred discretion

> to pay to or apply for the benefit of one or more any of the children of [his own] children, Matthew Hallett and Amy Hallett Hebert, such sums from the net income and principal of the [HFT] in such shares and proportions as in [their] sole discretion shall be necessary or advisable from time to time for their medical care, education, support, and maintenance in reasonable support comfort, taking into consideration to the extent the Trustee[s] deem[ ] advisable any other income or resources known to the Trustee[s].

Id.

On April 14, 1997, Dick executed the Amendment to the Trust as originally constituted. See Agr'd Exh. 6. So far as relevant to the case now before the Court based on the actual events that later occurred, under the Amendment, after his death and during her lifetime for so long as she remains unmarried, the Co-trustees are directed to distribute to or apply to the benefit of Barbara all of the net income from the HFT. In addition, the provision for the discretionary use of the HFT income and principal to satisfy the Minimum Annual Distribution set out in the original version of the Trust was changed to eliminate use of its net income, presumably in light of the change effected in allocating all of it to her apart from the Minimum Annual Distribution. See Agr'd Exh. 6, ¶ c & d.[5] Finally, the Amendment provides that on Barbara's death what

[5] The changes effected by the Amendment to Article 7, for reasons the Court can only presume to have been scrivener's error, re-letter the paragraphs of the original Trust by beginning with "b" rather than "a" and continuing the letter sequence from there in seriatim.

It is unclear to the Court whether the Minimum Annual Distribution as originally referenced in the Trust before, and/or after, the Amendment is an entitlement due Barbara or only a matter of expectation left to be fulfilled or unfulfilled in whole or in part, depending on the Co-trustees exercise of discretion. While the descriptive words "annual minimum distribution" and "minimum annual distribution" suggest the establishment of a base amount that is required, other language stating that the Co-trustees' "are authorized, in their discretion, to distribute principal [of the HFT] . . . to supplement the annual distribution of net income with sufficient principal so that the Grantor's wife receives a minimum distribution of $75,000 per year[,]" (emphasis added), seemingly poses an internal inconsistency, if not contradiction, at

assets remain in the QTIP Trust are required to be distributed in the following manner: $20,000 to Matthew Hallett ("Matthew") conditioned on his survival of Barbara, and one (1) share each to Dick's other children, Mark and Amy Hallett Hebert ("Amy"), or by right of representation to their surviving issue. If all of Dick's children are deceased at Barbara's death, the property is to pass to his grandchildren on a per capita basis.

Five days after executing the Amendment, on April 19, 1997, Dick passed away.

In accordance with the terms of the Trust, the HFT was funded with Dick's half-interest in a partnership, referenced in the Trust as Two Wheels Partnership, see Agr'd Exh. 4, Art. 7, ¶ a, but designated in the partnership agreement, as amended, as Two Wheels Realty Company ("Two Wheels"). See Agr'd Exhs. 3 & 3a. Two Wheels owned real estate in Manchester and Hooksett, New Hampshire that earned it, at least in part, income through rents. As already stated, under the Amendment, once Dick died, the net annual income of the HFT was made distributable to Barbara. See Agr'd Exh. 6, Art. 7, ¶c. It further specifies that at the death or remarriage of Barbara, the Co-trustees, in their discretion, can then distribute net income of up to $500 a calendar month to the Dick's sister, Ms. Sanderson, during her lifetime. See Agr'd Exh. 6, Art.7, ¶ e. Additionally, in their discretion, the Co-trustees are allowed to invade the principal of the HFT for the benefit of his grandchildren, the children of his children, Matthew and Amy, "for their medical care, education, support and maintenance in reasonable comfort, taking into consideration to the extent the Trustee[s] deem[ ] advisable, any

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the very least. If it is a mandate, it is difficult to appreciate in what manner the Co-trustees have any discretion to exercise since the amount is designated and any CPI adjustment is otherwise mathematically ascertainable, as is the amount of any principal supplementation needed to otherwise fill the void of any net income and principal shortfalls. In any event, neither party has asserted that the Minimum Annual Distribution is not a mandate to be carried out by the Co-trustees. As such, for purposes of the rulings of this Decree it is so construed, with the Co-trustees' discretion limited to ascertainment only of whether and how much of a principal supplementation of the income is needed to reach any given annual Minimum Annual Distribution mandated.

other income or resources known to the Trustee[s]." See Agr'd Exh.6, Art. 7, ¶ f. After the death or remarriage of Barbara, and the death of Ms. Sanderson, the remaining income and principal assets of the HFT are to be distributed to Matthew and Amy's then living children in per capita, equal shares, see Agr'd Exh. 6, Art. 7, ¶ g; however, those shares are to be held by the Co-trustees for the benefit of any such grandchild until his or her attainment of the age of forty (40) subject to the Co-trustees discretionary distribution for the beneficiary's "medical care, education, support and maintenance in reasonable comfort . . . taking into consideration to the extent the [Co-trustees] deem[ ] advisable any other income or resources of the beneficiary known to the [Co-trustees]." See Agr'd Exh. 6, Art. 16.

B. *Trust Administration and Management*

At some point shortly before the death of her husband, Barbara had begun executing some of the management responsibilities regarding the Trust properties on his behalf, at least in modest measure. After Dick's April 19, 1997 death, the Respondents assumed their positions as Co-trustees of both the QTIP Trust and the HFT. As between the Co-trustees, day-to-day administration and management of the Trust has been handled almost exclusively by Respondent Hallett, with Respondent Brennan's involvement for the most part limited to participating in matters more legal, such as certain dealings with the Petitioners and other beneficiaries, evictions, municipal land use concerns, rendering legal advice to Respondent Hallett regarding her trust administration and management responsibilities, and the like. For example, it

was Respondent Brennan who sent Dick's children a copy of the trust agreement and will after their father's death. He also believes that he sent a copy to Ms. Sanderson.[6]

To fund the HFT, the Grantor required that his partnership interest in Two Wheels be held and administered by the Co-trustees subject "to the dictates of the Partnership Agreement which control the distribution of particular assets upon the death of a partner." See id. at ¶ b. The Two Wheels partnership agreement states that upon the death of one of the partners, "a proper accounting shall be made of the capital and income accounts of each Partner, the net profits or loss of the Partnership . . . and of the net asset value of inventory, equipment and book accounts then on hand. . . . Each Partner (or his estate) shall . . . then receive an amount in cash or property equal to the current sum of his [portion of the partnership]." See Agr'd Exh. 3, Art. 10, ¶ a.

Respondent Hallett testified that John Nutter, the Grantor's remaining partner in Two Wheels, arranged for an appraisal. In the months following Dick's death, the Co-trustees worked through the process of liquidating the HFT partnership interest in Two Wheels.[7] After some negotiation related to valuation of the partnership, the Co-trustees agreed on a price with Nutter. See Agr'd Exhs. 19-21. On January 1, 1998, Nutter signed a promissory note (the "Nutter Note") to the HFT, secured by real estate in Hooksett, New Hampshire (the "Hooksett Property"), for $325,000, together with

[4] Respondent Brennan testified that the practice at his law office is to purge files of records after 10 (ten) years, which was done in regard to the documentation relating to the matters at hand prior to the commencement of the litigation. Accordingly, in this particular instance and some others, he indicated that his testimony was based on his belief or best recollection.

[7] It is uncertain whether the Dick's partnership interest in Two Wheels was actually ever transferred or conveyed to the HFT before or after his death. Respondent Brennan testified that he is unaware of any documentation evidencing that it was, and that it was his belief or legal understanding that it passed through Dick's will and from it "poured" into the Trust by operation of law. While he had Dick's will probated, he did not petition for administration under averment that there was no estate to administer. See Agr'd Exh. 10. In any event, it appears that the Co-trustees treated it as though it had so devolved.

