

THE STATE OF NEW HAMPSHIRE

7th Circuit

Probate Division
Trust Docket

DOCKET NO. 317-2013-EQ-00865

JOHN MARK HALLETT, ET AL

VS.

WILLIAM E. BRENNAN, ET AL

AND

BARBARA D. RASKIN HEBERT HALLETT, ET AL.

Petitioners' Memorandum of Law

**Supporting their Motion for a Ruling on the Safe Harbor Provison
of NH RSA 564-B:10-1014**

NOW COME THE PETITIONERS, by and through their counsel,
Attorney Francis J. Coffey, in a Memorandum of Law so as to
assist the Court in deciding the Defendants' Motion and state
the following:

1. The Petitioners incorporate by reference their entire
Verified Petition and the Respondents' answers as offers of
proof, and their Motion for a ruling on the New Hampshire
Uniform Trust Code Safe Harbor Provision.

Complaint

2. The Petitioners (as Qualified Beneficiaries defined by statute) of the Richard S. Hallett 1996 Revocable Trust (a Private Express Trust that was formed on January 8, 1997 and became irrevocable on April 19, 1997 by death of the Settlor) have pending before this Court an eleven count petition (the action) requesting relief. The gravamen of the Complaint challenges the acts of the Trustee(s) as a direct result of their having committed a breach of fiduciary duties or breach of trust.

The No-Contest Clause

3. The Richard S. Hallett 1996 Revocable Trust Declaration contained a No-Contest or Interrorem Clause at Article 13.
4. Such a clause forbids a Beneficiary from directly or indirectly conducting or in any manner whatsoever taking part in or aiding in any proceeding to oppose the administration of the Trust, or any amendment thereto, or to impair, invalidate, or set aside the Trust or the Trust amendment, or any of their provisions.
5. In such event, the provision therein made for the benefit of such a person shall thereupon be revoked.
6. The Petitioners have invoked the protection of the Safe Harbor Provision of the NH Uniform Trust Code found at NH RSA 564-B:10-1014 by prefacing their pending Petition with

a request that the Court rule (as a preliminary matter) whether their Petition in any way violates the No-Contest Clause.

New Hampshire Law

7. New Hampshire law has provided for a means by which Beneficiaries of a Trust may protect themselves from being "No-Contested" out of a Trust and the Court may find the No-Contest Clause unenforceable. See NH RSA 564-B:10-1014
8. The Court has requested Counsel to brief this subject as to how the ruling can be accomplished.

Unenforceability of the No-Contest Clause for Fraud or any

Other Reason

9. The Court may find that the No-Contest provision is unenforceable to the extent that the trust is invalid because of "fraud,... or any other reason." see NH RSA 564-B:10-1014(B)
10. In March of 1986 Richard S. Hallett was ordered by the Hillsborough County Superior Court to convey real property to his three children (two of the Petitioners in this case). Mr. Hallett violated that Court order when he did not convey the property.
11. Some years later, in January 1997 Mr. Hallett conveyed that same real property to the Trust. After Mr. Hallett's

death the 2 Trustees then gifted the real property to Mr. Hallett's Widow. (the Widow is in fact one of the Trustees and the other Trustee is the lawyer charged with the responsibility of conveying the real property to the children)

12. Mr. Hallett's children (Petitioners John Mark and Amy) claimed ignorance of the 1986 Superior Court order until January of 2012. They filed suit in 2013 at the Superior Court (against the Respondents/Trustees in this case) to establish their third party beneficiary rights to that real property and to recover damages. Sadly, their claims were dismissed when the Respondents in this case successfully argued to invoke the Statute of Limitations.

13. As a matter of public policy, Court orders by a judge should be followed.

14. In this case, Mr. Hallett failed to follow the Judge's 1986 order and then Mr. Hallett formed a Trust, inserted a No-Contest Clause within the Trust Declaration, and then conveyed the real property at the center of that Court Order to the Trust.

15. The Court could find that Mr. Hallett's insertion of the No-Contest Clause into the Trust Declaration was part of a fraud or that it violated public policy because the clause discourages the Beneficiaries in this case from

asserting their rights under a Judge's 1986 order, as such an assertion puts at risk any benefits from the Trust.

16. No-Contest Clauses that are part of a fraud or that violates public policy should be held unenforceable.

Unenforceability of the No-Contest Clause for Trustees' Breach of Fiduciary Duties or Breach of Trust

17. The Court may find that the No-Contest provision of this Trust shall be unenforceable in an action solely to challenge the acts of the Trustees or other Fiduciary of the Trust when the Trustee or other Fiduciary has committed a breach of fiduciary duties or breach of trust. see NH RSA 564-B:10-1014(B)
18. The very core of the instant action, (DOCKET NO. 317-2013-EQ-00865 now pending before the court) challenges the acts of the Trustees of the trust because the Trustees have committed a breach of fiduciary duties or breach of trust.
19. The Petitioners core claims include failures to report, incomplete reporting, and failure to provide information reasonable related to the Trust's administration.
20. The Petitioners have filed their Petition with all the facts contained therein under the pains and penalties of perjury.

