

STATE OF NEW HAMPSHIRE
10th CIRCUIT COURT

PROBATE DIVISION
BRENTWOOD

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

Docket No. 318-2013-EQ-01252

MOTION TO DISMISS

NOW COME Nathan N. Stubbart, Ethan T. Stubbart, Charles F. Stubbart, III, and Sherry Stubbart ("the Stubbarts") and move the Court to dismiss the Partially Assented-to Petition to Validate the Third Amendment and Restatement of the Judith E. Tierno Revocable Trust of 2003 for the reasons stated in their Memorandum of Law in Support of Motion to Dismiss.

WHEREFORE, the Stubbarts respectfully request that the Court:

- A. Dismiss the Petition to Validate the Third Amendment and Restatement of the Judith E. Tierno Revocable Trust
- B. Grant such other relief as is just.

Respectfully submitted,

**NATHAN N. STUBBERT, ETHAN T.
STUBBERT, CHARLES F. STUBBERT, III
AND SHERRY STUBBERT**

By and through their attorneys,

HARMAN LAW OFFICES

Dated:

2/13/14

By:

Terrie Harman (BNH 20613) for
Terrie Harman – NH Bar #1096
59 Deer Street, Suite 1B
Portsmouth, NH 03801
603-431-0666

RULE 21 CERTIFICATE

I, Terrie Harman, hereby certify that a copy of the foregoing document was served on all interested parties by first class mail.

Dated: February 13, 2014

By:

Terrie Harman for
Terrie Harman – NH Bar #1096

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

NOW COME Nathan N. Stubbart, Ethan T. Stubbart, Charles F. Stubbart, III, and Sherry Stubbart, “the Stubbarts” and submit this Memorandum of Law in Support of their Motion to Dismiss. In support thereof they state as follows:

I. Introduction

Petitioner has brought a Petition to Validate the Third Amendment and Restatement of the Judith E. Tierno Revocable Trust of 2003, seeking to validate an unsigned Third Amendment and Restatement (“Unsigned Third Amendment”) of the Judith E. Tierno Revocable Trust of 2003 (“Trust”) pursuant to RSA 564-B:6-602.

Ms. Tierno executed The Second Amendment and Restatement to the Judith E. Tierno Revocable Trust of 2003 (“Second Amendment”) on September 3, 2009, by initialing every page and signing it before witnesses and a notary public. (*See Exhibit 1 to the Petition*). Paragraph 19 of the Second Amendment (*Exhibit 1 to the Petition*) states that “the trust agreement and any amendments hereto” will be effective only when executed by the grantor.” That identical language exists in Paragraph 18 of the Unsigned Third Amendment. (*Exhibit 3 to the Petition*). Ms. Tierno never signed, initialed, or executed in any other way the Unsigned Third Amendment.

The Petition should be dismissed for two reasons. First, the Unsigned Third Amendment was never executed in compliance with the express terms of the Trust instrument. Second, Petitioner cannot show by clear and convincing evidence that Ms. Tierno possessed requisite mental capacity to amend the Trust.

II. 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). Motions to dismiss must be granted if the facts pleaded do not constitute a basis for legal relief. Id.

III. Argument

A. The Unsigned Third Amendment Was Not Executed in Compliance with Express Terms of the Trust Instrument

Petitioner argues that the Unsigned Third Amendment is valid under RSA 564-B:6-602(c) which states:

“The settlor may revoke or amend a revocable trust:
(1) by substantial compliance with a method provided in the terms of the trust; or
(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.”

Petitioner argues that Ms. Tierno's notification to him about intended changes was compliance with the method provided in the terms of the Trust, namely Paragraph 16 of the Second Amendment. (*Petition* ¶¶ 38, 39). In the alternative, Petitioner argues that no terms of the Trust prohibited other methods of amendment and therefore her notification to the Petitioner was a valid method to amend the Trust. (*Petition* ¶ 40).

Both of Petitioner's arguments are incorrect, because the Trust instrument requires that any amendments be executed by the grantor in order to be effective. Paragraph 19 of the Second Amendment in relevant part states:

“This trust agreement, and any amendments hereto, shall be effective when executed by the Grantor, notwithstanding that the signature of the Trustee is provided for, the Trustee's signature being intended to denote the acceptance of the Trustee to serve in that capacity only.”

The Trust instrument expressly states that the Trust agreement and any amendments are invalid until and unless executed by Ms. Tierno. Petitioner misconstrues the Trust instrument as follows:

- a. in paragraph 38 of the Petition, he misstates that the Trust does not require an executed document, and
- b. in paragraph 40 of the Petition, he misstates that the terms of the Trust do not expressly prohibit methods to amend the Trust other than method prescribed in Trust.

The New Hampshire Supreme Court states that when it construes a trust instrument, “the intention of a settlor is paramount, and we determine that intent, whenever possible, from the express terms of the trust itself.” Shelton v. Tamposi, 164 N.H. 490, 495 (2013). The settlor’s intent must be ascertained from the language of the entire instrument as a whole. King v. Onthank, 152 N.H. 16, 18 (2005). “In searching for the proper interpretation of words used in a written instrument, we require that the words and phrases be given their common meaning. Will of Smith, 131 N.H. 396, 398 (1988). The common meaning of the word “execute” is “to make (a legal document) valid by signing.” *Black’s Law Dictionary* (9th ed. 2009). The grantor’s intent evident from the text of the Second Amendment was that any subsequent amendments had to be executed by her in order to be effective. Furthermore, Ms. Tierno’s intent was exhibited graphically in the way she executed the Second Amendment: by initialing every single page and by signing it in the presence of witnesses and a notary public. (*See Exhibit 1 to the Petition*).