"interest on the unpaid balance of nine (9) percent per annum." Interest only installments were made payable over sixty (60) consecutive months in the amount of Two Thousand, Four Hundred and Thirty Seven Dollars and Fifty Cents ($2,437.50), followed by repayment of all outstanding principal in one "balloon payment at the end of five (5) years." At the borrower's option the Nutter Note was also made renewable for an additional term of five (5) years. See Agr'd Exhs. 17 &18. However, before even the initial term of the Nutter Note expired, the Hooksett Property securing it was sold to Dennis and Evelyn Withee (the "Withees) and a new promissory note (the "Withee Note") was given to the HFT by the Withees on October 15, 1999 under essentially the same terms as, and in substitution for, the Nutter Note but for: a first, interest only, payment of $1,218.75 (an apparent pro-rated one-half of the regular $2437.50 interest only payments that were required to follow); an initial term of seven (7) years; a balloon payment of the $325,000 principal sum due on October 15, 2006; and a seven (7) year renewal at the borrowers' option. See Agr'd Exh. 26. The same Hooksett real estate was again mortgaged to the HFT to secure the Withee Note. See Agr'd Exh. 25. Respondent Hallett testified that in her opinion, as well as that of Respondent Brennan, owing to the high interest rate established under the notes, the liquidation of the Two Wheels partnership interest was very favorable from an investment standpoint. Between the execution of the Nutter Note in January 1998 and later continuing under the Withee Note until August 26, 2003, Barbara received and retained the 70 monthly interest only installments, totaling some $170,625, paid on the notes as income beneficiary under the QTIP Trust and the HFT. The interest was not deposited into the

HFT, but rather into a joint bank account Barbara held with Dick during his life and not until quite sometime later changed to her name alone after his death.[8]

In August 26, 2003, the Withee Note was renegotiated at the Withees' request and a new note was executed and given to the HFT, secured by a mortgage of the Hooksett Property. This transaction allowed for a reduced interest rate in exchange for amortized monthly principal and interest repayments on the indebtedness (the "Renegotiated Withee Note"). See Agr'd Exh. 38. A 5.25% fixed interest rate per annum for 10 years was agreed on, to be adjusted thereafter based on recited terms, as well as payments commencing on September 1, 2003 and continuing through October 1, 2018, or such sooner date as the obligation for principal repayment under the Renegotiated Withee Note was fully satisfied. See Id. The Withees repaid the principal obligation in December of 2011, and the mortgage on the Hooksett Property was then discharged. See Agr'd Exh. 42.

After the Renegotiated Withee Note was executed, the Co-trustees for the first time opened an account for the HFT with Smith Barney[9] into which the amortized monthly installment payments began and later continued to be deposited. The account was a simple savings account from which certificates of deposit where periodically purchased (the "CDs"). According to Betsy Bowen, the financial advisor engaged in 2003 to manage the HFT account and CDs, this was done to maintain liquidity in order to make cash available for the grandchildren's education. On the instruction of

[8] Though Respondent Hallett earlier in her testimony had stated that the payments were deposited into a bank account of the HFT, she later represented, after it was established that such an account did not then exist, that they were instead deposited into the joint bank account referenced.

[9] The Smith Barney account later became a Morgan Stanley account after the latter's acquisition of the former.

Respondent Hallett, at the end of each year Ms. Bowen was informed of the amount of the deposited installment payments that were to be allocated to interest, which were then transferred into a personal account of Barbara at the end of each year until the beginning of 2012, after all remaining principal owed under the Renegotiated Withee Note had been fully repaid. That which remained was treated as principal. Once the Renegotiated Withee Note obligation had been satisfied, the Co-trustees worked with Ms. Bowen to change the account investment strategy to one focused on affording Barbara income in substitution for that lost as a result of the note repayment, while preserving assets and affording principal growth through capital appreciation.

Meanwhile, Barbara, as a Co-trustee, continued to administer the Newington Property of the QTIP Trust, collecting rents and maintaining it largely as though she owned it in her own right as an individual. For example, at times she executed lease documents and more often received vendor, tax or provider bills and invoices proffered in her own name as an individual, without informing or requiring the issuers to designate as owner or obligor herself as trustee and representative of the Trust or QTIP Trust, or directly in the name of the Trust or QTIP itself, as otherwise appropriate, and then tacitly endorsing her failure by issuing payment from her personal checking account. See, eg., Agr'd Exhs. 27, 28, J-3, K-3, N-3, O-3, P-3, E-5 L-5, T-5, W-5, X-5, Y-5, H-6, I-6 J-6 K-6, Q-6, R-6, W-6 Z-6 A-7 B-7 E-7 F-7 I-7 J-7 K-7 F-7 U-7 V-7, W-7, A-8, B-8 & E-8. As she remained unmarried, Barbara received all income from both the QTIP Trust and net income from the HFT as beneficiary, in addition to principal from the HFT to the extent that she and her Co-trustee determined necessary to fund any income deficiency in the permissible Minimum Annual Distributions. During calendar years 2009, 2011 and

2012, Respondent Hallett, with concurrence of Respondent Brennan, invaded the principal of the HFT by a total of $90,000 ($20,000 in each of the years 2009 and 2011, and $50,000 in 2012) that she distributed to herself as a supplement to the net income of both the QTIP Trust and the HFT.[10] See Agr'd Exhs. 14, xi, xii & xiii. Those same calendar years she received net income from the QTIP Trust totaling $215,165.06, see Agr'd Exh. 13, xiii, xiv & xv, and from the HFT in the cumulative sum of $28,616.32. See Agr'd Exh. 14, xi, xii & xiii. According to Respondent Brennan, this was done after he learned that Barbara had taken a line of credit on her home to cover some of the expense associated with the Newington Property of the QTIP Trust. The record does not afford the Court a reasonable basis for determining whether the invasion was or should have been needed to meet the Minimum Annual Distribution. It seems equally possible that any such need was the consequence of Respondent Hallett's drawing down the gross income derived from the Newington Property out of the QTIP Trust bank account on a regular basis, placing it into a personal account of her own, and then paying the expenses of the Newington Property out of that personal account — as apparently had been her practice from the time the QTIP Trust was initially funded. That practice may well have produced a deficit of gross income available to fund the QTIP Trust operating expenses in conjunction with the Newington Property.[11]

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[10] Respondent Hallett testified that she made the payments out of the HFT principal; and from Respondent Brennan's testimony the Court discerns that she did so at his suggestion, direction or, at the least, with his approval.

[11] No discretionary distribution was taken from the principal of the QTIP Trust to fund the Minimum Annual Distribution in advance of those taken from the HFT, as Article 8, ¶ b and Article 7, ¶ d might suggest was intended. Read together one might reasonably deduce that the use of QTIP Trust principal is a condition precedent to the Co-trustees exercise of what authority they are conferred to invade HFT principal. The value of the QTIP Trust principal greatly exceeds the value of the HFT principal, and always has. The Court presumes that the Co-trustees opted to read the provision of Article 8, ¶ b and Article 7, ¶ d as affording them discretion not to invade the principal of the QTIP Trust before that of the HFT, if for no

Other than the mandatory income and/or permissible principal distributions made by Barbara as a Co-trustee to herself as beneficiary, from the testimony presented at trial the only other distributions made from the HFT by Barbara as a Co-trustee were to Rachael Hebert and Hannah Hebert, two of Dick's grandchildren and the children of Amy. Rachael requested and received two years (2011-2012) of tuition for post-secondary education at New England Technical Institute in the combined amount of $8,630. See Agr'd Exh. 14, xiii & xvi. In 2007, Hannah asked for tuition to attend four years of college at Cazenovia College. As a Co-trustee, Respondent Hallett, indicated that the HFT could not cover the tuition for all four years; and although the first semester tuition of $12,326 was paid on her behalf, her matriculation was very abbreviated for what she described as personal reasons between her and the school having nothing to do with a lack of further funding from the HFT. While the Court's best recollection is that it was not the subject of any testimony, the submitted evidence indicates that an additional $8,000 was distributed on Amanda Hallett's behalf in conjunction with her attendance at Michael's School of Hair Design in 2012. See Agr'd Exh. 14, xiv.[12]

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other reason than it would have required sale of all or a condominiumized portion of the Newington Property. It takes note that Article 8, ¶ b of the pre-amended Trust specified that if the net income of the QTIP Trust alone is insufficient to meet the Minimum Annual Income requirement, then, in the Co-trustees' discretion, its principal may be invaded to supplement what is determined needed; while Article 7, ¶ b of the pre-amended Trust and Article 7, ¶ d of the Amendment both qualify the use of HFT principal in supplementing the Minimum Annual Distribution on the QTIP having "insufficient income or principal funds available." (Emphasis added.) As neither party raised an issue or any concern regarding the matter in course of the trial of the case, the Court makes no finding or ruling, but only its observation in regard to it.

[12] Amanda Hallett ("Amanda") was another of Dick's four grandchildren, the daughter of his son Matthew. Schedule C of the same exhibit reports: "12/07/2012 Refund of prior principal distribution for educational expense . . . $4000", while its Schedule F evidences two $4000 distributions made on behalf of Amanda to Michael's School of Hair Design, one on July 5, 2012 and the other on August 7, 2012, suggesting to the Court that the refund was likely in relation to the latter $4000 tuition distribution on behalf of Amanda. As the Court recalls no direct testimony adduced in relation to the matter and the exhibit offers no other explanation, it offers the foregoing only as a possible explanation and not a finding — supported though it may be in one of the Respondents' requests for findings of fact. See *Co-Trustees' Proposed Findings of Fact, Rulings of Law and Proposed Judgment*, Index #119.

