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

317-2013-EQ-00865

ORDER ON HALLETT BENEFICIARIES' MOTION TO CONSIDER THE PROPOSED AMENDED PETITION; INVOCATION OF SAFE HARBOR AND NH RSA 564-B:10-1014

Presently before this Court in this consolidated action is a *Motion to Consider the Proposed Amended Petition; Invocation of Safe Harbor Provision and NH RSA 564-B:10-1014* (Index #40)("Second Safe Harbor Motion")[1] 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

[1] The Hallett Beneficiaries previously filed a *Motion for a Ruling on The Safe Harbor Provision of NH RSA 564-B:10-1014(c)(3)* ("First Safe Harbor Motion")(Index #16) regarding their *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). The Court has previously issued an Order on that motion (the "First Safe Harbor Order")(Index #39).

[2] The Court recognizes that not all the "Hallett Beneficiaries" are beneficiaries as some are remainder-persons. In addition, Co-Trustee Barbara D. Hallett is also a beneficiary of the R.S. Hallett Trust and the

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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"), have seasonably objected ("*Second Safe Harbor Objection*")(Index #41) and, by way of consolidated inclusion, contemporaneously filed a "*Cross-Motion for Ruling That Hallett Beneficiaries' Action to Date Constitute a "Contest" and Prohibiting Beneficiaries from Seeking Further Amendment or Preliminary Rulings Regarding the Trust's No-Contest Provision.*" See Index #41 ("*Second Safe Harbor Cross-Motion*")(Index #41). The Hallett Beneficiaries timely filed a response to the *Second Safe Harbor Objection* along with an objection to the *Second Safe Harbor Cross-Motion*. See *Second Safe Harbor Reply and Objection* (Index # 42).

In their *Second Safe Harbor Motion*, the Hallett Beneficiaries request the Court to determine: (a) that successful prosecution of one "contest" to the R.S. Hallett Trust makes the no-contest clause unenforceable against the entire action; (b) the no-contest clause is in fact unenforceable as to the action proposed under the "*First Amendment to the Verified Petition*" ("*Amended Petition Proposed* ") because it is an action seeking construction of the terms of the R.S. Hallett Trust, see RSA 564-B:10-1014(c)(4); and (c) none of the allegations contained in the *Amended Petition Proposed* constitute a "contest" within the terms of Article 13 of the R.S. Hallett Trust. The Hallett Beneficiaries also request guidance "[i]f the Court finds any part and/or all of the *Amended Petition Proposed* violates the Article 13 No-Contest clause . . .[,] what part of the Petition may be in violation and allow [them] to further amend . . . or reserve that

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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."

right." *Second Safe Harbor Motion* at 3-4 (Index #40). In their *Second Safe Harbor Cross-Motion* (Index #41), the Co-Trustees request the Court to rule that the Hallett Beneficiaries: (a) by pursuing discovery associated with the *Verified Petition* are in violation of Article 13 of the R.S. Hallett Trust; and (b) may not seek further amendments or preliminary rulings regarding Article 13 of the R.S. Hallett Trust. Id. at 2, 10. Although the Co-Trustees "otherwise do not object to the Hallett Beneficiaries amending" the *Verified Petition*, they specifically object to allowance of Count IV of the *Amended Petition Proposed,* deeming it "futile." Id. at 9-10.

After review and hearing on the pleadings, the Court rules that the *Second Safe Harbor Motion* is DENIED to the extent that: (1) the Court has determined that Counts I-V of the *Amended Petition Proposed* would constitute a "contest" within the meaning of the no contest clause of the R.S. Hallett Trust potentially triggering the no contest provision of the R.S. Hallett Trust, see RSA 564-B:10-1014(c)(3); and (2) the Court declines the request to rule that the claims set forth the *Amended Petition Proposed* are simply actions brought regarding the construction and interpretation of the terms of the R.S. Hallett Trust. See RSA 564-B:10-1014(c)(4). The *Second Safe Harbor Motion* is GRANTED so far as the Court has concluded that in certain instances safe harbor may be reached where only some claims are successful; however, it cannot rule at this juncture whether the mix of claims included in the *Amended Petition Proposed* will render the no-contest clause unenforceable. It instead construes the filing of the *Second Safe Harbor Motion* as preliminary inquiry falling under RSA 564-B:10-1014(c)(3) that does not trigger Article 13 of the R.S. Hallett Trust. The Court is unable, however, to grant the Hallett Beneficiaries' request that it advise whether the no contest