The Trust instrument must be construed as a whole, and therefore, paragraphs 16 and 19 of the Second Amendment are to be read together. Accordingly, the following steps are required to amend the trust:

- a. the grantor had to notify the trustee of her intent to modify, and
- b. she must formally execute the amendment.

Ms. Tierno allegedly spoke to the Petitioner about the modifications, but, she never executed the Unsigned Third Amendment. Therefore, Unsigned Third Amendment cannot be validated under RSA 564-B:6-602(c)(1), because of the absolute nonexistence of substantial compliance with the method prescribed in the Trust instrument.

Petitioner's alternative argument that the Unsigned Third Amendment could be validated under RSA 564-B:6-602(c)(2), because the Trust did not prohibit other amendment methods, also fails. The Trust instrument expressly states that it and any amendments are effective only when executed by the grantor, notwithstanding signatures by the trustees. That is, even if Ms. Tierno had signed it as a trustee, such as signature would nonetheless be ineffective. The language in paragraph 19 of the Second Amendment requires execution by grantor for the instrument to be valid and consequently excludes any other methods of amendment. Therefore, the Unsigned Third Amendment cannot be validated under RSA 564-B:6-602(c)(2) because the Trust forbids any method of amendment not carrying the signature of the grantor.

The petition must be dismissed because the Unsigned Third Amendment is invalid under both provisions of RSA 564-B:6-602(c). Petitioner's allegations cannot and do not form a basis for legal relief sought.

B. No Clear and Convincing Evidence Exists that Ms. Tierno Possessed Requisite Mental Capacity to Amend the Trust

Even if Petitioner was correct (he is not) in his assertion that Ms. Tierno had amended the Trust orally, Petitioner cannot show that Ms. Tierno possessed the mental capacity requisite to do so. RSA 564-B:4-402(a)(1) provides that one of the requirements in creating a trust is grantor's capacity to create it. A person has capacity to create a revocable inter vivos trust to the same extent that the person has capacity to devise or bequeath the property free of trust. *Restatement (Third) of Trusts* § 11. RSA 564-B:4-407 requires that creation of an oral trust and its terms be established only by clear and convincing evidence.

Furthermore, the alleged changes between Second Amendment and the Unsigned Third Amendment were testamentary in nature to the extent that the Stubberts were excluded from the disposition of the trust estate after Ms. Tierno's death. In New Hampshire the burden of proving testamentary capacity remains on the proponent of the document throughout the proceeding. In re Estate of Washburn, 141 N.H. 658, 662 (1997).

In the petition, Petitioner states that Attorney Hughes spoke with Ms. Tierno about making changes to the Trust on October 9, 2013[sic].(*Petition* ¶ 20). Attorney Hughes returned to see Ms. Tierno just 3 days later on October 12, 2012, at which time Ms. Tierno "lacked legal capacity to execute" the Unsigned Third Amendment both in the morning and later in the afternoon, and subsequently passed away just five days later. (*Petition* ¶¶ 23-27). 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 document and was so ill that she passed away mere days later.

Furthermore, in the introduction section of the petition, Petitioner states that Ms. Tierno had reviewed the Unsigned Third Amendment, however this assertion either conflicts with or is not supported by other facts in the Petition. "After the Third Amendment was prepared and subsequently reviewed by Ms. Tierno and Co-Trustee Daniel E. Healy, but before it was formally executed, Ms. Tierno passed away." (*Petition* pg. 1). In the facts section, Petitioner states that Attorney Hughes drafted the amendment on October 11, 2012 and presented it to Ms. Tierno the next day, at which time she lacked legal capacity to execute it. (*Petition* ¶¶ 22-26). Petitioner's statement that Ms. Tierno had reviewed the Third Unsigned Amendment (on October 12, 2012) after it was drafted (on October 11, 2012) is misleading: if she lacked capacity to execute it on October 12, 2012, she never could have reviewed it, nor does Attorney Hughes claim that she did so review it. (*Exhibit 2 to the Petition*).

IV. Conclusion

New Hampshire law requires that a trust be amended by a method defined in the trust instrument. The Second Amendment expressly provides that any amendments to the Trust must be executed by the grantor. Ms. Tierno never executed the Unsigned Third Amendment. Furthermore, Petitioner cannot show by clear and convincing evidence that Ms. Tierno had sufficient mental capacity to amend the Trust. In fact, Petitioner's own facts, taken together, demonstrate her complete mental incapacity. For the reasons stated above, the Petition to Validate the Unsigned Third Amendment must be dismissed.

WHEREFORE, the Stubberts request that the Court dismiss the Petition and for such other relief as is just.

Respectfully submitted,

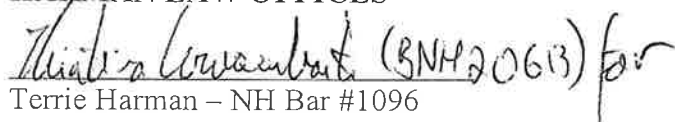
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By and through their attorneys,

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