

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-00865

ORDER ON HALLETT BENEFICIARIES' MOTION FOR A RULING ON THE SAFE HARBOR PROVISION OF NH RSA 564-B:10-1014(C)(3)

Presently before this Court in this consolidated action is the *Petitioners' Motion for a Ruling on the Safe Harbor Provision of NH RSA 564-B:10-1014(c)(3)* (Index

#16)(“*Safe Harbor Motion*”)¹ and *Petitioners’ Memorandum of Law Supporting Their Motion for a Ruling on the Safe Harbor Provision of NH RSA 564-B:10-1014* (Index #35)(“*Supplemental Memorandum*”) filed by John Mark Hallett, Hannah R. Hebert, Amy Hallett Hebert, Rachel M. Hebert, John A. Hallett, Amanda C. Hallett, and Patricia Hallett Sanderson (collectively, the “Hallett Beneficiaries”).² William E. Brennan and Barbara D. Hallett, Co-trustees of the Richard S. Hallett 1996 Revocable Trust (“R.S. Hallett Trust”) and its Sub-trusts (collectively, the “Sub-trusts” or, individually, as the “Hallett Family Trust” and “Hallett QTIP Trust”), seasonably objected, see Index #19,³ and filed a *Joint Supplemental Memorandum in Opposition to Petitioner’s Motion for a Preliminary Ruling on the Safe Harbor Provisions of NH RSA 564-B:10-1014(c)(3)* (Index ## 32-33) (“*Supplemental Opposition Memorandum*”).

In their *Safe Harbor Motion*, the Hallett Beneficiaries request the Court to determine: (a) that “no part of the [Verified] Petition constitutes a contest” of the R.S. Hallett Trust; (b) that “by the Verified Petition they are not in violation of the No-Contest Clause” of the R.S. Hallett Trust; and (c) “[i]f the Court finds any part of [the Verified] Petition violates the No-Contest clause . . . [,]what part may be in violation and allow [them] to amend . . . or reserve the right, or enter an order that is fair and just to the

¹ See also *Verified Petition for a Preliminary Safe Harbor Ruling, a Preliminary Injunction, the Removal of Trustees, Request for Damages, Surcharges, Other Relief, and Attorney’s Fees* ¶¶ 168-173 (Index #1) (“*Verified Petition*”).

² The Court recognizes that not all the “Hallett Beneficiaries” are beneficiaries as some are remainderpersons. In addition, Co-trustee Barbara D. Hallett is also a beneficiary of the R.S. Hallett Trust and the Sub-trusts. For purposes of this order and ease of identification, the Court will refer to the clients of Attorneys Bernard and Coffey as the “Hallett Beneficiaries.”

³ See also *Answer and Affirmative Defenses of Respondent Barbara D. Raskin Hebert Hallett to Petitioner’s Verified Petition for a Preliminary Safe Harbor Ruling, a Preliminary Injunction, the Removal of Trustees, Request for Damages, Surcharges, Other Relief, and Attorney’s Fees* ¶¶ 168-173 (Index #7); *Answer of William Brennan to Petitioner’s Petition* ¶¶ 168-173 (Index #8).

interest of all the parties.” *Safe Harbor Motion* at 3 (Index #16). In their *Supplemental Memorandum*, the Hallett Beneficiaries expand/revise their requests, seeking additional court orders that the no-contest provision of is unenforceable: (1) “to the extent [] the trust is invalid because of fraud [or] violates public policy;” (2) “because the fundamentals of [their] action solely challenge the acts of the Trustees as . . . breach[es] of [their] fiduciary duties and . . . of trust”; and (3) as “any action to determine whether [the *Verified Petition*] constitutes a contest within the meaning of the No-Contest Provision . . . [, as well as] any action brought by a beneficiary . . . for a construction or interpretation of the terms of the Trust . . .” is, as to the former – statutorily, and as to the latter – statutorily and under the express terms of the no-contest provision, exonerated from its enforcement.⁴ *Supplemental Memorandum* at 9 (Index #35). The *Safe Harbor Motion* is DENIED, but only so far as the Court has determined that each of Counts II-XI of the *Verified Petition* do pose a “contest” within the meaning of the no-contest clause capable of possibly triggering forfeiture of the Hallett Beneficiaries’ interests in the R.S. Hallett Trust. See RSA 564-B:10-1014(b) & (c)(3). Because the Court, is unable, at this time and without benefitting the parties of discovery and a trial, to rule on whether the no-contest provision is enforceable or unenforceable in accordance with RSA 564-B:10-1014(b) & (c) against or in favor of those counts, at this juncture the denial must be so limited. Put another way, the Hallett Beneficiaries may only find statutory sanctuary from the no-contest provision after they successfully prove, to the measure needed, what they have alleged. Id. The motion is GRANTED in relation to the Court’s determination that Count I constitutes a permissible action for a