provisions of the R.S. Hallett Trust is unenforceable pursuant to RSA 564-B:10-1014(b) should they file the *Amended Petition Proposed,* because, as set forth in the First Safe Harbor Order, they may only find statutory sanctuary from the no contest provision of the J.S. Hallett Trust after, and to the extent possible, they successfully prove at trial the matters alleged in the *Amended Petition Proposed.* First Safe Harbor Order at 3 (Index #39). Finally, the Court declines the Hallett Beneficiaries' invitation to allow further amendment or request for advice substantially similar to that requested in the *First Safe Harbor Motion* and *Second Safe Harbor Motion.*[3] In so ruling, it DIRECTS them to proceed toward final resolution through either the *Amended Petition Proposed,* become non-suit or otherwise successfully withdraw or be allowed withdrawal of their action against the Co-Trustees as such and individually. The Co-Trustee's *Second Safe Harbor Cross-Motion* is GRANTED to the extent the Court will not allow further motions for preliminary rulings as set forth supra; it is otherwise DENIED.

I. No-Contest Provision of the R.S. Hallett Trust, Procedural Background, and *Amended Petition Proposed*

The Hallett Beneficiaries instituted their action by filing an 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

[3] Also, the Court is unable to grant the Hallett Beneficiaries' request for relief that it advise whether the no contest provisions of the R.S. Hallett Trust are unenforceable pursuant to RSA 564-B:10-1014(b) if they file the *Amended Petition Proposed* because, as set forth in the First Safe Harbor Order, they may only find statutory sanctuary from the no contest provision of the J.S. Hallett Trust after, and to the extent possible, they successfully prove at trial the matters alleged in that petition. First Safe Harbor Order at 3 (Index #39).

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 the extended controversies lies the "no-contest provision" of the R.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 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). RSA 564-B:10-1014 essentially codifies and builds upon New Hampshire 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"). 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.

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).

Count I of the *Verified Petition* sought advice from the Court about the applicability of the Article 13 no-contest provision. In their *First Safe Harbor Motion* and

other associated pleadings, see First Safe Harbor Order at 1-2 (Index #39), the Hallett Beneficiaries sought both specific and general guidance from the Court regarding the applicability of the Article 13 no-contest provision. In its order the Court determined that if pursued in total, Counts II-XI of the *Verified Petition* constituted "contests" within the Article 13 no-contest provision. See generally, RSA 564-B:10-104. First Safe Harbor Order at 11 (Index #39). It also ruled that "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. [Courts] 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." Id. at 7. As such, this Court held that the Hallett Beneficiaries are not entitled to advance rulings "on whether, if the proposed contest were to be pursued, the no-contest clause would nonetheless be unenforceable" pursuant to the safe harbor provisions of RSA 564-B:10-1014. Id. (quotations omitted.) However, in the interests of justice and because the Hallett Beneficiaries had requested advice in Count I, see RSA 564-B:10-104(c)(3), the Court did not rule that they, at that stage of the litigation, were irretrievably forced to successfully pursue the *Verified Petition* to its conclusion or face sanction under Article 13. Id. at 12. Rather, the Court advised them that they were left with the following options: (1) give up their legal action and accede to the trust; (2) proceed with the *Verified Petition* as then cast and risk an evidentiary ruling after trial that the no-contest provision is triggered; or (3) file a *Motion to Amend* adding, deleting, or modifying claims. Id. at 12 (quotations and citations omitted). The Court further cautioned them that it: "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." Id. n. 7.

In response, the Hallett Beneficiaries chose to file the instant *Second Safe Harbor Motion* seeking guidance with respect to the attached five-count, thirty-six page *Amended Petition Proposed*. Index #41. The Co-Trustee's responded with their *Second Safe Harbor Objection* and *Second Safe Harbor Cross-Motion*. Index #41. The Hallett Beneficiaries' *Second Safe Harbor Objection and Reply* followed in due course. Index #42.