Further, in regard to trust administration, investment and management, the Co-trustees extended a loan to the QTIP Trust from the HFT in the amount of $3,299.44 on a date unspecified during 2013 that is reported in Schedule B of that year's accounting as: "Loan Receivable QTIP Trust – Legal Fees Paid to Law Office of Janie Lanza Vowles, P.C. o/b/o QTIP Trust for Trust Admin. Issues regarding QTIP Trust[,]" Agr'd Exh. 14, xv, that was increased by another $1,125.00 the following year. See Agr'd Exh. 14, xvi, Schedule B. It was represented at trial that there is no loan documentation evidencing the loans, and they do not carry interest. As during calendar years 2013 and 2014, respectively, Barbara received from the QTIP Trust gross income of $136,333.68 and 148,663.99, while the HFT distributed to her net income of $97,015.55 and $56,306.45, it is unapparent why the loan should have was needed by the QTIP, and it certainly served no productive investment purpose from the standpoint of the HFT. The accountings for both sub-trusts also show that all investment fees for the HFT, as well as all attorney fees, were charged to and paid from the HFT principal even when they were related to work for the Newington Property of the QTIP Trust or otherwise conferred benefit through the receipt of income. Neither the QTIP principal nor its income bore any such expense.

The Co-trustees conferred by phone, email or, less often, in person, from time to time. From the testimony at trial, their meetings were typically prompted by the need to address some legal matter associated with the Newington Property, a concern presented by one or other Hallett beneficiary, or of a "how are things going" nature, than of a more formal sit-down to discuss the status or specifics of the administration and management of the sub-trusts. Beyond forwarding the then adult Hallett beneficiaries a

copy of the Trust and Dick's will after he died, they did not render written accounts or regular reports to the beneficiaries, with or without their request, until litigation was begun. They also at no time endeavored to initiate contact with the beneficiaries of the HFT to whom discretionary principal distributions were permissible so they might be informed of their rights and interests in the Trust or the sub-trusts and/or assess matters of their administration in regard to material facts necessary for them to advance and protect their interests.

Finally, although a request was made of the Co-trustees by the parent of at least one of the non-income Hallett beneficiaries of the HFT for a principal distribution to pay for dental braces, the request was denied without any apparent endeavored assessment of need or seeming other meaningful consideration.

C. *Litigation*

In early October 1998, Mark, after sending a copy of the Trust and Dick's will to Attorney Jack Bielagus, endeavored to ascertain what his rights were under them. See Agr'd Exh. 24. Not apparently satisfied with Attorney Bielagus's advice, later, in early 2001, Mark met with Attorney Steven Cohen seeking similar advice, especially in relation to Respondent Hallett's management as Co-trustee of the properties held in the QTIP Trust and the HFT. See Agr'd Exh. 57. Mark thereafter had no further communication with either or both Co-trustees until the mid-November 2011. Similarly, in early 2002, Amy sought advice from Attorney Deborah Bailin concerning her and her children's rights under the trusts. See Agr'd Exh. 32. Attorney Bailin sent a letter dated March 29, 2002 to the Co-trustees on behalf of Amy as the "mother and legal guardian of Hannah Hebert and Rachel Hebert." Agr'd Exh. 33. Respondent Brennan answered

Attorney Balin by letter dated April 17, 2002, explaining the purchase and sale agreement related to the HFT's partnership interest in Two Wheels, the Nutter Note and mortgage, as well as the later Withee Note and mortgage. See Agr'd Exh. 35. He further described and explained the nature of the monthly installment payments of interest only under the notes, Barbara's entitlement to them as income beneficiary of the HFT, the anticipated principal balloon payment, and that the Co-trustees would reevaluate the investment strategy upon receiving payment of the principal due under the Withee Note. Amy, herself, later initiated contact with Respondent Hallett in her capacity as a Co-trustee concerning HFT's funding of post-secondary education expense of her two daughters discussed earlier.

In mid-November 2011 Mark reinitiated contact with Respondent Brennan, and there then ensued a series of communications concerning questions Mark had about "administrative accountability" that he felt he and his siblings were entitled to receive. See Agr'd Exh. 44-50. Mark represented in these communications that he was writing on behalf of his siblings. See, e.g., Agr'd Exh. 44 & 46. After a Co-trustees meeting, Respondent Brennan sent a letter dated December 6, 2011, in which he explained the assets held in the HFT and the QTIP Trust, as well as provided a disk of tax returns that had been prepared to that date for the two sub-trusts. See Agr'd Exh. 47. On December 21, 2011, Mark met with Respondent Brennan, along with Francis Coffey, who was introduced as either Mark's accountant or representative, see Agr'd Exh. 47a, but was actually a car dealer in whose business Mark wanted to invest.[13] At this meeting, Mark requested a gift or advance of money from the HFT for that purpose.

[13] Mr. Coffey later became an attorney licensed in Massachusetts. He motioned and was granted leave to serve as the Petitioners' trial counsel in the litigation now before this Court. See *Verified Application to Appear Pro Hac Vice* (Index #2).

Mark also requested that he be hired to manage the QTIP Trust's Newington Property. The following day, Respondent Brennan sent an email to Mark stating that Respondent Hallett was not prepared to gift or advance money to Mark from the HFT, and that she had also declined his offer to manage the Newington property. See Agr'd Exh. 49. That same day, Mark requested copies of the QTIP Trust and HFT declarations and the Schedule A purported initial funding of the Trust, apparently not understanding that there were no such declarations standing apart from the Trust, which Mark himself testified he received from Respondent Brennan after Dick's death. See Agr'd Exh. 49a. In responding, Respondent Brennan alluded to that fact, tersely commenting that he had already informed him that Schedule A to the Trust reflected funding of "$10,000.00", and stating: "I think we have reached the end of the line." Agr'd Exh. 50.

Over the next several months, Mark continued to send letters and emails to Respondent Brennan and/or Respondent Hallett seeking information concerning the Trust. See Agr'd Exhs. 93, 66, 68-70, 72-73 & 75-77. Other beneficiaries also sent letters requesting similar information. See, e.g., Agr'd Exhs. 64 & 77. A meeting was eventually scheduled by Respondent Brennan for Mark to meet with the Co-trustees on February 21, 2012 at 9 a.m. for one hour. Mark elected not to attend for want of advance written responses to some twenty enumerated questions he had posed in prior correspondence to the Co-trustees, as well as six more, restated and newly articulated in a letter to them dated February 20, 2012 and emailed at 5:38 p.m. See Agr'd Exhs. 78 & 79. Respondent Brennan proffered answers to each of Mark's queries via an email back to the latter on February 21, 2012 at 9:53 p.m., see Agr'd Exh. 80; however, Mark replied that he found the answers in tenor offensive and, in illustratively articulated

instances, substantively inadequate when not "complete distortions of the truth." Agr'd Exh. 83 at 7. Exchanged written banter between them continued that day, and the two days that followed, through email bearing similar dispositional tone and manner. See Agr'd Exhs. 81 & 83. But for a cover letter sent to Mark, along with his brother Matthew, dated March 5, 2012, see Agr'd Exhs. 86 & 87, that enclosed a copy of a letter referencing enclosures sent by Respondent Brennan to Amy, see Agr'd Exh. 84, in response to her letter of February 20, 2012, see Agr'd Exh. 77; all communication between them then ceased until the beginning of August of 2012. At that time, Mark initiated another string of correspondence rehashing essentially the same themes as had been aired between them during the period of the prior December to March 5 — regrettably, and to the same unsatisfying end from the perspective of both sides. See Agr'd Exhs. 89-93. In short, Mark sought further information or greater explanation of answers to questions previously asked, and the Co-trustees, through Respondent Brennan, continued to maintain that all Mark was entitled to receive had been given.

On March 6, 2013, the Petitioners, as then constituted, filed an action with the Hillsborough County North Superior Court, alleging 15 separate counts against the Co-trustees. The Co-trustees countered with a motion to dismiss for lack of subject matter jurisdiction as to those claims that pertained to the administration of the QTIP Trust and the HFT, as well as alleged violations of the New Hampshire Uniform Trust Code. On July 29, 2013, the Superior Court (Abramson, J.) granted the motion to dismiss the trust-related claims. In November 2013, the Petitioners, again as then constituted, re-filed their dismissed claims under the original Hallett Beneficiaries Petition in the 6th Circuit Court – Probate Division, alleging various breaches of trust and violations of the

New Hampshire Uniform Trust Code. The Respondents followed with their filing of the QTIP Petition and the HFT Petition with the same court. The three cases were then reassigned and transferred to the Trust Docket under Administrative Order 2014-2023, dated October 8, 2014, by the Chief Administrative Judge of the Circuit Court. See Index #24

Initially in this Court, the Petitioners, and the since non-suited Amy and Hannah Hebert, inter alia, sought a determination of whether their original Hallett Beneficiaries' Petition would constitute a "contest" within the meaning of the Trust's *in terrorem* clause. This Court ruled that Counts I through V of the petition did constitute a contest, but that under certain later trial established circumstances they might find "safe harbor" if at least some of their claims were ultimately determined to be meritorious. As mentioned earlier, the Petitioners, with leave of the Court and without objection, then amended their petition, see *First Amendment to Verified Petition* (Index 58), and proceeded to trial. Importantly, despite their non-suit, Amy and Hannah Hebert both voluntarily testified on behalf of the Petitioners.

