**STATE OF NEW HAMPSHIRE**

**TENTH CIRCUIT PROBATE DIVISION**

 **BRENTWOOD**

In Re: The Judith E. Tierno Revocable Trust of 2003

Docket No.318-2013-EQ-01252

**MEMORANDUM OF LAW IN SUPPORT**

**OF OBJECTION OF MOTION TO DISMISS**

 **NOW COMES** Daniel E. Healy (“Petitioner”), Trustee of The Judith E. Tierno Revocable Trust of 2003, (the “Trust”), by and through his attorneys, McLane, Graf, Raulerson & Middleton, Professional Association, and submits this Memorandum of Law in Support of his Objection to the Motion to Dismiss. In support thereof, the Petitioner states as follows:

1. **INTRODUCTION**

 Nathan N. Stubbert, Ethan T. Stubbert, Charles F. Stubbert, III, and Sherry Stubbert (the “Contestants”) have brought a Motion to Dismiss the Petitioner’s Partially Assented Petition to Validate the Third Amendment and Restatement of The Judith E. Tierno Revocable Trust of 2003.

 The Contestants first argue that because the “unsigned Trust Amendment was never executed in compliance with the express terms of the Trust Instrument” the Petition should be dismissed. The Contestants further argue that the Petition should be dismissed because the Petitioner cannot show by “clear and convincing evidence” that Ms. Tierno “possessed requisite mental capacity to amend the Trust.”

 The Court should deny the Contestants’ Motion to Dismiss because the Petitioner has pled facts reasonably susceptible of a construction that would permit a basis for legal relief. Specifically, the Petition shows that The Third Amendment and Restatement is a manifestation of the Grantor’s clear intent and is not expressly prohibited by the terms of the Trust instrument. Secondly, the Contestants have not introduced evidence that has rebutted the presumption that Ms. Loconti had testamentary capacity when expressing her intent to amend the Trust, nor has it shown that the Petitioner cannot meet its burden of showing Ms. Tierno possessed the requisite capacity.

1. **LEGAL STANDARD**

 The legal standard for ruling on a motion to dismiss is whether the Petitioner's allegations

are “reasonably susceptible of a construction that would permit the relief sought”. *In re*

*Guardianship of Raymond* *B*., 163 N.H. 502,504 (2012). The Court “assumes the truth of the facts as alleged in the petitioners’ pleadings and construe all reasonable inferences in the light most favorable to the petitioners.” *Id*. The threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. *See* Tessier v. Rockefeller, 162 N.H. 324, 330 (2011).

“If the allegations constitute a basis for legal relief . . . it [is] improper to grant the motion to dismiss.” Id. (citations omitted).

1. **ARGUMENT**
	1. **The Third Amendment was Validly Created Pursuant to RSA 564-B:6-602(c).**

 RSA 564-B:6-602 (c) provides, in part:

 The settlor may revoke or amend a revocable trust:

. . . .

(2) by any other method manifesting clear and convincing evidence of the settlor's intent if the terms of the trust do not provide a method *or* *do not expressly prohibit methods other than methods provided in the terms of the trust.* (Emphasis added).

 The Second Amendment and Restatement contains provisions giving the Grantor the power to amend or revoke the Trust. *See* Petition, Exhibit 1, Second Amendment and Restatement, § 16. The Second Amendment and Restatement provides *a* method for amending or revoking the Trust; it does not provide *the* *only* method:

# The Grantor reserves the right at any time or from time to time without the consent of any person and without notice to any person other than the Trustee to revoke or modify the trust hereby created, in whole or in part, to change the beneficiaries hereof, or to withdraw the whole or any part of the trust estate by filing notice of such revocation, modification, change, or withdrawal with the Trustee.

 Similarly, Paragraph 19. of The Second Amendment and Restatement states that amendments to the trust shall be effective when executed by the Grantor. It does not say that such amendments shall be effective *only* when executed by the Grantor.

 The New Hampshire Uniform Trust Code provides that a Trust need not be written. *See* RSA 564-407 (“a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence”). Moreover, as discussed above, a revocable trust can be amended by any method manifesting clear and convincing evidence of the grantor’s intent if the terms of the trust do not expressly prohibit such method. *See* RSA 564:B-6-602(c).

 The Petitioner has pled facts that Ms. Tierno validly amended her Trust pursuant to the New Hampshire Uniform Trust Code. Beginning on or before September 28, 2012, Ms. Tierno clearly expressed her intent to modify the Trust to her Co-Trustee and her counsel.  *See* Petition §§ 18,19. In addition, Ms. Tierno’s method of amending her Trust is not expressly proscribed in the Trust instrument.