21. The Respondents have filed no such comparable affidavit.
22. The Respondents' answers to the Petition through Counsel were for the most part vague general denials putting the Petitioners to their proof.
23. In addition, the Trustees filing of the 15 years of belated reports to this Court in cases 317-2013-EQ-00877 and 878 is evidence that the Trustees failed to report. That alone is an admission and evidence of a breach of Fiduciary Duty.
24. The Court has ample evidence before it to decide as a prerequisite to trial that the Trustees have committed at least 15 counts of a breach of fiduciary duties or breach of trust.

**Unenforceability of the No-Contest Clause for Determination of
Safe Harbor**

25. Any action to determine whether a proposed or pending motion, petition, or other proceeding constitutes a contest within the meaning of a no-contest provision is unenforceable. see NH RSA 564-B:10-1014(c)(3)
26. The Petitioners have never been shy about invoking the Safe Harbor Provision of the Statute.
27. The Petitioners pending Petition is exactly that, a PENDING (emphasis added) Petition.

28. An action cannot be pending unless it is filed. The Petitioners have precisely conformed their Verified Petition and their invocation of the Safe Harbor to the Statute in order to give the court a preview of what is to come. Such detailed information is required in order for the Court to reach a determination regarding the Safe Harbor.

29. The Court may decide as a prerequisite that the No-Contest clause is unenforceable.

Unenforceability of the No-Contest Clause for Claims of Construction or Interpretation of Terms

30. In any action brought by a beneficiary or on behalf of any such beneficiary for a construction or interpretation of the terms of the trust, a No-Contest Clause is unenforceable. see NH RSA 564-B:10-1014(c) (4)

31. The Probate Court has exclusive jurisdiction over the interpretation, construction, modification, and termination of the Trust in this matter. See NH RSA 547:3 and 564-A:1,1

32. New Hampshire law also allows the court to modify the terms of the Trust to accomplish the Settlor's intent.

33. Based on the Verified Petition the Court could find that the Petitioners have brought this action for a construction or interpretation of the terms of the Trust.

34. As such, the No-Contest clause is unenforceable by statute.

Hearing Not Required by Statute

35. New Hampshire state law, NH RSA 564-B:10-1014, does not provide an expressed mechanism of how a Court arrives at a Safe Harbor determination.

36. If the NH Legislature saw fit to provide for an evidentiary hearing it could have said so. It did not.

37. Other jurisdictions have accomplished this "Safe Harbor" provision determination by application and hearing. "After a hearing on the matter, the probate court concluded, without making a specific finding whether the former or the current no contest clause law applied, that the matters raised in the beneficiaries' proposed petition did not constitute a contest under the terms of the no contest clauses of the subject trust." See Donkin vs. Donkin 58 Cal.4th 412165 Cal.Rptr.3d 476314 P.3d 780 (2013)

38. In the absence of statutory instruction or guidance the Court may use its discretion and may rule accordingly with or without a hearing.

Conclusions

Wherefore, The Petitioners respectfully submit this Memorandum of Law and ask the Court to rule that:

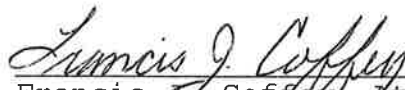
- A. No part of the Pending Petition constitutes a contest of the Trust by the Petitioners within the meaning of the Trust's No-Contest provision of Article 13.
- B. The No-Contest provision is unenforceable to the extent that the trust is invalid because of fraud or any other reason including violation of public policy.
- C. The No-Contest provision is unenforceable because the fundamentals of this action solely challenge the acts of the Trustees of the Trust when the Trustee(s) have committed a breach of fiduciary duties or breach of trust.
- D. The No-Contest Provision is unenforceable because any action to determine whether a proposed or pending motion, petition, or other proceeding constitutes a contest within the meaning of a No-Contest Provision, is unenforceable.
- E. The No-Contest Provision is unenforceable because in any action brought by a beneficiary or on behalf of any such beneficiary for a construction or interpretation of the terms of the Trust, a No-Contest Clause is unenforceable.

F. The Court may use its discretion and rule accordingly.

Respectfully Submitted,

John Mark Hallett,
Amy Hallett Hebert,
Hannah R. Hebert,
Rachael M. Hebert, and
Patricia Hallett Sanderson,
the Petitioners,
by their Attorney:

11-16-14
date


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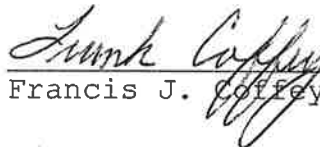
Certification

I CERTIFY THAT I did provide a copy of this pleading to
Attorneys Ralph Suozzo and Linda Smith at 1001 Elm St. Suite
205, Manchester, NH 03101 by first class mail or by electronic
mail at rsuozzo@morrisonmahoney.com and

lsmith@morrisonmahoney.com and to Attorney Janie Lanza Vowles at 81 Merriam Av. Leominster, Ma 01453 by first class mail or by electronic mail at jvowles@jlvlaw.com. I did not seek the assent of counsel for the Respondents as it is unlikely they would assent.

11-16-14

date


Francis J. Coffey