

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
N.H. CIRCUIT COURT**

ROCKINGHAM COUNTY

10<sup>th</sup> CIRCUIT - PROBATE DIVISION -  
BRENTWOOD

**The Judith E. Tierno Revocable Trust of 2003  
Case No. 318-2013-EQ-1252**

**ORDER ON MOTION TO DISMISS**

This matter came before the Court on the Motion of Nathan N. Stubbert, Ethan T. Stubbert, Charles F. Stubbert, III, and Sherry Stubbert (the "Stubberts") to dismiss the Petition to Validate the Third Amendment and Restatement of the Judith E. Tierno Revocable Trust. The Trust has objected to that motion. For the reasons set forth below, the Court denies the motion to dismiss.

The petition in this matter was filed to seek an order from this Court validating the Third Amendment to The Judith E. Tierno Revocable Trust of 2003. The petition alleges, among other things, that the settlor of the Trust, who was also a co-trustee, directed her attorney to prepare a third amendment to her trust changing certain beneficiaries of the Trust, among other things. The Stubberts were removed as beneficiaries of the Trust, and therefore object to the petition.

In reviewing the motion to dismiss, this Court must determine if 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) citation omitted; see also, *Ireland v Worcester Insurance Co.*, 149 N.H. 656, 657 (2003). When conducting its review, this Court will assume the truth of the facts alleged in the

plaintiff's pleadings and will also construe all reasonable inferences in a light most favorable to the plaintiff. *See id.*, at 504.

The facts alleged in this case are that Judith E. Tierno created a Trust in 2003. The Trust was the subject of two prior amendments, which are not disputed. The Third Amendment was prepared at a time when Ms. Tierno and Daniel E. Healy were co-trustees. The petition alleges that on September 28, 2012, at the instruction of Ms. Tierno, Mr. Healy contacted Attorney Hughes who represented Ms. Tierno. At that time, he explained to the Attorney that Ms. Tierno wanted him to make certain changes to the Trust.

The petition continues by alleging that Attorney Hughes met with Ms. Tierno on October 9, 2012, and discussed with her the specific changes she wanted made to the Trust. Based on that conversation, he then drafted the Third Amendment to the Trust on October 11, 2012. Although he brought that amendment to Ms. Tierno on October 12, 2012, Attorney Hughes did not have her sign it as he determined that the medications she was on that day made it so that she lacked legal capacity to sign the Amendment. He made another attempt later that same day to see if Ms. Tierno could sign the Amendment, but again determined she could not sign it. Ms. Tierno passed away on October 17, 2012 without having signed the Amendment.

The parties agree that paragraph 16 of the Second Amendment to the Trust reserved to Ms. Tierno the right to amend the Trust by filing notice of the change with the trustee. However, the Stubberts seek to dismiss the petition citing language in Paragraph 19 of the Second Amendment that states as follows:

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 Stubberts argue that because the Third Amendment was never executed, it is not effective and therefore is invalid. They argue that this language must be read to mean that the Trust expressly prohibited any method to amend it other than the provisions contained in the Trust.

In addition to these arguments, the Stubberts argue that the Petitioner cannot establish that Ms. Tierno had the necessary mental capacity to create the Third Amendment. The Stubberts also cite discrepancies that they say exist in the allegations contained in the Petition as further evidence that the Petitioner could not meet his burden to establish the necessary mental capacity of Ms. Tierno.

Regarding the issue of whether Ms. Tierno could amend her Trust by an instrument that was not executed, the Petitioner argues that the language of the Trust is not exclusive since it does not say that the provisions in the Trust are the only method by which the Trust could be amended. As noted above, the Stubberts argue that Paragraph 19 is exclusive and that it provides that the trust document, and any amendment, thereto are not effective unless executed. In order to rule on these competing arguments, this Court must look to RSA 564-B 6-602(c).

Section 6-602(c) of the Uniform Trust Code as adopted in New Hampshire allows the amendment of a trust "by any method manifesting clear and convincing evidence of the settlor's intent if the terms of the trust do not ... expressly prohibit methods other than methods provided in the terms of the trust." Given this language, the statute

contemplates that a trust may be amended in any number of ways so long as those methods are not expressly prohibited by the trust and there is clear and convincing evidence that the settlor intended to amend the trust.

The case law in this area, although limited, supports this conclusion. In the case of *In re Wendland-Reiner Trust*, 677 N.W.2d 117 (Neb 2004), the Court noted that the modern trend in trust cases is to allow an amendment to a trust by any method so long as the amendment is established by clear and convincing evidence as the intent of the settlor, unless the trust provides an exclusive method for amendment. *See id*, at 701-02 citing Restatement (Third) of Trusts § 63(3) at 443, Unif. Trust Code § 602(c)(2)(B).

Here, the Trust does not contain language stating that the only way it may be amended is by a writing signed by the settlor. In section 16 of the Second Amendment and Restatement of the Trust, the language reserves to the settlor the right to amend the trust by filing notice of the change with the trustee, which in this case would have included Ms. Tierno as a co-trustee. Although Paragraph 19 provides that the amendments are effective when executed by the Grantor, it does not specifically exclude any other method of amendment. Given the general and broad language contained in Paragraph 16, and the provisions of RSA 564-B:6-602(c) requiring that a trust “expressly” prohibit those methods not provided in the trust, this Court finds that the plaintiff has pled sufficient facts which, if proven as true, would permit the relief sought.


The Stubberts’ other argument asserts that the the petitioner fails to allege sufficient facts regarding the mental capacity of Ms. Tierno. Under the legal standard for considering a motion to dismiss discussed above, the Court is to accept all of the

facts as true, as well as the reasonable inferences from those facts. In this case, given the facts presented regarding Ms. Tierno's communications with Mr. Healy and with Attorney Hughes, the plaintiff has pled sufficient facts, which when taken with their reasonable inferences as true, establish that Ms. Tierno was competent at the time of the first meeting with Attorney Hughes. Moreover, this Court notes that the determination of competency is a fact specific determination. *See, e.g., In re Estate of Washburn*, 141 N.H. 658, 659-60 (1997). Since it is clear that there is a dispute as to the facts surrounding the competency of Ms. Tierno, and this Court must presume that the facts in the petition, and the reasonable inferences from them, are true, the Stubberts' Motion to Dismiss based upon lack of capacity is denied.

Given the above findings and rulings, the Motion to Dismiss is denied.

**So Ordered**

Dated: 3/21/14

  
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Mark F. Weaver, Judge