II. Second Safe Harbor Motion

a) *Effect of Single Successful Breach of Trust Action*

First, the Hallett Beneficiaries request a ruling by the Court that if, after a trial on the merits, it determines that at least one of the breach of trust claims in the *Amended Petition Proposed* is valid, see RSA 564-B:10-1014(b), then Article 13 will not be enforceable as to "the entire action filed." *Second Safe Harbor Motion* at 3. Like many of the questions posed in the *First Safe Harbor Motion*, there is little decisional guidance for this Court.[4] RSA 564-B:10-1014, while providing safe harbor for successfully litigated claims, see First Safe Harbor Order at 6-8 (Index # 39), does not address the question posed. Nor has the Court been able to find case law on point. As such, it must review the text of the safe harbor statute in light of Article 13 and the stated goal to construe and apply the safe harbor statute in a manner consistent with, and broadly supportive of, a settlor's intent. RSA 564-B:10-1014(d).

[4] Indeed, submissions by both the Hallett Beneficiaries and Co-Trustees are breathtaking in their lack of support, either in the form of statute or case law, for the arguments set forth in those submissions.

The relevant safe harbor provision states: "[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 trust."[5] RSA 564-B:10-1014(b). Courts determine the meaning of a statute by analyzing its plain meaning. Landry v. Landry, 154 N.H. 785, 787 (2007). The language of a statute, however, "should not be read in isolation; rather, all parts of a statutory act must be construed together. [Courts] construe statutes so as to effectuate their evident purpose and to avoid an interpretation that would lead to an absurd or unjust result." State v. Bulcroft, No. 2013-424, 2014 WL 4119973, at *1 (N.H. Aug. 22, 2014)(quotations and citations omitted). A plain reading reveals that if the claims made are "solely to challenge the acts of the fiduciary," then Article 13 is unenforceable to the extent there has been "*a* breach of fiduciary duties or breach of trust." RSA 564-B:10-1014(b)(emphasis added). Review of only that statutory provision suggests that one successful claim might afford a litigant a protective seawall for steerage into the safe harbor.

Yet, the Court must interpret the safe harbor provisions in a manner giving greatest enforcement of a settlor's intent. RSA 564-B:10-1014(d). As noted in the First Safe Harbor Order, the sheer breadth of Article 13 indicates that the Settlor intended to discourage challenges to the terms and administration of the R.S. Hallett Trust. Id. at 8 (Index #39). Indeed, it is commonly recognized that the general purpose of no-contest clauses include a desire to avoid wasting trust assets on meritless litigation. See, e.g.

[5] At first blush, it is not apparent from the Hallett Beneficiaries' *Second Safe Harbor Motion* that this provision applies as they attempt to cast their claims as one for construction of the trust terms and not challenging the "acts of the trustee or other fiduciary." *Second Safer Harbor Motion* at 2, ¶4. As discussed infra however, the claims proposed allege breach of duty by reason of actions of the Co-Trustees.

RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 9.1 Restraints on Contests, cmt. a (2014). Trust assets may be wasted not only by meritless challenges brought to trial, but also primarily pre-textual actions with, on balance, mostly spurious claims, made to apply pressure on a fiduciary in order to force an advantageous settlement. Cf. Estate of Stoller, 780 N.Y.S.2d 861, 862 (N.Y. Surrogate's Ct. 2004). Construction of RSA 564-B:10-1014(b) to allow one successful claim, even a minor technical breach, to render a no-contest clause unenforceable could conceivably thwart the clear intent of the settlor and render a no-contest provision meaningless unless a trustee carries out his or her duties to perfection. Under this scenario, statutory interpretation would act to "immunize legal proceedings plainly intended to frustrate [the settlor's] unequivocally expressed intent from the reach of the no-contest clause." Estate of Strader, 132 Cal. Rptr.2d 649, 654 (Cal. Ct. App. 2003).