II. Rulings

Trustee's Duty to Administer, Invest and Manage Trust, and Distribute Trust Assets

The Petitioner's allege that the Co-trustees breached their fiduciary duties when they failed to collect and place in the trust: (1) $28,205.06 in life insurance proceeds paid on five policies owned by and insuring the life of Dick at the time of his death; and (2) rent and back rent from the Milford property. The Court disagrees.

A. *Life Insurance*

Article 2 of the Trust states, inter alia, that "[the Grantor] may hereafter transfer

and deliver additional property or cause the Trustee to be designated as beneficiary of life insurance policies, the proceeds of which are payable to the Trustee . . . ." It does not appear to be a matter of dispute that the policies of concern named Barbara as the beneficiary without any reference to her status as a Trustee or Co-trustee. Barbara received the insurance proceeds by checks made payable to her in her name as an individual person, cashed them and retained the money.

The Petitioners are requesting the Court to find and rule that the proceeds were received by Barbara as a trustee of the Trust and, as such, she should have put the cash received into it. To do so, the Court would need to read the term "Trustee" within the context of Article 2 as signifying not just a person so named or qualifiedly designated, but as one having that representative status when not designated or acting in such a capacity. It does not find the term "Trustee," or any other language of Article 2 for that matter, ambiguous as it relates to the payment and receipt of the insurance proceeds. However, assuming, simply for the sake of argument, that there is ambiguity, the Court would need to ascertain its existence after examination of "the entire document as a whole and [ ] not focus on an isolated phrase or clause." Indian Head Nat'l Bank v. Brown, 123 N.H. 87, 91 (1983) (citing Indian Head Nat. Bank v. Rawls, 105 N.H. 142, 146 (1963)). At various points in the Trust, Dick either specifically names Barbara or "his wife", apart from her role as a Trustee or Co-trustee. See, e.g., Art. 3, ¶ 3; Art. 6, ¶¶ a-b; Art. 7, ¶¶ b-e, g; Art. 8 ¶¶ a-e; Art.14; Art.15; Art. 22; & Art. 26. Had he intended for the word "Trustee" in Article 2 to include Barbara in her capacity as an individual, there is ample evidence to suggest that he would have so stated, as he did throughout the rest of the Trust.

In any event, as stated above, the Court does not find that the language in Article 2 ambiguous. The language was intended to allow for the Grantor to add property to the Trust at a later date. No evidence was presented demonstrating that the insurance policies named or were intended to be paid to the Trust or its representative(s) as beneficiary. Therefore, the Court finds no breach of fiduciary duty in Barbara's personal receipt and retention of the death proceeds.

B. *Milford Property*

It is an accepted fact among the parties that the Trust owned the Milford Property at the time of Dick's death. According to Article 6, paragraph b. of the Trust, "[i]f the Grantor's wife survives him, the Trustee shall allocate . . . [the Milford Property] . . . to the Grantor's wife, Barbara D. Hebert Hallett." The Trustees failed to do so through deed conveyance until July 3, 1998, almost 15 months after Dick's death. See Agr'd Exh. 23. Respondent Brennan testified that this was due in part to Barbara Hallett's emotional state in dealing with this particular piece of property.[14] However, it strikes the Court at least as likely, if not more so, that it was owing to his admitted erroneous belief that a deed was not required to effect the transfer from the Trust to the distributee but rather, as is the case with a will, it occurred by operation of law. It is not clear what eventually lead him to realize that a deed was required. At all times after Dick's death, Barbara treated and administered the Milford Property under the belief and as if it was her own and not still an asset of the Trust.

[14] In addition, the post-mortem passage of ownership to the Milford Property was an apparent matter of discontent to Mark who testified that he felt or had understood that his father was going to leave it to him on his death, rather than on condition that Barbara predeceased his father as is specified in the Trust. See Agr'd Exh. 4, Art. 6, ¶ b.

The failure of the Co-trustees to more timely convey the Milford Property to Barbara arguably was a breach of duty so far as they are charged with "administer[ing] , invest[ing] and manag[ing] the trust and distribut[ing] the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries. . . ." RSA § 564-B:8-801 (2005). A delay in the distribution of trust property can give rise to a breach of fiduciary duty. See In re Eiteljorg, 951 N.E.2d 565, 570 (Ind. Ct. App. 2011) (breach of fiduciary duty where trustee failed to promptly distribute trust assets when the trust specified that distributions be made "upon or promptly after" the Grantor's death); see also RSA 564-B:1-106 (except as expressly modified, common law of trusts and principles of equity supplement RSA Chapter 564-B). However, the facts of this case do not support the ruling the Petitioners' request. Though the Trust here does state that the "Trustee shall allocate" the Milford Property to Barbara Hallett "[u]pon the death of the Grantor", see Agr'd Exh. 4, Art. 6, ¶ b, it does not otherwise contain any qualifying time-related or limiting language instructing the Trustee to make the allocation in a more expedient manner than occurred. Beyond that, while the Comment, subparagraph (b) to the Uniform Probate Code's (the "UTC") § 817(b), adopted and enacted as RSA 564:8-817(b), [15] informs that "[u]pon the occurrence of an event terminating or partially terminating a trust, expeditious distribution should be encouraged to the extent reasonable under the circumstances[,]" its words resonate as more aspirational and flexible than mandatory or fixed. More importantly, what delay occurred worked no prejudice or injury to the Petitioners since the Milford Property was not allocated or

[15] Hereafter, any citation in this Decree to the comment accompanying a section of the UTC that informs the reader of the reasoning behind or explaining the intended scope or meaning of the section and/or any of its parts, only pertains to those sections or its parts of the UTC that have been fully adopted and enacted in New Hampshire under RSA chapter 564-B without change or alteration.

distributable to them. Further, even had the deed conveyance occurred in the moments after Dick's death, the rental funds derived from the Milford Property would have been payable to Barbara in her individual right, not to either the QTIP Trust or the HFT.[16]

C. *Newington Property*

The Petitioners also complain that the Co-trustees have never conveyed the Newington Property to the QTIP Trust, a proposition to which the Respondents stipulated at trial. As with the Milford Property, the Petitioners assert that the need to convey the Newington Property to the QTIP Trust is mandated by the terms of the allocation set out in Trust. The Respondents maintain that there is no need for a deed conveyance and that the property in currently in the QTIP Trust by operation of law, citing In re Frolich, 112 N.H. 320, 328 (1972), as authority. In doing so, the Court submits that they misplace their reliance. In its view Frolich is distinguishable from the matter at hand so far as it involved a testamentary trust into which real estate owned by the decedent was devised with a direction that the executrix transfer and deliver by a proper deed of conveyance the land there of concern "free and discharged of all trusts to [the executrix in her individual right] . . . ." Concerned that to do so might violate her fiduciary duty of loyalty, she sought instruction from the Supreme Court, which informed her she could carry out the instruction of the will without breaching the duty because, inter alia, "it is the rule in this State that the expressed intention of the grantor will override, whenever possible, purely formalistic objection to real estate conveyance

[16] The Petitioners assert that the Co-trustees further breached their fiduciary duty to administer and manage the Trust by not pursuing the collection of rent arrearages past due from Milford Lumber and Muir Lumber, tenants at the Milford Property. However, again they were not harmed as a result since, had the Milford Property been conveyed more timely, or even on the day Dick died, the rental indebtedness would have followed the transfer of title to Barbara, not them or either sub-trust. In effect they argue that the failure to transfer the Milford Property out of the Trust to Barbara constitutes a breach of duty owed Barbara that they should benefit from by her repayment of the rental income received from it by reason of its constituting an asset of the Trust until it was deeded to her.

