



THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

PROBATE COURT

Docket No. 317-2013-EQ-865

IN RE: John Hallett, et. al v. William Brennan et. al.

OBJECTION OF RESPONDENTS WILLIAM E. BRENNAN AND BARBARA D. HALLETT TO PETITIONERS' MOTION FOR A RULING ON THE SAFE HARBOR PROVISION OF NH RSA 564-B:10-1014(c)(3)

William E. Brennan and Barbara D. Raskin Hebert Hallett, individually and as Trustees of the Richard S. Hallett 1996 Revocable Trust and all subtrusts contained therein (hereinafter, collectively "Respondents"), by and through their counsel, hereby oppose Petitioners' Motion for a Ruling on the Safe Harbor Provision of NH RSA 564-B:10-1014 (C)(3). In support of their opposition, Respondents state as follows:

1. Petitioners have brought an 11 count Petition against the Respondents as follows:

- COUNT I: Preliminary Safe Harbor Ruling
- COUNT II: Preliminary Injunction (to remove trustees)
- COUNT III: Removal of Trustees
- COUNT IV: Finding that Co-Trustees have failed to execute their offices as Trustees
- COUNT V: Accounting and Reporting
- COUNT VI: Breach of Trust
- COUNT VII: Breach of Fiduciary Duty and Surcharges
- COUNT VIII: Unjust Enrichment
- COUNT IX: Modification of Trust
- COUNT X: Enforcement of the No-Contest Provision and Revocation of all benefits to Barbara D. Hallett
- COUNT XI: Request for Attorney Fees and Costs

2. On March 14, 2014 Petitioners filed their Motion for a Ruling on the Safe Harbor Provision contained in the Richard S. Hallett 1996 Revocable Trust (the "Trust.")

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3. The pending Motion seeks a preliminary ruling on the applicability of NH RSA 564-B:10-1014(C)(3) – hereinafter, the “Safe Harbor Provision” -- to Petitioners’ claims against the Respondents.

4. The Trust contains a “No-Contest” or Interrorem Clause at Article 13, which clause specifically states that:

Contest of Will or Trust. It is the Grantor’s will and direction that if any beneficiary under this Trust or under the Grantor’s Will, or any other person, *shall, directly or indirectly institute, conduct or in any manner whatsoever take part in or aid in any proceeding to oppose the probate of said will, or any codicil thereto, or 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 provisions herein made for the benefit of such persons or person 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.*

Nothing contained herein shall be construed to prevent the Trustees from instituting or bringing any action, suit or proceeding for the construction or interpretation of this Trust, nor to prevent any beneficiary from disclosing relevant information in such a proceeding.

(emphasis added) The Trust is attached in its entirety to Petitioners’ Petition.

5. NH RSA 564-B:10-1014, in subsections (b) and (d), specifically provides that no-contest provisions contained in trusts “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”; and, that it is the intent of Section 10-1014 “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.”

6. Recently enacted New Hampshire statutes and longstanding New Hampshire Supreme Court case law evidence the State of New Hampshire's history and practice of giving deference to the clear terms of a trust and the testator's wishes. See, e.g., NH RSA 564-B:10-1014 (b). The New Hampshire Supreme Court recently noted "the intention of the settlor is paramount," and the Court should determine the intent from the express terms of the trust itself. Shelton v. Tamposi, 62 A.3d 741, (*citing Appeal of Lowy*, 156 N.H. 57, 61 (2007)). The Court should reject any construction of the trust language that would defeat the clear and expressed intention of the settlor's intent." Id.

7. There are exceptions to the applicability of subsection (b), which exceptions – in relevant part – provide that "[i]n 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 the trust." If Petitioners are relying on this exception, however, then these issues must be determined in the usual course – that is, after an opportunity for discovery and trial – *not* preliminarily.

8. The Code language itself reflects this common-sense conclusion, inasmuch as there is no statutory provision that permits a preliminary ruling on the applicability of the Safe Harbor Provision. Such a preliminary ruling of inapplicability would be premature – not only because it denies the opportunity for discovery and trial on Petitioners' allegations regarding breaches of trust – but also because, as litigation strategies change, pleadings are amended and facts are revealed through discovery, a determination regarding the applicability of the Safe Harbor Provision could change throughout the course of the litigation.

9. Moreover, if any determination *could* be made preliminarily, the only such clear preliminary conclusion is that the Trust's No-Contest provision *has* been triggered. Specifically,

Petitioners' Motion for a Preliminary Injunction to remove Respondents as trustees of the Trust, filed contemporaneously with their Motion for a Ruling on the Safe Harbor Provision, is a clear attempt to circumvent the decedent and settlor Richard S. Hallett's clear intent as evidenced by the Trust language. See Trust, Article 1 (clearly directing that Respondents become Trustees upon the death or incompetency of Richard S. Hallett.)