Consequently, the Court must answer the Hallett Beneficiaries' inquiry with the, likely unsatisfying, response "it depends." 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. The Court, at this juncture, however, cannot discern, in the absence of proof offered and tested at trial, whether the proposed *Amended Petition Proposed*, advances 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.

b) *RSA 564-B:10-1014(c)(4) Action for Construction of Trust Terms*

The Hallett Beneficiaries seek a determination that pursuit of the claims set forth in their proposed *Amended Petition Proposed* will not violate Article 13 because they

seek "construction or interpretation of trust terms." *Second Safe Harbor Motion* at 4. RSA 564-B:10-1014(c)(4) allows safe harbor for "[a]ny action brought by a beneficiary or on behalf of any such beneficiary for a construction or interpretation of the terms of the trust." By its plain terms, see generally, Prof'l Firefighters of N.H. v. HealthTrust, Inc., 151 N.H. 501, 503 (2004) (when interpreting the meaning of a statute, courts look to the plain meaning of the words used), the statute permits "construction and interpretation" meaning "the act . . . of interpreting or explaining the meaning of a writing . . . ." BLACK'S LAW DICTIONARY at 379 (10th ed. 2014). Courts are not permitted to add words to a statute that the legislature did not see fit to include. See, e.g., Town of Newbury v. N.H. Fish & Game Dep't., 165 N.H. 142, 144 (2013). Here, the statute provides for construction or interpretation of trust terms; it does not expansively include application of those terms to the acts of fiduciaries. Cf. BLACK'S LAW DICTIONARY at 379 (10th ed. 2014)("For practical purposes . . . the real object of both interpretation and construction . . . is merely to ascertain the meaning and will of the lawmaking body in order that it may be enforced"(quotations omitted)). This interpretation of the permitted actions under RSA 564-B:10-1014(c)(4) is consistent with that statute's directive that it is to be applied "to enforce the settlor's intent as reflected in a no-contest provision to the greatest extent possible." RSA 564-B:10-1014(d). A more expansive interpretation would effectively encompass all challenges to trust administration and substantially nullify most no-contest provisions – an interpretation prohibited by statute and common law. Cf. Burtman v. Burtman, 97 N.H.254, 259 (1952).

The Court has reviewed the claims set forth in the proposed *Amended Petition Proposed* and concludes that these claims do not constitute an action for interpretation

or construction of trust terms. It may be undeniable that these claims may ultimately require the Court to construe trust terms as a subsidiary determination whether there has been a breach of duty, however, the claims do not, in a pure sense, request a determinative ruling on the meaning of a provision. Rather, Counts I-IV allege *specific acts or failure to act* by the Co-trustee[s] in violation of the terms of the trust or their duties as fiduciaries under the trust code. See *Amended Petition Proposed* at 30.[6]

c) *Proposed First Amendment Claims Satisfying the Definition of "Contest"*

As they did in the *First Safe Harbor Motion*, id. at 3 (Index #16), see also *Supplemental Memorandum* at 9 (Index #35), the Hallett Beneficiaries request, pursuant to RSA 564-B:10-1014(c)(3), a determination that none of the claims asserted in the *Amended Petition* Proposed constitute a "contest" under the terms of Article 13 of the R.S. Hallett Trust. *Second Safe Harbor Motion* at 4 (Index 40). In its *First Safe Harbor Order*, this Court set forth the analytical framework for evaluating whether a claim is a "contest." Id. at 8-9 (Index #39). The Court discerns no reason why the analytical framework should vary under the instant motion, and incorporates by reference that analysis. In particular, the Court reminds the Hallett Beneficiaries of its ruling that:

> the no-contest provision includes a directive that opposition to 'the administration of this Trust' triggers the no contest 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

[6] The Court notes that the Hallett Beneficiaries' preliminary "brief introduction" paragraphs in the *First Amendment to Verified Petition* outlining claims against the Co-Trustees each begins with the phrase "[t]he respondents have . . . ." Id. ¶¶ 15-18 (Index #40).

> 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).

First Safe Harbor Order at 8 (Index #39). Further, it reminds the Hallett Beneficiaries that Article 13 of the R.S. Hallett Trust

> 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 [five] counts or prayers for relief of the [*Amended Petition Proposed*] may be found to potentially fall within the punitive ambit of Article 13, this Court must deem the Verified Petition to pose a contest.

Id. at 8-9 (quotations omitted).