based on shadowy, subtle and arbitrary distinctions and niceties of the feudal common law." Id. at 327 (citation omitted). The Supreme Court went on to comment that: "[s]ince there is no statute or public policy militating against implementation of the method of transfer selected by the testator in this case, the terms of the will supersede the common-law rule against fiduciaries selling to themselves." Id. at 328. While it is true that the court, by way of dicta, perhaps unnecessarily went on to comment that it was "not unmindful that title to the [property of concern] passed to the petitioner by operation of law upon the death of the testator, or that petitioner has already obtained full title . . . by merger of the legal and beneficial interests[,]" id. (internal and external citations omitted), those doctrines are viewed by this Court as inapposite to the facts pertinent to the Newington Property. The relate to the QTIP Trust so far as Dick's will or the Trust for that matter, contained no such deed conveyance direction; the Trust is one that is intervivos rather than testamentary; before his death Dick placed title to the Newington Property in the Trust; and, unlike Frolich, the subject real estate did not pass from the decedent to the testamentary trust. Further support for the foregoing derives from the Supreme Court's citation in Frolch of Wentworth v. Wentworth, 75 N.H. 547 (1910) for the passage of title by operation of law proposition. Wentworth, in turn, cites Lucy v. Lucy, 55 N.H. 9 (1874) in stating that "[t]he real estate of a deceased person not insolvent vests at once upon his death in his heirs or devisees, subject to be divested by proper proceedings in due course of administration." Id. (Emphasis added.) Dick did not die owning title to the Newington Property, as he had already conveyed it to the Trust before his death. See Agr'd Exh. 7.[17]

[17] The Petitioners endeavored to make much of the November 1, 1996 date of the deed versus the January 8, 1997 date of the acknowledgement of Dick to his November 1, 1996 dated Trust by way of

To whatever extent breaches of duty can be viewed as otherwise having occurred, in this Court's view its rulings on the delayed Milford Property conveyance and rent payments and arrearages collection clearly fall within, are supported by, and are consistent with the equitable principle that "a court of equity . . . will order to be done that which in fairness and good conscience out to be or should have been done[,]" Langevin v. Hillsborough County, 114 N.H. 317, 320 (1974), because that property was granted to Barbara outright. However, the same cannot be said of the Co-trustees' failure to deed the Newington Property to the QTIP. Barbara is not the only beneficiary of the QTIP Trust. Amy and Mark, and to the measure of $20,000, Matthew, are its remainder beneficiaries. That the case, the Co-trustees' failure to deed the Newington Property to the QTIP Trust is found to be a breach of their duty to properly administer the Trust and QTIP Trust.

Trustees' Duties of Loyalty and Impartiality[18]

Dick established the HFT in part for the benefit of his grandchildren as remainder-beneficiaries. They are entitled to receive from the Co-trustees during Barbara's remaining unmarried life discretionary distributions of principal for their "medical care, education, support and maintenance in reasonable comfort, taking into consideration to the extent the Trustee deems advisable, any other income or resources

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attempting to establish the deed's inefficacious conveyance of title to the Trust; however, the Court declines the invitation to so rule. First an acknowledgement is not a prerequisite to the establishment of a valid trust concerning land, see RSA 477:17; and even if it was, the record in this case does not establish by a preponderance of the evidence that the Trust was not created on November 1, 1996,only that it was not acknowledged until January 8, 1997. Further, that the deed was not recorded until January14, 1997 does not affect its validity as between the grantor and grantee, only third person bona fide purchasers and creditors without notice. See RSA 477:7; also see Continental Cablevision of New Hampshire, Inc. v. Osgood Lodge #48 I.O.O.F Building Ass'n, 123 N.H. 215, 218 (1983).

[18] The Court addresses the Petitioners' duty of loyalty and duty of impartiality claims together as they are closely associated. Indeed, it is said that "[t]he duty of impartiality is an important aspect of the duty of loyalty." UTC §803, cmt.

known to the Trustee[,]" see Agr'd Exh. 6, Art. 7, ¶ f, and, on Barbara's death or sooner remarriage and the death of Ms. Sanderson, the then Trustee is to distribute what remains of the assets in the trust, on a per capita basis to and among the then living children of Matthew and Amy. See Agr'd Exh. 6, Art. 7 ¶ g.

When "a trust has 2 or more beneficiaries, the trustee [has a duty to] act impartially in administering, investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests." RSA 564-B:8-803. In cases with an income beneficiary and remainder beneficiaries,

> the trustee has a duty to exercise care to ensure that a reasonable amount of income will be payable to the income beneficiary. But the trustee is also under a duty to the remainder beneficiaries to exercise reasonable care in an effort to preserve the trust property, a duty that ordinarily includes a goal of protecting the property's purchasing power."

RESTATEMENT (THIRD) OF TRUSTS, § 79, cmt. g (2007). The United States First Circuit Court of Appeals has articulated that, "an impartial trustee must view the overall picture as it is presented from all the facts, and not close its eyes to any relevant facts which might result in excessive burden to the one class in preference to the other." Dennis v. R.I. Hosp. Trust Nat'l Bank, 744 F.2d 893, 897 (1st Cir. R.I. 1984) (citing Pennsylvania Co. v. Gillmore, 43 A.2d 667, 672 (N.J. 1945)) (internal quotations omitted). Beyond the foregoing, RSA 564-B:8-802 provides, inter alia, that except for five listed circumstances not applicable under the evidence adduced,

> a sale, . . .or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interest is voidable by a beneficiary affected by the transaction[.]

Id. The foregoing prohibition is essentially a codification of Article 9, ¶d of the Trust, which specifies that "[n]o person who at any time is acting as Trustee hereunder shall have any power or obligation to participate in any discretionary authority which the Grantor has given to the Trustee to pay principal or income to such person, or for his or her benefit . . . ." Further, "[a] transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust." RSA 564-B:8-802 (e). The provisions of RSA 564-B:802 relate to and govern a trustee's duty of loyalty in administering, investing and managing the trust, as well as distributing its property "solely in the interests of the beneficiaries." Id. The "interests of the beneficiaries" to which the duty of loyalty is tethered are those specified under the terms of the trust. See RSA 564-B:1-103 (7).

It is said that the duty of loyalty is "perhaps the most fundamental duty of the trustee." See RSA 465-B:8-803, UTC §802, cmt. The Co-trustees of the HFT favored the income beneficiary, Barbara, over the remainder beneficiaries, in violation of their duties of impartiality and loyalty. In 1997, the year of Dick's death, Barbara received $117,573.06 in income from the QTIP Trust. See Agr'd Exh.13, (i). After the HFT partnership interest in Two Wheels was sold to Nutter, all income generated from the principal — the Nutter Note — was distributed to Barbara as income beneficiary. Thus what investment return there was on the principal did not in any way benefit those beneficiaries with an interest in the principal, but only the income beneficiary. The principal remained unchanged. When negotiating and reaching agreement on liquidation of the partnership interest, the Co-trustees — one of whom, Barbara, was

also the sole income beneficiary of the HFT — predominantly, if not exclusively focused on conferring benefit on her having that status. By doing so they subordinated and compromised the interests of the other beneficiaries designated in the QTIP Trust and the HFT. Respondent Brennan testified that he felt he had an obligation to invest the Two Wheels liquidation funds[19] into something that would create the most income for Barbara. In what appears to have been offered as modest deference to the duty of impartiality, if not also loyalty, he testified that he and Respondent Hallett felt that it would be years ahead before the grandchildren beneficiaries would need funding for education, and, accordingly they myopically focused on the receipt of income by Barbara, while at best deferring into the future, material consideration of the beneficial interests of the other beneficiaries concurrent potential needs for principal distributions, not just for education, but medical care, support and maintenance in reasonable comfort, also; while dismissing entirely the interests of the remainder beneficiaries in befitting from growth in the principal of the HFT. When confronted by one of the Petitioners' attorneys over the foregoing, Respondent Brennan's rather lame to disconcerting response was that he and Respondent Hallett had an understanding that it there was a need to fund a distribution of the HFT at a time when it lacked sufficient principal to meet it, Respondent Hallett would provide what additional funds were needed out of her own personal funds or those of the QTIP Trust — a proposition anathematic to trust law. He further went on to inexplicably testify that the trust funds

[19] The Court recognizes that the Petitioners maintain the liquidation did not occur until, at the earliest, 2003 when the amortization under the Renegotiated Withee Note became effective, and, at the latest in 2012, when the entire indebtedness was repaid; however, they are mistaken. It occurred on January 1, 1998 on the execution and receipt of the Nutter Note converting the partnership interest held by the HFT into a seller financed loan indebtedness owed to it. That a promissory note was received rather than cash does not signify that the partnership interest itself was not liquidated.

were only available for the remainder beneficiaries due to the "goodwill of Barbara Hallett."