 Thus, the Contestant’s Motion to Dismiss should be denied because the Petitioner has pled facts and allegations reasonably susceptible of a construction that would permit the relief sought.

* 1. **Requisite Mental Capacity**

 The Contestants also assert that the Petitioner “cannot show by clear and convincing evidence that Ms. Tierno had sufficient mental capacity to amend the Trust.” Id. pp. 4, 5. The Contestants argue that because the Third Amendment is testamentary in nature, the “burden of proving testamentary capacity remains on the proponent of the document throughout the proceeding, citing, *In re Estate of Washburn*, 141 N.H. 658, 662 (1997). Id. p. 5.

 The Contestant is correct in asserting that a person’s “capacity required to . . . amend a revocable trust . . . is the same as required to make a will . . . .” RSA 564-B:6-602. While, the *Washburn* Court holds that the burden of proof rests on the proponent in the probate of a will in solemn form, it is unclear if the Court would impose the same or similar burden exists on a disinterested independent Trustee, such as the Petitioner.

 Even if the burden of proof of requisite capacity rests with the Trustee as it does with the proponent of a will, the Contestants misapprehend the *Washburn* opinion. Assuming, without agreeing, that the burden of proof resting on the Trustee is the same as that of a proponent of a will, under *Washburn*, the testator (and thus the Grantor) is presumed competent. In re Estate of Washburn, 141 N.H. 658, 663 (1997) (“The proponent is aided in this task by a presumption of capacity accorded the testatrix”). The proponent does not need to introduce evidence of capacity, as indicated by the Contestants, unless the presumption is rebutted. *Id*. Assuming the Contestants could successfully rebut the presumption, the evidentiary burden resting on the proponent is not the “clear and convincing” standard as the Contestants claim. Rather, “the proponent must persuade the trial court, by a preponderance of all the evidence presented, that the testatrix possessed the requisite capacity to make the will.” *Id*. (citations omitted).

 In affirming the trial court’s Order in *Washburn*, holding that the testatrix lacked the testamentary capacity necessary to execute her will, the Court found that the contestant provided evidence from three physicians rebutting the presumption, as well as anecdotes, illustrating incompetency was “concrete evidence of incapacity . . . and was “not the mere incantation of the phrase ‘Alzheimer’s dementia’ without any connection to the testatrix’s condition at the time in question.” *Id.*  The “mere incantation” that the “petitioner cannot show by clear and convincing evidence that Ms. Tierno had sufficient mental capacity on October 9, 2012, when only three days later she was so debilitated by medication that she lacked capacity to execute the documents” is not evidence and is clearly not grounds to dismiss the Petition.

 As discovery has yet to even begin in this matter, the Contestants have no basis to assert that Trustee cannot show Ms. Tierno had the requisite capacity on or before October 9, 2013 when she amended her Trust. That she was or may have been incapacitated by medication on October 11 and 12, 2012 is insufficient to overcome the presumption that she was capacitated on October 9. Whether Ms. Tierno had the requisite capacity is a factual question which can only be determined through discovery and dismissing the petition prior to the opportunity to conduct such discovery is inappropriate. Indeed, for purposes of the Motion to Dismiss, the Court must construe the facts in a light most favorable to the Trustee. Accordingly, the capacity must be presumed and the Motion should be denied.

1. **Conclusion**

 Contrary to the Contestants’ assertions, New Hampshire law does not require that a trust be amended by a method defined in the trust. Rather, Ms. Tierno modified her Trust as provided under the New Hampshire Uniform Trust Code by a method that is not proscribed by the express terms of her Trust and which manifested clear and convincing evidence of her intent. Moreover, Ms. Tierno is presumed to have had the requisite capacity to amend her Trust until the Contestants produce evidence that she lacked such capacity. No such evidence has been produced.

 Because the Court assumes the truth of the facts as alleged in the Petitioners’ pleadings and construes all reasonable inferences in the light most favorable to the petitioners and for the reasons stated above, the Contestants’ Motion to Dismiss must be denied.

 **NOW THEREFORE,** for the reasons set forth above, the Petitioner respectfully requests that this Honorable Court deny the Motion to Dismiss and for such other relief as is just.

 Respectfully Submitted,

 Daniel E. Healy in his capacity as

 Trustee of the Judith E. Tierno

 Revocable Trust of 2003

Date: February \_\_, 2014 By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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 **RULE 21 CERTIFICATE**

 I Darrell J. Chichester, certify that a copy of the foregoing document was served on all interested parties by first class mail.

Dated: February \_\_\_\_, 2014 By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Darrel J. Chichester, Esq. NH Bar # 17666

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