10. These allegations of breach of fiduciary duty are merely pleading strategies and vagaries in order to try to circumvent the clear intent of decedent Grantor Richard S. Hallett to have the Respondents serve as Trustees. See, e.g., Ross v. The Home Ins. Co., 146 N.H. 468, 471 (2001), quoting M. Mooney Corp. v. U.S. Fidelity & Guaranty Co., 136 N.H. 463, 469 (1992) (Courts should inquire into the underlying facts to avoid permitting the pleading strategies, whims and vagaries of third party claimants to control the rights of parties to an insurance contract).

11. The Trust language also makes clear that the Trust is primarily for the benefit of the "Grantor's Wife," Barbara Hallett, during her life time. See id., Article 6, 7, 8. For example, Article 8 of the Trust outlines the annual income Barbara Hallett is to receive under the Trust.

12. The Petitioners contend that their petition is not an action against the Trust, but the petition (Petition ¶186), read in total, is exactly that.

13. For instance, in their eleventh paragraph prayer for relief, Petitioners seek, in part:

- immediate removal of the Trustees;
- attachment of assets/income "and/or divert those funds into a new trust operating account";
- allow only Mark Hallett and Amy Hallett to vote or recommend successor Trustees;
- enter judgment against both Respondents "for Unjust Enrichment as demanded and personally repay to the Trust" funds that were wrongfully distributed and to "void the conveyance of the 300 Elm Street property"
- "order a modification of the life income beneficiary", Barbara Hallett;

- “order a revocation” of Barbara Hallett’s benefits under the Trust under the No-Contest provision;
- adjudge that both Respondents have committed an undefined “breach of trust” and award damages; and
- adjudge that both Respondents have breached a fiduciary duty and award damages.

14. It is notable that in the 57-page Petition, Petitioners never cite to any language of the Trust as supporting their position.

15. Further, Petitioners allege, in partial support of their request to remove Grantor’s wife as Trustee, that she “has an inherent conflict of interest with the remaindermen that cannot be resolved.” See Petition, ¶ 260(1). Petitioners do not, however, address that this supposed conflict would have been readily apparent to the Grantor at the time he selected the Trustees.

16. It is the position of the Respondents that all actions taken by either trustee were consistent with the provisions of the Trust and applicable law. In fact, Respondents have filed their own actions – pending in this Court – seeking a declaration on the No Contest Clause and Safe Harbor Provision, as well as approval of annual accounts of the Trust activities.¹

17. Petitioners’ efforts to couch their claims in terms of breach of trust and/or breach of fiduciary duty are nothing but transparent and groundless attempts to avoid the Safe Harbor Provision given Petitioners’ true objectives. They seek to remove the trustees, modify the trust, and seek repayment from the trustees of distributions to which they disagree, as outlined in prayers for relief. Specifically, prayers for relief H through K seek to strip their father’s widow of all benefits of the Trust, to Petitioners’ own benefit.

18. In short, they seek to “impair, invalidate or set aside” provisions of the Trust. See Trust, Clause 13).

¹ Also pending before this Court is Respondents’ Motion To Consolidate said actions with the instant action, and for removal of the consolidated actions to the Trust Docket.

19. This is precisely the circumstance in which the No Contest Clause is triggered.

20. Consequently, the Court should rule that Petitioners' actions trigger the "No-Contest" or Interrorem Clause at Article 13, and that any finding regarding the Safe Harbor Provision is premature.

21. The Respondents also note that, at the recent status conference in this matter, this Court ordered the parties to mediate the case, and the parties intend to comply with said order. The Court further indicated that, if the case does not settle, it will likely be transferred to the Trust Docket.

22. Therefore, the Respondents respectfully suggest that, unless the within Motion is summarily denied, a hearing should be held in the Trust Docket Session on said Motion and an Order issued after this case is transferred to the Trust Docket.

WHEREFORE, Respondents respectfully requests that this Honorable Court:


- A. Issue an order that Petitioners' Petition triggers the No-Contest Clause of the Trust;
- B. Issue an order that Petitioners' Motion for a Preliminary Injunction, which seeks to remove the trustees, triggers the No-Contest Clause of the Trust;
- C. Otherwise deny Petitioners' Motion, subject to the parties' rights to dispute at trial the applicability of the Safe Harbor Provision; and
- D. Grant such other and further relief that the Court deems just and equitable.

Respectfully submitted,

William Brennan, Individually and as
Trustee of the Richard S. Hallett 1996
Revocable Trust

Dated: 3/31/14


By



Ralph Suozzo, Esq., #12946
Linda M. Smith, Esq., #265038
MORRISON MAHONEY LLP
1001 Elm Street, Suite 304
Manchester, NH 03101
(603) 622-3400

BARBARA D. RASKIN HEBERT
HALLETT, INDIVIDUALLY AND AS
TRUSTEE OF THE RICHARD S.
HALLETT 1996 REVOCABLE TRUST,

By her attorney,




Janie Lanza Vowles
N.H. Bar No. 18725
Law Office of Janie Lanza Vowles, P.C.
81 Merriam Avenue
Leominster, MA 01453
Phone: 978/534-9771
Fax: 978/534-9778
Email: jvowles@jlvlaw.com

Dated: March 28, 2014

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this day forwarded to Frank Coffey and Daniel Clark.



Linda M. Smith