Until August 26, 2003, when the Renegotiated Withee Note amoritization allowed for a graduated pay down on the principal owed and its reinvestment, the principal of the HFT realized no investment return by way of appreciation or other growth benefitting the non-income beneficiaries either by way of their permissible receipt of possible discretionary principal distributions or their remainder interest rights. Both Co-trustees testified that the primary purpose of the seller financing of the partnership interest buy-out, and thus their investment strategy, was exclusively to maximize distributive income to Barbara. If the Co-trustees were interested in balancing the needs of the income beneficiary and the remainder beneficiaries, they could have liquidated the partnership assets and invested the amount received in such a way to allow for both principal growth and income payouts. The Co-trustees essentially disregarded the interests of the non-income beneficiaries of the HFT until the amortization of principal and interest under the Renegotiated Withee Note came into effect after August 26, 2003. A review of the records shows that in eight of the eighteen accounts submitted by the Co-trustees for the QTIP Trust, Barbara is reported to have received income alone in excess, and in some years far in excess, of the Minimum Annual Distribution, even as adjusted under witness Joel Raskin's calculations and adopted methodology. See Agr'd Exhs. 55 & 55a.[20] Further, when the income received from the HFT is factored in, the combined

[20] The exhibits were prepared by Mr. Raskin, an accountant and the brother of Barbara. The Petitioners offered no real challenge to his testimony explaining the manner and methodology used in preparing the exhibits. Beyond that, there was no apparent dispute between the parties regarding the meaning of the provisions of the Trust, and by extension, the sub-trusts concerning the CPI adjustments. Because the Court does not regard the adjustment calculations to be critical to the rulings of this Decree, it neither endorses nor disaffirms the exhibits or testimony of Mr. Raskin in relation to them.

income received from the two sub-trusts exceeds any claimed shortage in the Minimum Annual Distribution under the accounts submitted for each, as well as Mr. Raskins exhibits, by $128,160. In total, she received some $1,627,536.02 in income distributions from the QTIP Trust. She also received an additional, $277,863.69 from the HFT.[21] During the same period, the grandchildren received a total of $30,306, after adjustment for the December 7, 2012 tuition refund reflected in the 2012 account, between calendar years 1999 and 2012. Meanwhile, until 2012, there was no meaningful capital investment return or appreciation on the principal of the HFT,[22] but only reported Schedule B gains of a mere total of $261.13 against losses of totaling of $325.05, for a combined net loss $63.92.[23]

The Co-trustees clearly favored the net income life beneficiary, a Co-trustee herself, over others, in the liquidation of the Two Wheel partnership interest, a proposition infected, if not driven, by inherent conflict between Respondent Hallett's fiduciary and personal interests. This conflict was exacerbated by Respondent

[21] These two trusts thus paid her $1,905,401.60 in all, just as income, and exclusive of the $90,000 in HFT principal paid to her.

[22] What is reflected in the accounts between 2003 and 2012 as "Other Receipts" in Schedule C represents cash received by way of payments reducing the outstanding principal indebtedness on the Renegotiated Withee Note, not actual return or addition to the value of principal.

[23] In fairness, the accounts between 2012 and 2014 do suggest that the changed investment strategy, whether inspired by the Co-trustees' sense of future litigation on the horizon and/or the payment of all outstanding principal due under the Renegotiated Withee Note as earlier noted, brought about Schedule B net gains on investments of $4291.59 for 2012, $21, $21,084.79 in 2013 and $9,430.54 in 2014; however, after taking into consideration the $50,000 principal distribution to Barbara in 2012, the $30,306 in cumulative principal distributions on behalf of Hanna, Rachael and Amanda for education (after crediting the $4000 educational expense refund of December 7, 2012), investment fees totaling $5271.85, and attorneys' fees paid three separate law firms in the aggregate amount of $17,564.66, over the 3 year period of 2012 through 2014 the value of the principal of the HFT fell from $292,674 on December 31, 2011 to $225,368.74 on December 31, 2014, which included the outstanding interest free loans to the QTIP of $4424.44 . The investment fees were all charged to principal, though income derived from the investment of the principal, distributed to Barbara as income beneficiary, was not allocated any of the burden for their payment.

Brennan's blurred, and oftentimes concurrent roles as a Co-trustee, and attorney for Barbara as a beneficiary or for the QTIP Trust and the HFT. As such, the Court holds that they have breached both their duty of impartiality and duty of loyalty for which the remedy should be surcharge in an amount commensurate with the loss or harm to the HFT. The Petitioners, however, have introduced into the record nothing from which the Court can reasonably deduce what that commensurate amount should be, apart from the difference between the principal invasion totaling $20,000 in 2009, which when added to the combined sub-trust income distributed to Barbara of $107,678 exceeded the reported Raskin determined Minimum Annual Distribution for that year of $116,783 by $10,895. Therefore, the excess in principal invaded and distributed to Barbara to fund the Minimum Annual Distribution constitutes a proper subject for surcharge. Since, however, the nature of the Minimum Annual Distributions have been accepted and treated by the parties as mandatory, and not discretionary in a manner rendering them violative of RSA 564-B:8-815(c) or Article 9, ¶ d of the Trust, and the invasions in 2011 and 2012 do not exceed the income shortages of $39,008 in 2011 and $74,841 in 2012, they are not a seen as proper subjects for surcharge.

Finally, as to the Petitioners' assertion that Barbara's receipt and retention of Milford Property rental payments or her failure to act to collect rental arrearages constitutes a breach of the Co-trustees duty of loyalty under RSA 564-B:8-802 (e), the Court disagrees and it does not so find. First, the matter of the entitlement to rents from the Milford Property has never been a concern associated with the administration, investment or management of the trust or the distribution of trust property to which the Petitioners, or any of them, have an interest as beneficiary(ies) pursuant to RSA 564-

B:8-802 (a). Second, while the transactions did not pertain to trust property because the Milford Property was distributable to Barbara outright and free of any trust by the Trust's terms, Barbara bore no fiduciary duty as trustee or a Co-trustee in regard to it that would have involved a conflict between her personal and fiduciary interests, and the transactions complained of do not concern opportunities "properly belonging to the [T]rust[ ]" under RSA 564-B:8-802 (e) in any event. Third, in relation to rental arrearages, the Petitioners' concerns do not involve any transaction(s), but a lack of action(s) encompassed with RSA 564-B:8-802 (e). Finally, the Petitioners have not alleged or referenced any other provision of RSA 564-B:8-802's duty of loyalty even arguably supportive of their assertions.

Recordkeeping and Identification of Trust Property

The Petitioners allege that the Co-trustees breached their fiduciary duty when they failed to keep adequate records of the administration of the sub-trusts, failed to keep trust property separate from their own property and commingled assets, and Respondent Hallett acted as owner of the Newington property as an individual. In some measure the Court agrees.

It is "[a] well established and salutary principle of the law of trusts . . . that a trustee cannot commingle trust funds with his own funds or with other trust funds." Mechanicks Nat'l Bank v. D'Amours, 100 N.H. 461, 465-66 (1957). The practice is also prohibited by RSA 564-B:8-810(b) ("A trustee shall keep trust property separate from the trustee's own property."). This duty is absolute, and it is irrelevant that a trustee keeps records adequately documenting the funds. See RESTATEMENT (THIRD) OF TRUSTS § 84, cmt. b (2007) ("[I]t is improper for a trustee to deposit money of the trust in

the trustee's personal account in a bank, even if the trustee maintains records continuously and carefully showing the trust's interest in the account."); see also RSA 564-B: 8-810, UTC cmt. § 810.

Respondent Hallett testified that she took the gross revenue of the Newington property and deposited it into her personal account. She also testified that she paid all of the expenses for the Newington property from that same personal account. The evidence submitted by the parties supports this finding. The QTIP Trust accountings dating from 1997 through 2014 demonstrate that for a majority of the money deposited into the QTIP Trust account, a subsequent check for the same exact amount would be written and the funds removed, and based on the testimony presented then deposited into Barbara's personal checking account. See Agr'd Exh. 13, i-xviii. She included documentation from which she attempted to show that the funds were accounted for separately within her personal account. Id. However, nothing within those documents precludes a determination that personal and trust funds were co-mingled within the meaning of law.

Beyond that, however, Respondent Hallett's testimony concerning her "bookeeping" for the Newington Property was at times so vague or seemingly contradictory, that at one point the Court made its own inquiry of her to gain a clearer picture of her manner of handling rents collected on the Newington Property for the QTIP Trust and paying vendors or managing the QTIP Trust's assets. In the end she acknowledged that rents collected would be deposited into a QTIP bank account. She would then proceed to draw out the money deposited, save for $2500 to $3000, and transfer it into her own personal checking account, which included non-trust funds, and

from which she paid bills, charges and expenses related to the Newington Property using the One-Write computer software program to purportedly segregate allocations to and disbursements from the purported divisions she established for the commercial rentals within the greater Newington Property. The Petitioners also allege that Respondent Hallett improperly paid herself $13,019.00 in travel expenses and $53,723.00 in cleaning expenses, as well as underreported her income to the beneficiaries by $111,043.00 through a claimed depreciation expense.