The Court, after review of the five proposed counts contained in the *Amended Petition Proposed*, concludes that all five amended counts are "contests" within the meaning of Article 13 and RSA 564-B:10-1014. Counts I (Breach of Duty – life insurance proceeds and trust liquidity)[7]; Count II (Breach of Duty – no-asset affidavit and Milford Lumber/Muir Lumber promissory note); Count III (Record Keeping and Identification of Trust Property – improper collection of trust property and improper recordkeeping); and Count IV (Breach of Duty – annual reporting and improper accounting), see *Amended Petition Proposed* at 24-30, each advance a "contest" of the

[7] The Court's notation of the foundational allegations contained in each count are merely summaries of the substance of each claim. These parentheticals are intended to assist in the present analysis of whether a "contest" is alleged. The summaries are not intended to be comprehensive and do not reflect any decision on the merits of each claim.

R.S. Hallett Trust to the extent that each, in part or in full, oppose or challenge administration of the trust by the Co-trustee[s].

Count V, concerning a request for attorney's fees, includes a request that the Court award fees payable by either: (1) the Co-Trustees personally; or (2) "from the trust that is the subject of the controversy." *Amended Petition* Proposed at 30-31 (Index # 40). The Court concludes, as it did in the First Safe Harbor Order at 11 (Index #39), that

> any grant of such fees as an act of administration of the Trust, . . . 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 varying the terms of the Trust or an action challenging the act of the Co-Trustees. . . as described in the terms of the Trust.

Id. (brackets, quotations, and ellipses omitted).

d) *Further Amendment or Preliminary Rulings*

Finally, the Hallett Beneficiaries request that this Court "point out what part of the [proposed *Amended Petition Proposed*] may be in violation and allow the Petitioners to further amend the Petition or reserve that right." *Second Safe Harbor Motion* at 4 (Index # 40).

The Co-Trustees do not object to amending the *Verified Petition*, see *Second Safe Harbor Objection* ¶23 (Index #41), however, they do object, inter alia, to: (1) preliminary determinations of enforceability; and (2) further petitions for preliminary

rulings. Id. at ¶ 22.[8] The Hallett Beneficiaries are permitted by statute to initiate "any action" to determine whether a proposed motion constitutes a contest. RSA 564-B:10-1014(c)(3) does not, by its terms, limit advance direction from a court to "an action" or "one action." Cf. Genger v. Delsol, 66 Cal. Rptr.2d 527, 541 (Cal. App. 1st. Dist. 1997)(decided under prior version of law substantially similar to RSA 541-B:10-1014)(statute specifically allows only one inquiry). Thus, it is arguable that the Hallett Beneficiaries are permitted under RSA 564-B:10-1014(c)(3) to serially file amendments and requests for rulings. It is a well-settled rule of statutory construction that single statutory provisions, however, must be interpreted not in isolation, but in light of the overall statutory scheme. See, e.g., Town of Newbury, 165 N.H. at 144. Where possible, statutes concerning similar subject matter will be interpreted in a manner to avoid conflict and to produce a harmonious result. See, e.g., In re Aldrich, 156 N.H. 33, 35 (2007). As such, the reach of section (c)(3) must be viewed through a prism informed by RSA 564-B:10-1014(d) directing that the intent of the entire statute is "to enforce the settlor's intent as reflected in a no-contest provision to the greatest extent possible."

As noted in the First Safe Harbor Order, "Article 13 evinces a broad intent to discourage beneficiaries or any other person from litigating against the trust." Id. at 8 (Index #39). Moreover, a well-established rationale for no-contest clauses is to protect against "wasting of the estate in litigation." RESTATEMENT (SECOND) OF PROPERTY. DONATIVE TRANSFERS § 9.1 Restraints on Contests, cmt. a (2014), see e.g. In re Muller, 525 N.Y.S.2d 787, 788 (Surrogate's. Ct. Nassau Cty. 1988). Finally, in any act taken by

[8] The Co-Trustees also seek a ruling that "the Hallett Beneficiaries actions to date . . . constitute a "contest." Id. That inquiry is addressed supra.

this Court, or any court, it must be careful to conduct itself in a manner that is fair to both parties and maintains its objectivity and independence from each.