⁴ The related prayers D and E of the *Supplemental Memorandum*, as phrased, nonsensically ask that the Court rule “[t]he No-Contest provision . . . unenforceable because [any such] action . . . is unenforceable[]”; however, the Court construes the requests consistent with what it presumes the Hallett Beneficiaries actually intended.

determination of whether the *Verified Petition* is a contest in violation of, and, therefore, triggering enforcement of the no-contest provision.⁵ *Id.* Finally, the Court further holds that the initial filing of the *Verified Petition* is construed as an inquiry falling under RSA 564-B:10-1014(c)(3), and accordingly, grants leave to the Hallett Beneficiaries to amend or revise the *Verified Petition*.

Verified Petition and No-Contest Provision of the R.S. Hallett Trust

The Hallett Beneficiaries instituted the instant eleven-count, fifty-five page *Verified Petition* against the Co-trustees on October 28, 2013. The case was transferred, along with two associated complaints filed by the Co-trustees against some or all of the Hallett Beneficiaries, see Docket Numbers 317-2013-EQ-00877; 317-2013-EQ-00878, to the Trust Docket on October 8, 2014. The Co-trustees' actions were consolidated by order of this Court, and then the two surviving were consolidated into the one case now before it on November 20, 2014. See Index #31.

At the center of Count I of the *Verified Petition* and the *Safe Harbor Motion* lies the "no-contest provision" of the J.S. Hallett Trust. See R.S. Hallett Trust, Art. 13 (Index #1). Specifically, Article 13 provides, in pertinent part:

Contest of Will or Trust. It is the Grantor's will and direction that if any beneficiary under this Trust . . . or any other person, shall, directly or indirectly institute, conduct or in any manner whatsoever take part in or aid in any proceeding to

⁵ The Court notes that both parties allege that some or all of the Hallett Beneficiaries filed an action in New Hampshire Superior Court asserting a variety of counts against the Co-trustees. See Supplemental Memorandum at ¶12 (Index #35); Supplemental Opposition Memorandum at 5-6 (Index #32). That action was unsuccessful and apparently dismissed by the Superior Court. *Id.* The Court takes no position on whether that action violated the no-contest provision of the J.S. Hallett Trust as it does not appear that the Co-trustees sought to invoke it against the Hallett Beneficiaries. Because the Superior Court action preceded the *Verified Petition*, if the no-contest provision had been invoked, then those Hallett Beneficiaries who participated in the Superior Court action presumably may not have standing to pursue the matter before this Court. The Court assumes that the Co-trustees chose not to invoke the no-contest provision after the Superior Court action, and as no court blessed invocation, the Hallett Beneficiaries have standing in the matters now before this Court.

oppose the . . . administration of this Trust, or any amendment hereto, or impair, invalidate or set aside the same, or any of their provisions, then, in such event, the provision herein made for the benefit of such person or persons shall thereupon be revoked. Such person or persons shall thereafter be excluded from any participation in this Trust and shall, thenceforth, have no right, title or interest in the assets of this Trust. Any property, devise, bequest or distribution to such person or persons shall thereafter pass as if such person or persons did not survive the Grantor.

Under New Hampshire law; the terms of this provision are to be honored to the greatest extent possible, save for legislatively declared exceptions to enforceability or inapplicability under RSA 564-B:10-1014. See RSA 564-B:1-105(b)(14). Consequently, the Court next turns to a review of RSA 564-B:10-1014.

RSA 564-B:10-1014 essentially codifies and builds upon the common law upholding no-contest provisions and finding them enforceable, even against unsuccessful contests brought in good faith and with probable cause. See Nadine M. Catalfimo and Charles A. DeGrandpre, *Closing the Loopholes – New Laws for ‘In Terrorem’ (No Contest) Clauses in Wills and Trusts*, NHBJ Autumn 2011 at 16-17; Burtman v. Butman, 97 N.H. 254, 257-59 (1952). As movants, the Hallett Beneficiaries 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).