However, Petitioners offered little but testimonial assertion and no real probative evidence sufficient to afford the Court ability to determine that their claims have merit or that there was any impropriety involved apart from the co-mingling of funds referenced. It, therefore, does not deem those payments and expenses to have given rise to a breach of fiduciary duty. Nonetheless, the evidence and credible testimony do support finding that Respondent Hallett, while acting as Co-trustee for the QTIP Trust, violated her fiduciary duty when she commingled trust assets with her personal funds and failed to earmark or designate many of the QTIP Trust assets so they would be known and understood to be such in the records maintained by parties with whom she engaged or dealt. See RSA 564-B:8-810 (c), UTC cmt. §810. Respondent Brennan, based on his own testimony is found to have been complicit and, therefore, jointly responsible.

Duty to Inform and Report

The Petitioners allege that the Co-trustees breached their fiduciary duties when they failed to provide them with an annual accounting report of the trust assets and transactions undertaken, and by failing to notify them as qualified beneficiaries of a change in trustee compensation. In proffering this claim they argue that RSA 564-B:8-

813(b) is the controlling law. It specifies that "[a] trustee shall keep the qualified beneficiaries of an irrevocable trust who have attained 21 years of age and those having the rights of a qualified beneficiary reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." Id. The Court disagrees.

First, that notice and reporting provision does not apply to the instant trust, as it was made irrevocable prior to October 1, 2004 and no new trustees have been since that date added. See § 564-B:8-813(f). Second, and perhaps more importantly, the terms of the trust dictate specific reporting requirements for the trustees. See Art. 12. Article 12 states that only "the beneficiary or a majority of the beneficiaries who are then of legal age and capacity to whom or for whose use the current income of the Trust is at the time authorized or required to be paid," may follow specific steps to receive any information regarding the Trust accountings. (Emphasis added). The Respondents argue that this only presently entitles Barbara, as the sole income beneficiary under both sub-trusts, to accounts under the terms of the trust. The Court agrees. Even if it were to expand the definition of "income" to include principal in an attempt to allow those qualified beneficiaries or distributees to receive accounts, they still would not qualify. The Trust only allows those for whom the income "is . . . required to be paid," to constitute beneficiaries; and at no point is the Trust required to apply such a broad definition of "income" to the grandchildren. At this time, the only beneficiary to whom the Co-trustees are required to report accountings to upon request is Barbara, a Co-trustee herself. While the Grantor may have been ill-advised in not expanding the duty to others, he was free to do as he did. That the case, as the Petitioners are not current

income beneficiaries of either sub-trust and the Trust, as well as the sub-trusts did not gain life after January 1, 2004, the Co-trustees are not determined to have breached their duty when they failed to report information to the remainder beneficiaries.

The Petitioners have asserted that the Respondents have breached their duty to inform the beneficiaries of their rights and interests under the Trust and sub-trusts and keeping them informed about the administration of the trust and of the material facts necessary for them to protect their interests. In doing so, they presumably rely on UTC § 813, which does impose such a duty upon a trustee. However, New Hampshire's enactment of RSA 564-B:8-813 excludes that aspect of UTC § 813. For that reason the Court does not rule that the Co-trustees failure to act more affirmatively and pro-actively than they did under the evidence presented at trial in informing the beneficiaries of their rights and interests constituted a transgression of duty.

Respondent Brennan's Breach of Fiduciary Duty of Care

So far as only pertinent to the Petitioners' assertion that Respondent Brennan breached a duty of care by not actively participating as a Co-trustee in the administration and management of the sub-trusts, and Respondent Brennan's posited defense, RSA 564-B:7-703 specifies that:

> (c) A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.
>
> . . . .
>
> (e) A trustee may not delegate to a cotrustee the performance of a function the settlor reasonably expected the trustees to perform jointly. . . . [and]

. . . .

> (g) Each trustee shall exercise reasonable care to:
> (1) prevent a cotrustee from committing a serious breach of trust;
> and
> (2) compel a cotrustee to redress a serious breach of trust.

Id.[24]

In addition, it has long been recognized that "[i]f a trust has more than one trustee . . . each trustee has a duty and the right to participate in the administration of the trust . . . and] [e]ach trustee also has a duty to use reasonable care to prevent a co-trustee from committing a breach of trust and, if a breach of trust occurs, to obtain redress." RESTATEMENT (THIRD) OF TRUSTS § 81 (2005). However,

> A trustee is not liable for a breach of trust committed by a co-trustee, unless the trustee: (i) participated or acquiesced in the breach of trust or was involved in concealing it; (ii) improperly delegated administration of the trust to the co-trustee; or (iii) enabled the co-trustee to commit the breach of trust by failing to exercise reasonable care, including by failing to make reasonable effort to enjoin or otherwise prevent the breach of trust."

Id. at cmt. e. Respondent Hallett, as Co-trustee of the QTIP Trust, breached her fiduciary duty when she commingled trust assets with her own personal assets. Respondent Brennan, as Co-trustee, breached his duties by failing to act reasonably in that capacity to prevent Respondent Hallett from committing the comingling. Instead he either implicitly or explicitly condoned the practice. Further, to the extent Respondent Brennan may be viewed as having delegated the financial administrative and management functions of their co-trusteeship to Respondent Hallett, he has failed to

[24] Other provisions of RSA 564-B:7-703 have been disregarded by the Court owing to their irrelevance under the facts or want of proffered facts supporting their inclusion.

introduce proof justifying exemption under RSA 564-A:7-703(e), RSA 564-B:8-807, or the terms of the Trust.

Respondent Brennan testified that he had knowledge of the manner in which Respondent Hallett was handling the receipts and disbursements of the QTIP Trust and its Newington Property in the manner the Court has already referenced. He stated that he did not regard it as constituting a commingling of trust assets with her personal assets. He purported to justify his failure to act to prevent the comingling, or to compel redress, on his belief that Respondent Hallett's use of the One-Write accounting system software itself prevented commingling of accounts. Yet, no such evidence was introduced and he proffered no specific basis for that belief.

Additional evidence of Respondent Brennan's breach of duty lies in his admitted lack of providing any meaningful oversight of Respondent Hallett's dealings with the Newington Property and her management of the QTIP Trust. He also testified that he was unaware Barbara was leasing properties in her personal name and individual right, only becoming aware of it during the discovery phase of this case. See, e.g., Pet. Exhs. J7 & K7.

Remedies Sought

Damages, Surcharge, Removal, Attorneys' Fees and Costs

The Petitioners ask that the Court assess damages and impose surcharges and remove of the Co-trustees for their breaches of trust, defined by RSA 564-B:10-1001(a) as "[a] violation by a trustee of a duty the trustee owes to a beneficiary . . . ." Remedies for a breach of trust include under RSA 564-B:10-1001, inter alia, the remedies the Petitioners request.

"When a breach of trust occurs, the beneficiary of the trust is entitled to be put in the position he would have been if no breach of fiduciary duty had been committed." In re Guardianship of Dorson, 156 N.H. 382, 387 (2007) (citation omitted). "Other remedies include holding the trustee liable for 'any loss or depreciation in the value of the trust estate resulting from the breach of trust' or requiring the trustee to disgorge any profit that the trustee made through the breach of trust." Id. (Citations omitted.) Damages for a breach of trust are proscribed in RSA 56-B:1002(a) as "the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach." Although damages need not be proven with absolute certainty," Robert E. Tardiff,, Inc. v. Twin Oaks Realty Trust, 130 N.H. 673, 679 (1998), the Court cannot award damages on bare speculation about the amount due. Cf. Mahoney v. Town of Canterbury, 150 N.H. 148, 154 (2003).

Under the evidence presented by the Petitioners the Court has determined that it cannot reasonably deduce what, if any, damages should be awarded for the Co-trustee breaches of trust found. The Petitioners introduced no expert evidence that might have been assistive in that regard. On what record it has before it, any damages awarded would be based on rank speculation and conjecture. Hence, it denies the Petitioners' prayers for damages.

That said, "[a] surcharge is an equitable penalty imposed when a trustee fails to exercise the requisite standard of care and the trust suffers thereby." Id. at 386. (Citation omitted.) It may be imposed when a trustee fails "to exercise common prudence, common skill and common caution in the performance of the fiduciary's duty

and is imposed to compensate beneficiaries for loss caused by the fiduciary's want of due care. In re Estate of McCool, 131 N.H. 340, 346 (1998) (quotation omitted).

As earlier found, the Co-trustees breached their duties of loyalty and impartiality in invading $10,895 of the principal of the HFT in 2009, for which they are now surcharged.