As such, the Court now concludes, and reaffirms its prior directive to the Hallett Beneficiaries, that although it offered appropriate guidance in the First Safe Harbor Order, and gave the Hallett Beneficiaries the option to file a motion to amend, it will not entertain serial and prolonged motions seeking Court advice regarding the implications of claims made and the manner to correct any improprieties. See First Safe Harbor Order at 13 (Index #39). To do otherwise would risk undue elongation of the litigation and thus frustrate the intent of the settlor to discourage challenges to the trust and violate statute's directive that this intent be honored to the greatest extent possible. Serial advice could also potentially compromise the proper preeminent role of this Court as neutral arbiter of legal disputes should the Hallett Beneficiaries motions inspire an appearance of its unduly acting as a "super lawyer" rendering legal aid and guidance in charting the course to safe harbor for one of two litigants with a cause before it. Cf. Duncan v. State, 102 A.3d 913, 922 (2014)(advisory opinions may only be issued by the New Hampshire Supreme Court in very narrow circumstances). This Court has, as required by statute, to date opined on matters properly before it under RSA 564-B:10-1014(c)(3) and set forth principles based on the law and language of Article 13 that the Hallett Beneficiaries may use to guide their decisions on how to proceed in this matter. It does not discern, at this time, any reason why further court intervention or amendment pursuant to RSA 564-B:10-1014(c)(3) will be necessary to prevent injustice.[9] Cf. Bennett v. ITT Hartford Group, Inc., 150 N.H. 753, 760 (2004); Kravitz v. Beech Hill

[9] The Court similarly does not have any due process concerns regarding its ruling. It has, pursuant to RSA 564-B:10-1014(c)(3), offered appropriate guiding principles useful to the Hallett Beneficiaries. Absent statutory directive, such guidance might be otherwise considered extraordinary.

Hosp., L.L.C., 148 N.H. 383, 392 (2002); RSA 516:9. As such, the Hallett Beneficiaries request is respectfully DENIED and they are instructed to proceed toward final resolution through either the formal submission of the *Amended Petition Proposed,* non-suit, or otherwise by successful withdrawal. They shall make their election known through a motion so indicating filed within **30 days** of the date reflected on the Clerk's Notice of Decision accompanying issuance of this order.

III. Second Safe Cross-Motion

a) *Article 13 No-Contest Provision and Discovery*

The Co-Trustees seek a ruling that because the Hallett Beneficiaries engaged in certain discovery in December 2014 and January 2015, "the only preliminary determination the Court should make is that . . . the Trust's No-Contest provision has been irrevocably triggered for the same reasons stated in this Court's January 15, 2015 Order . . . ." *Second Safe Harbor Cross-Petition* ¶¶ 8-15. They note that under Article 13, a violation occurs when a person "directly or indirectly institute[s], conduct[s] or in any manner whatsoever take[s] part in or aid in any proceeding to oppose the . . . administration of this Trust . . . ." They assert that Article 13 has been violated because the Hallett Beneficiaries *conducted* litigation when: (1) in December 2014, Hallett Beneficiary Amy Hallett Hebert "served interrogatories and Requests for Production of Documents" on the Co-Trustees; and (2) the Hallett Beneficiaries reviewed the documents produced by Barbara Hallett, answered her interrogatories, and served their expert disclosures. Id. ¶¶ 8-9. The Hallett Beneficiaries object on the basis that there is no law precluding discovery while the Court considers its Safe Harbor Petitions. *Objection to Second Safe Harbor Cross-Motion* at 3 (Index #42). Resolution of this

question requires the Court to consider the interplay of Article 13, RSA 364-B:10-1014, and the policy considerations underlying no-contest provisions.

As always, the intent of the testator is the veritable North Star guiding a court when it is interpreting the terms of a trust. See, e.g., Tamposi v. Shelton, 164 N.H. 490, 495 (2013) (intent of settlor is "paramount"). The Court begins with consideration of the verbs: "institute;" "conduct," "or "take part in" and the noun "proceeding." See id. (courts construe intent of settlor through express terms of trust). The active verbs all imply starting, pursuing, managing, and engaging in a "proceeding." See BALLENTINE'S LAW DICTIONARY at 243 (3rd ed. 1969) ("to conduct" means "[t]o carry on [or] to manage . . . ."). "Proceeding" is defined as:

> [t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. **2.** Any procedural means for seeking redress from a tribunal or agency. **3.** An act or step that is part of a larger action. **4.** The business conducted by a court or other official body; a hearing.