RSA 564-B:10-1014(d) provides that: “[i]t is the intent of this section to enforce the settlor's intent as reflected in a no-contest provision to the greatest extent possible. The provisions of this section shall be construed and applied in a manner consistent with such intent.” Cf. Shelton v. Tamposi, 164 N.H. 490, 495 (2013) (intent of settlor is “paramount”); King v. Onthank, 152 N.H. 16, 18 (2005)(intent of testator is the

“sovereign guide”). A party wishing to institute a “contest” against the trust will not violate the terms of the no-contest provision by bringing “action to determine whether a proposed or pending motion, petition, or other proceeding *constitutes a contest* within the meaning of a no-contest provision.” RSA 564-B:10-1014(c)(3) (emphasis added). As such, in ascertaining whether this safe harbor provision is applicable to this case the Court will look to the language of Article 13 as its guide to determining if a “contest” has been proffered within the meaning of the article and whether the claims asserted in the *Verified Petition* exonerate the Hallett Beneficiaries from the legal consequence of “no contest” enforcement.

In addition, RSA 564-B:10-1014(b), while affirming the common law broad enforcement of no-contest provisions, also sets forth a series of actions that will not be held to violate a trust’s no-contest provision. Specifically, section (b) provides:

A no-contest provision shall be enforceable according to the express terms of the no-contest provision without regard to the presence or absence of probable cause for, or the beneficiary's good or bad faith in, taking the action that would justify the complete or partial forfeiture of the beneficiary's interest in the trust under the terms of the no-contest provision. A no-contest provision shall be unenforceable to the extent that the trust is invalid because of fraud, duress, undue influence, lack of testamentary capacity, or any other reason. In the case of an action solely to challenge the acts of the trustee or other fiduciary of the trust, a no-contest provision shall be unenforceable to the extent that the trustee or other fiduciary has committed a breach of fiduciary duties or breach of trust.

“Generally, when construing statutes [a court] first examine[s] the language used, and, where possible, [] ascribe[s] the plain and ordinary meanings to the words used. [It] interpret[s] statutes in the context of the overall statutory scheme and not in isolation.”

Shelton, 164 N.H. at 499 (citations omitted). A plain reading of section (b) reveals that

in order to avail themselves of the protections against enforceability included in that section, the Hallett Beneficiaries must demonstrate actual invalidity of the R.S. Hallett Trust due to “fraud, duress, undue influence, . . . or any other reason.” Similarly, the safe harbor provisions of section (b) shield actions against the Co-trustees that assert breach of fiduciary duties or breach of trust. None of those protected predicates can be established, however, without evidential proof.

The Court recognizes that the journey to these safe harbors is necessarily fraught with risk for a litigant, as actual invalidity of the trust, or breach of duty by a trustee, cannot be determined in advance of completed litigation. The only preliminary adjudication of risk that may be made permissibly is whether a claim constitutes a “contest” that would bring a legal action within the no-contest terms of a trust. RSA 564-B:10-1014(c)(3). A court cannot predict whether, or presume that, the safe harbor provisions within section (b) apply so as to render a no-contest provision unenforceable on allegations alone. The Court agrees with a California court’s interpretation of a similar safe harbor provides:

a “safe harbor” for beneficiaries who seek an advance judicial determination of whether a proposed legal challenge would be a contest. But the issue permitted to be decided in that “safe harbor” proceeding is justifiably confined to the question whether a proposed action would be a contest. Upon obtaining an adverse ruling, the beneficiary is put to an election: either to accede to the will or trust or to pursue the contest. If the beneficiary chooses to pursue the contest, she may, in another proceeding, assert the exemption[s] [within the statute] from the enforceability of the no-contest clause. However, . . . [a] beneficiary is not entitled to an additional ruling in advance on whether, if the proposed contest were to be pursued, the no-contest clause would nonetheless be unenforceable.