RSA 564-B:7-706 governs trustee removal. It provides, inter alia, that a trustee may be removed on request of a "settlor, cotrustee, or a beneficiary . . . or . . . by the court on its own initiative. Id. at ¶ (a). Among the reasons articulated are: (1) the commission of a serious breach of trust; (2) court determination that removal best serves the beneficiaries interests owing to unfitness, unwillingness or persistent failure to administer the trust effectively; (3) as well as those grounds set out in RSA 564:9, which is expressly made applicable to an express trust as defined by RSA 564-A:1. Id. at ¶ III. The Trust and sub-trusts here fall within the RSA 564-A:1 definition of an express trust. RSA 564:9, I allows removal of a trustee if, the court determines that the trustee has become unsuitable to serve. Further, RSA 564:9, II specifies that a beneficiary may seek replacement of a trustee by the court, which, after taking into account, inter alia,

> all relevant factors, [it] finds that a change in trustee would be in keeping with the intent of the grantor, provided further that in deciding whether replace a trustee, the court may consider the following additional factors in making such determination:
>
> (a) It would substantially improve or benefit the administration of the trust.
>
> (b) The relationship between the grantor and the trustee as it existed at the time the trust was created.
>
> (c) Changes in the nature of the trustee since the creation of the trust

(d) The relationship of the trustee with the beneficiaries.

(e) The responsiveness of the trustee to the beneficiaries.

(f) The experience and level of skill of the trustee.

(g) The investment performance of the trustee.

(h) The charges for services performed by the trustee.

(i) Any other reasonable factors pertaining to the administration of the trust.

The Co-trustees have been found to have breached several duties imposed by them under the law. Chief and most serious among them their duties of loyalty and impartiality, which as earlier stated are perhaps the most important and fundamental of all their duties. Respondent Hallett, with the concurrence if not urging of Respondent Brennan, has, and has over the past years examined in the course of the trial, had a conflict between her personal interests as income beneficiary and fiduciary interests as a Co-trustee that has resulted in allowing the former to dominate proper advancement of the latter. While her having done so may not, and probably does not, alone be the cause of the clear distrust, if not animosity, between the Co-trustees and Hallett beneficiaries, and their replacement may not entirely purge the toxicity that has been engendered between them, it at least offers opportunity to "right the ship." To whatever degree the Hallett beneficiaries may harbor resentment or disaffection with the structure of the sub-trusts established by Dick, they must come to accept that it is what it is. So far as the actions and inactions of the Co-trustees have served to fuel the distrust and sense of fiducial impropriety that has been the fodder that has exacerbated or augmented that resentment or disaffection, their removal and replacement with a

trustee who or that has no personal stake in the how the sub-trusts are administered and managed, is seen as in the best interest of the sub-trusts and their beneficiaries.

In regard to the requests of both the Petitioners and the Respondents that they be awarded attorneys' fees and costs from the other, the requests are DENIED based on the Court's assessment and determination that justice and equity under all attendant circumstances do not require or justify such awards, see RSA 564-B:10-1004, nor does it consider any statutory or judicially recognized exception to the American Rule that generally parties to litigation bear their own costs and fees incident to it .

Respondents Statute of Limitations Defenses

The Respondents have asserted that at least four of the Petitioners' claims of breach of duty against them are timed-barred. In this regard, they reference RSA 564-B: 1104 (b)'s specification that "[i]f a right is . . . the expiration of a prescribed period that has commenced to run under any other statute before the [October 1, 2004 effective date of the enactment of RSA Chapter 564-B], that statute continues to apply to the right even if it has been repealed or superseded." The Petitioners' claims of the Respondents' concern relate to: the matter of Dick's life insurance and whether it constituted a Trust asset; the Milford Property rent and rent arrearages received and retained by Barbara after Dick's death and before the Milford Property was deeded to her; the failure to execute a deed conveyance to the QTIP Trust of the Newington Property; and the Two Wheels manner of seller financing attendant the sale to Nutter.

The Respondents bear the burden of proof on their affirmative defense of the statute of limitations. See Glines v. Bruk, 140 N.H.180, 181(1995). In regard to the claims of concern, the Respondents appear to concede that the limitation of actions

period of three years established under RSA 508:4 pertains. All of those claims pertain to act or omission occurrences before October 1, 2004. Therefore, the Respondents are correct in arguing that the Petitioners' must carry the burden of showing that the discovery rule enhancement of the limitations period under RSA 508:4 avails them of greater time and opportunity than would otherwise be the case. See Dobe v. Commissioner, New Hampshire Dept. of Health and Human Services, 147 N.H.458, 461 (2002). Here, it is questionable in the Court's mind whether the Petitioners would or could have reasonably discovered the complained of omissions or actions and earlier initiated legal action. For example, that the evidence may show that Mark knew, or should have known, that Milford Lumber and Muir Lumber were paying on-going rent, or against past arrearages, to "Barbara or Dick" and that Dick had deceased does not establish that he knew that she was not treating it as HFT property at the time the payments were made. Further, that Mark knew or should have known otherwise does not establish that the other Petitioners were informed or had reason to know. In the end, it strikes the Court that it really makes no difference at this juncture given its ruling on the merits of the issues set forth in this Decree. The Court has materially vindicated the Respondents' positions, or denied relief requested by the Petitioners on the claims, except with regard to the Newington Property. That a claim may be barred by a statute of limitations under trust law is not seen as precluding a court from entering an order requiring a trustee to execute a duty that he or she has continued to omit doing, whether with intention, through ignorance or by mistaken belief, or from removing the trustee when a past action or omission continues without abatement or evinces a pattern of conduct rendering him or her unsuitable or no longer trustworthy.

In Terrorem Clause

The Petitioners, in challenging the acts of the Co-trustees, have the burden of demonstrating that the no-contest provision should not be enforced. Cf. Hammer v. Powers, 819 S.W.2d 669, 673 (Tex.Ct.App.1991)(will contest). During the pendency of this litigation, they filed two motions seeking guidance concerning application of the in terrorem clause. See Index ##16, 40. [25] One issue addressed in this Court's second order concerning application of the in terrorem clause, see Index #46, was whether it could be successfully invoked against the Petitioners if they only partially succeeded in their *Amended Petition*. In that Order, the Court reviewed the applicable statutory and common law supplementing it, and held that whether an in terrorem clause is applied is dependent on the outcome of the case. Namely, "if after trial on the merits, it appears that the balance of proven breach, or breaches, of trust brought to trial outweigh those without merit, safe harbor arrival may be achieved." Order at 10 (Index #46).

The Court now concludes that the Petitioners proved and prevailed on very significant claims of breach against both Co-trustees such that the in terrorem clause should not be invoked. Specifically, the Petitioners have demonstrated: (1) breach by both Co-trustees in managing the Trust's assets in such a way that unduly favored the income beneficiary; (2) Respondent Hallett improperly co-mingled Trust assets; and (3) Respondent Brennan breached his duty of care. As such, the Petitioners have advanced "claims of such merit as to offer safe haven from the destructive waters fomented by determinations of the lack of merit in regard to others," Order at 10 (Index #46), and the in terrorem clause will not be enforced.

[25] The Court incorporates those orders by reference and will not repeat its analysis of the clause, see Article 13, and/or governing statute, see RSA 564-B:10-1014, and the common law.

III. Orders

1. The Co-trustees are jointly and severally surcharged $10,895 to be paid to the HFT **within 30 da**ys of the date this Decree goes to final judgment.

2. The Co-trustees shall execute and record a fiduciary deed of the Newington Property from themselves as representatives of the Trust to the QTIP Trust forthwith, and in all events **no later than 10 days** from the date of the Clerk's Notice of Decision in remittance of this Decree.

3. Respondent Brennan and Respondent Hallett are removed as Co-trustee of the QTIP Trust and the HFT conditioned on the appointment of their successor trustee or a special trustee. While they remain Co-trustees they are forthwith enjoined from making any further income or principal distributions from either trust absent further order of the Court or the sooner appointment of their successor to any beneficiary or to Respondent Brennan or Respondent Hallett in any capacity they have or hold, including without limitation, as an individual, attorney or trustee. They are further to ensure that all disbursements for operating or capital expenses related to the Newington Property are made from or on behalf of the QTIP Trust checking account in existence at the time of trial, and documented by date, payee, purpose and amount and receipted written invoice.

4. The parties are DIRECTED to confer and to the extent possible, agree on the individual they jointly recommend be appointed as neutral trustee of the QTIP Trust and the HFT. They shall jointly submit to the Court their stipulated agreement, and to the extent there remains disagreement, the nature of the disagreement, accompanied by proposed orders for appointment, and the resume(s), of any proposed nominee requested **by July14, 2016**.

5. The *Co-Trustees' Joint Motion for Directed Finding on Remaining Beneficiaries' Claims in 865 Case* is respectfully DENIED.

6. 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).

RECOMMENDED:

Dated: 6/16/16

Gary R. Cassavechia, Judicial Referee

SO ORDERED:

Dated: 6/17/16

Robert J. Foley, Judge