BLACK'S LAW DICTIONARY at 1398 (10th ed. 2014). RSA 564-B: 10-1014(d) directs that the purpose of the statute is "to enforce the settlor's intent as reflected in a no-contest provision to the greatest extent possible." Therefore, if the Court only looks at the terms of the no-contest provision and the broad sweep of the statute, then arguably, a beneficiary violates Article 13 by engaging in discovery as part of the present litigation.

The Court's inquiry does not cease there, however, because a court must always consider whether: (1) its interpretation of the terms of a no-contest clause would, in actuality, frustrate a settlor's intent, see, e.g. Estate of Strider, 13 Cal. Rptr.2d at 653-54; and (2) whether the settlor's clear intent is contrary to public policy. See Burtman v. Butman, 97 N.H. at 258-59. Difficulty in fashioning a rule of decision arises, however,

because of tensions inherent in determining and advancing the will of the settlor and promoting access to the courts to protect the settlor's intent. Cf. Dunking v. Dunking, 314 P.3d 780, 787 (Cal. 2013) (noting tensions within public policy interests).

First, it is well-established that the purpose of no-contest clauses often is to discourage potentially destructive or expensive litigation that has the potential of draining trust resources. See e.g. Estate of Strider, 13 Cal. Rptr.2d at 653; In re Ellis, 683 N.Y.S.2d 113 129 (N.Y. App. Div. 1998); Will of Muller, 525 N.Y.S.2d 787, 788 (Surrogate's Ct. Nassau Cty. 1988). Extensive discovery may frustrate this purpose by encouraging beneficiaries to avoid the dangers of a no-contest clause long enough to harass a trustee into settlement. Estate of Stoller, 780 N.Y.S.2d at 862.

On the other hand, meritless litigation may be avoided entirely after limited discovery reveals that a beneficiary's concerns are unfounded or lack a strong evidentiary foundation. Cf. Estate of Singer, 920 N.E.2d 943, 947 (N.Y. 2009)(litigation abandoned after limited discovery revealed that concerns were unfounded). As one court has observed, "[t]he *in terrorem* clause also serves as an effective self-regulating device. There is little chance that the . . . potential objectant[] will follow [discovery] with wasteful and divisive litigation unless [he/she] is quite certain of success because an uncertain . . . contest risks total forfeiture . . . ." Will of Muller, 525 N.Y.S.2d at 788.

Moreover, a settlor cannot be assumed to intend that his distributive plans be frustrated by a trustee who fails to act in accordance with trust terms.[10] "It would seem harsh to place the onus of socially-desireable verification of propounded [trust]

[10] Indeed, that is the apparent legislative intent behind RSA 564-B:1014(b)'s safe harbor provisions rendering a no contest clause unenforceable where there has been a breach of trust.

singularly upon the applicant while simultaneously coercing [his/her] assent to it with threat of forfeiture." Will of Muller, 525 N.Y.S.2d at 788.

In addition, it has long been New Hampshire law that no-contest provisions that are contrary to public policy will not be enforced. Cf. Burtman, 97 N.H. at 258. Thus, another consideration is that New Hampshire places high value on open and complete discovery. Cf. N.H. Ball Bearings, Inc. v. Jackson, 158 N.H. 421, 429 (2009)("discovery rules are to be given a broad and liberal interpretation"). This long-standing policy supports allowance of reasonable discovery driven by fact-finding necessary to determine whether the trust's administration has been conducted in accordance with trust terms and to allow reasonable evaluation of the risk of mounting a challenge to trust. Cf. Estate of Singer, 920 N.E.2d at 946 (New York law balances right to prevent will contest against right to investigate and evaluate risk of challenge).

It is against this backdrop of competing public policy considerations that the Court must discern whether Article 13 has been irretrievably violated by the discovery alleged.[11] The Court finds wisdom in the method advanced by, and observation of, the New York Surrogate's Court[12] allowing limited discovery, based on the facts of each case, that would provide a beneficiary with "information of potential value or relevance" in order to make a determination that the trust is being administered in accordance with a settlor's intent. In re Baugher, 906 N.Y.S. 2d 856, 859 (Surrogate's Ct. Nassau Cty.