Genger v. Delsol, 66 Cal. Rptr.2d 527, 539 (Cal. App. 1st. Dist. 1997)(decided under prior version of law substantially similar to RSA 541-B:10-1014). Consequently, to the extent the Hallett Beneficiaries seek advance rulings on the unenforceability of Article 13 based on fraud, breach of trust, public policy, breach of fiduciary duty, or any other exculpatory grounds set forth in that article, see RSA 564-B:10-1014(b) or (c), they must first demonstrate that the allegations of their *Verified Petition*, as a matter of fact and law, have merit. Given that the Co-trustees have seasonably objected and indicated an intent to disprove the allegations, the Court is unable to grant the Hallett Beneficiaries the relief or the full measure of the advice they seek, in advance of proof that Article 13 will not be successfully invoked by the Co-trustees,

The Court now considers whether each count of the *Verified Petition* qualifies as a “contest” within the terms of Article 13. “[W]hen courts construe a trust instrument, “the intention of a settlor is paramount, and [they] determine that intent, whenever possible, from the express terms of the trust itself. . . . [Courts should] reject any construction of trust language that would defeat the clear and expressed intention of the settlor.” Shelton, 164 N.H. at 495-96 (citations omitted). Moreover, this Court is, by statute, directed to interpret Article 13 “to enforce the settlor’s intent as reflected in [it] to the greatest extent possible.” RSA 564-B:10-1014(g). Article 13 evinces a broad intent to discourage beneficiaries “or any other person” from litigating against the trust. Its terms clearly point to the settlor’s intent to discourage “any proceeding” both “directly or indirectly” challenging the administration of the Trust or seeking to “impair, invalidate or set aside” it or any of its terms. Consequently, to the extent any or all of the eleven counts or prayers for relief of the *Verified Complaint* may be found to potentially fall

within the punitive ambit of Article 13, this Court must deem the *Verified Petition* to pose a “contest.”

In particular, the no-contest provision includes a directive that opposition to “the administration of this Trust” triggers the no content provision. This language manifests an intention of the settlor to discourage provocations impugning even mere acts of or, presumably inclusively, omissions in administration. If such administrative acts eventually are proven to be within the safe harbor provisions of RSA 564-B:10-1014(b), then the no-contest provision will not be enforced against the Hallett Beneficiaries. Yet, challenges to the trust administration do constitute, according to the terms of Article 13 necessarily “contests” to the trust. Cf. RSA 564-B:10-1014(a)(3)(in defining a “no-contest provision,” the statute includes provisions that “challenge the acts of the trustee . . . in the performance of the trustee’s . . . duties as described in the terms of the trust”); Hammer v. Powers, 819 S.W.2d 669, (Tx. 1991)(discussing “contest” in terms of more narrowly drawn no-contest provisions).

As such, the Court has determined that all but one of the claims made in the *Verified Petition* constitute a “contest” within the meaning Article 13. Specifically, the Court finds as follows:

1.) Count I – Preliminary Safe Harbor Request – Verified Petition ¶¶ 168-173 —

This is the only count that does not constitute a “contest” as it does not challenge administration or seek to impair, invalidate or set aside trust provisions. It merely seeks a permissible advisory opinion from the Court.

See RSA 564-B:10-1014(c)(3).

2.) Claims that Satisfy the Definition of "Contest" – The following counts make allegations that are suitably deemed "contests" and their pursual may result in invocation of Article 13 if the Hallett Beneficiaries fail to demonstrate they fall within the unenforceability provisions of RSA 564-B:10-1014(b):

Count II – Preliminary Injunction; - *Verified Petition* ¶¶ 174-193; Count III – Removal of Trustees - *Verified Petition* ¶¶ 194-210; Count IV – Failure to Act as Trustees - *Verified Petition* ¶¶ 211-219; Count V – Accounting and Reporting - *Verified Petition* ¶¶ 220-228; Count VI – Breach of Trust and Damages - *Verified Petition* ¶¶ 229-234; Count VII – Breach of Fiduciary Duty - *Verified Petition* ¶¶ 235-242; and Count VIII – Unjust Enrichment - *Verified Petition* ¶¶ 243-248 — These claims each advance a "contest" of the R.S. Hallett Trust at least so far as they oppose or complain over the administration of the trust.

3.) Remedial Claims – Some of the Hallett Beneficiaries' claims are remedial in nature. However, even these claims may, in part, be deemed a "contest:"

Count IX – Modification of the Trust - *Verified Petition* ¶¶ 249-261 — Although the Court interprets this count as largely remedial in scope, to the extent it can be viewed as seeking to modify, and in so doing "setting aside" trust terms, it posits a contest.

Count X – Enforcement of the No-Contest Provision Against Barbara D. Hallett as Beneficiary - *Verified Petition* ¶¶ 262-274 — At first glance, this count appears also to be largely remedial, however, so far as it challenges Co-trustee Hallett's administration of the trust, it presents a contest.