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[11] The Co-Trustees have not submitted affidavits documentary evidence supporting its allegations that certain discovery has occurred. The Hallett Beneficiaries, however, do not challenge these allegations in their objection. See *Objection to Second Safe Harbor Cross-Motion* at 2-3 (Index #42).

[12] The Court notes that although New York, by statute and judicial interpretation expanding the reach of that statute based on public policy concerns, see Estate of Singer, 920 N.E.2d at 947, allows discovery, commentators agree that "absent such a statute the result should be the same: any other rule would interfere with the probate court's task of ascertaining" a testator's intent. RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS §9.1 Restraints on Contests, n. 7(c).

2010); see Estate of Marin, No. 2012-181, 2013 WL 3467441 at *2 (Surrogate's Ct. Putnam Cty. July 11, 2013)("Courts seek to achieve a balance between a [settlor's] desire to avoid a . . . contest by spurned beneficiaries and the rights of these same beneficiaries to obtain sufficient information to make an intelligent decision as whether to risk triggering the *in terrorem* clause"). Here, the discovery alleged appears to have been in the nature of fact finding, and within the realm of reaching a determination whether the R.S. Hallett Trust was administered in accordance with the settlor's wishes. The Hallett Beneficiaries are cautioned, however, that they are not to interpret the Court's determination today as *carte blanche* to conduct unlimited discovery until and unless they opt to pursue their amended action to a litigated conclusion. Cf. Estate of Marin, No. 2012-181, 2013 WL 3467441 at *2 (violation of *in terrorem* found where extensive discovery undertaken). Courts have noted that beneficiaries risk being held in violation of the no-contest clause by pursuing discovery because of a concern of "abuse by a litigant with an eat-the-cake-and-have-it agenda, *i.e.,* who wants to avoid triggering a no-contest clause while at the same time building a case . . . or who is determined to skirt an in terrorem clause by building up pressure for settlement . . . ." Estate of Stoller, 780 N.Y.S.2d at 862.

The Court holds today that the Hallett Beneficiaries' discovery activities to date have remained, on balance, within the realm of acceptable inquiry consistent with determination whether the R.S. Hallett Trust had been administered in a manner intended by the Settlor. As such, it declines the Co-trustee's invitation, at this time, to find the Hallett Beneficiaries in violation of Article 13.

b) *Count IV of the Amended Petition Proposed*

The Co-Trustees request that "[t]o the extent that the Hallett Beneficiaries' motion may properly be considered to be a Motion to Amend the Petition" the Court deny proposed Count IV concerning the "[d]uty to inform and [r]eport" as "futile." *Second Safe Harbor Cross-Motion* at 10 (Index #41); see *Amended Petition Proposed* at 27-28 (Index # 40). It appears to the Court that this plea for relief is akin to a preemptive motion to dismiss prior to the Hallett Beneficiaries electing to amend the *Verified Petition* in the manner set out in the Amended Petition Proposed.[13] The Court DENIES the Co-Trustees request as premature as the Hallett Beneficiaries have not as yet specifically moved to amend. In addition, to the extent their arguments are pertinent to dismissal of any current claims regarding a breach of duty to inform or report, the Court directs the Co-Trustees to the plain terms of RSA 564-B:8-813. Although the duties set forth in subsections (b), (c), and (d) specifically "apply only to a trustee who accepts a trusteeship on or after October 1, 2004, to an irrevocable trust created on or after October 1, 2004, and to a revocable trust which became irrevocable on or after October 1, 2004", RSA 564-B:8-813(f), the provisions in subsections (a) and (i) are not, by statute, precluded from potential applicability to the R.S. Hallett Trust pursuant to its designation as a revocable trust, see RSA 564-B:8-813(a), (f), as well as the terms for trustee accounting under Article 12 of the Trust.

[13] The Court notes that the Co-Trustees allege that in the proposed *Amended Petition Proposed*, the Hallett Beneficiaries "seek to amend their petition, but simply re-allege more of the same." Id. at 3. The Court construes this as a concession that the claims in the proposed amendment do not materially vary in substance and do not unduly surprise the Co-Trustees. See RSA 516:9; Bennett, 150 N.H. at 760 (2004); Kravitz, 148 N.H.at 392 (standards for amendment).

SO ORDERED

Dated: 3.31.15

Gary R. Cassavechia, Judge