73 — This provision asks that attorney's fees for the beneficiaries be "paid from the trust income or as a last resort, the trust principle [sic][]" premised either as a remedy under a judicially recognized exception to the American Rule that each party to litigation bears the cost of their own attorneys' fees, or as an act of administration of the Trust pursuant to RSA 564-B:10-1004 based on the interests of justice and equity. Assuming without finding or ruling that as a sought remedy the court does not put forward a "contest" within the meaning of Article 13, any grant of such fees as an act of administration of the Trust, on the other hand, would implicate a "contest" so far as the Court cannot find, nor do the Hallett Beneficiaries assert there exist, any trust terms expressly providing for the payment of the Hallett Beneficiaries' legal expenses in this or any other instance. Thus any payment ordered by the Court trumping the Co-trustees' discretion over such a matter by way of distribution, payment of expense or other cause, can be seen as an "action [setting] aside or vary[ing] the terms of the [T]rust," RSA 564-B:10-1014 (a)(2), or an "action challeng[ing] the act[] of the [Co-trustees] . . . as described in the terms of the [T]rust," RSA 564-B:10-1014 (a)(3).

In sum, the Court concludes that all the counts asserted by the Hallett Beneficiaries, except Count I, in whole or in part, constitute contests under Article 13. See RSA 564-B:10-1014(c). Whether Article 13 is enforceable against those claims must of necessity be left for another day. See RSA 564-B:10-1014(b).

Effect of Filing of Verified Petition

Finally, the Hallett Beneficiaries have requested that the Court rule that “by the Verified Petition they are not in violation of the No-Contest Clause” of the R.S. Hallett Trust.” *Safe Harbor Motion* at 3 (Index #16). See RSA 564-B:10-1014(c)(3). The allegations and relief requested in the *Verified Petition* are broad, and include many claims, other than Count I, that the Court views as seeking to “impair, invalidate or set aside” the administration of, or terms within, the J.S. Hallett Trust. By way of non-exclusive example, the *Verified Petition* seeks to void conveyances from the J.S. Hallett Trust, block access to trust funds, challenge as improper the trust administration by the Co-trustees, and determine that trust assets were wrongfully expended or distributed. Thus, if pursued in total, the filing of the *Verified Petition* stands as a “contest” triggering the no-contest provision of the Trust. See RSA 564-B:10-1014(b). Again, however, whether it may be enforced against the Hallett Beneficiaries as a consequence is appropriately left for another day when an evidentiary determination may be made regarding the validity of the claims. Id.

As to the subsidiary question of whether the initial filing of the *Verified Petition* has created a situation where the Hallett Beneficiaries are inextricably bound to pursue all claims to their evidentiary conclusion in the hope that the no-contest clause is unenforceable or face imposition of the sanctions in Article 13, the Court, in the interest of justice, answers that inquiry in the negative. RSA 564-B:10-1014(c)(3) provides that: “[s]ubsection (b) shall not apply to the extent that a person initiates, maintains, or cooperates in any of the following actions or proceedings: . . . [a]ny action to determine whether a proposed or pending motion, petition, or other proceeding constitutes a contest within the meaning of a no-contest provision.” Although the *Verified Petition*

may not be the best vehicle for instituting a (c)(3) inquiry,⁶ the Court at this juncture will construe the *Verified Petition* as falling within the ambit of (c)(3) given the overriding precedence shown in invoking that provision as Count I.

Consequently, given the foregoing determinations, supra, the Hallett Beneficiaries are left with the following options: (1) “accede to the trust;” (2) proceed with the *Verified Petition* as cast and risk an evidentiary ruling after trial that the no-contest provision is triggered, see Genger, 66 Cal. Rptr.2d at 539; or (3) file a *Motion to Amend* adding, deleting, or modifying claims. If they pursue option three, the Court, in the interest of judicial economy, requires that the motion must be filed within **20 days** of the date reflected on the Clerk’s Notice of Decision accompanying issuance of this order.⁷

SO ORDERED

Dated: January 15, 2014



Gary R. Cassavechia, Judge

⁶ Rather, a simple motion pursuant to RSA 564-B:10-1014(c)(3) with a proposed pleading appended to an exhibit would be a more appropriate vehicle.

⁷ The Court does not intend to imply, however, that it will ad infinitum entertain serial motions requesting its determination whether amendments or modifications implicate the no-contest clause.