THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

TRUST DOCKET
7TH CIRCUIT COURT
PROBATE DIVISION

MARGRETHE RANDALL

v.

CLAYTON MAHAN, INDIVIDUALLY, AS TRUSTEE OF THE MARJORIE H. MAHAN 2008 TRUST, AND AS CO-TRUSTEE OF THE REBECCA MAHAN SUB-TRUST; REBECCA MAHAN; JESSICA THOMAS BEYER; STERLING HAIGHT; AND RALPH MAHAN

NO. 311-2013-EQ-00317

FINAL DECREE

A four-day trial was held on October 17-20, 2017 to address the remaining issue(s) raised in the Petitioner's *Petition to Remove Trustee, Co-Trustee and for Other Legal and Equitable Relief* (the "*Equity Petition*") filed in July 2013. See Index #1.[1] Attending the trial were: Attorney Todd W. Stevens, Esq. and his client, the Petitioner, Margrethe Randall ("Margrethe" or the "Petitioner")[2]; and Attorney Roy S. McCandless, Esq. and his client Clayton Mayhan, Individually and as Trustee of the Marjorie H.

[1] The Court observes that this matter languished for many years on the Probate Division docket as the parties filed multiple extensions for discovery. Although initially scheduled for trial in April 2015, the matter was transferred to the Trust Docket in February 2017, see Index #67, and calendared for trial in June 2017, only to be rescheduled again for October. See Order on Assented-To Motion to Continue Trial and Respective Deadlines (Index #79). At the final pretrial conference, counsel for the Petitioner stated that he was abandoning certain claims, see Order on Pretrial Conference at 2 (Index #82), and had chosen to focus on Trustee Clayton Mahan's management of the sale of the Setauket, New York property. Id. Notably, that sale occurred well after the filing of the *Equity Petition*, yet no amended complaint was filed. The Respondent did not object, and since that claim could generally be subsumed in the claim that Trustee Mahan had mishandled trust assets, see *Petition* ¶29 (Index #1), in the interest of bringing the matter to resolution, the Court allowed that claim to move forward.

[2] The Court does not intend to imply any disrespect by using first names or family names, however, given that many parties and/or witnesses share common last names, it, for purposes of clarity, will use their first names or family names.

Mahan 2008 Trust ("Clayton" or the "Trustee").[3] After review of the evidence presented at trial and exhibits filed with the Court, the *Petition to Remove Trustee, Co-Trustee and for Other Legal and Equitable Relief* is **DISMISSED.** The Trustee's plea for reimbursement of attorney's fees paid by the Trustee personally or the Trust by Margrethe, see *Trustee's Answer* at 11, Prayer G (Index #12), is **DENIED**. See RSA 564-B:10-1004. The Trustee, as the prevailing party in this matter, is however entitled to have his costs reimbursed by the Petitioner as set forth in Circuit Court Probate Division Rule 87(c).

I. Facts and Procedural Posture

The Court finds the following facts for background purposes and will recite additional findings specifically applicable to the issues presented infra. The Settlor, Marjorie Mahan, established the Marjorie H. Mahan 2008 Trust on November 12, 2008 ("Trust"). See R's Exh. E. She transferred to the Trust two parcels of real estate – one in Laconia, New Hampshire ("Laconia Condo") and another at 21 Flax Pond Woods Road, East Setauket, New York ("Old Field Property"),[4] along with personal property and certain liquid assets and investments. *Petition* ¶14 (Index #1); *Answer* ¶14 (Index #12). The beneficiaries of the Mahan Trust are three of Marjorie's children, Margrethe, Clayton and Rebecca, who are given equal one-third shares. The dispositions to Margrethe and

[3] Additional named respondents Jessica Thomas Byer, Rebecca Mahan, Sterling Haight, and Ralph Mahan did not file answers to the *Equity Petition*, have not meaningfully participated in this litigation, and were adjudged to have confessed allegations of *fact* in "Paragraphs One (1) through Thirty-Six" of the *Equity Petition*. See Order on Proposed Decree Pursuant to Court Order Dated April 29, 2014 at 2 (Index #26). Respondent Sterling Haight died during the pendency of the litigation, and none of the remaining named Respondents participated in the trial.

[4] The Court observes that the appraisal of this property states that it is located in "East Setauket," a town on Long Island. See R's Exh. W-7 & Y-7. However, other property profiles reflect its location as being in the village of "Old Field(s), New York." See R's Exhs. Z-7; C-8. The Court will refer to the property as the "Old Field Property" because during trial that was the term of reference most commonly used by witnesses and the parties' attorneys..

Clayton are to them outright, while that to Rebecca is to be held in a sub-trust with both Margrethe and Clayton designated as co-trustees. See R's Exh. Vol. 1, E at 3-4, Art. VII, ¶¶ VII. A – C. Another of Marjorie's children, Helen, predeceased her, and Helen's daughter, Jessica Beyer, is a contingent beneficiary whose interest is premised on Rebecca, Clayton and Margrethe all predeceasing final distribution to Rebecca's sub-trust and Jessica successfully passing random drug testing for three (3) following the date of Rebecca's death. Id. at 4, §VII, ¶ C. Marjorie died on July 17, 2009. See Estate of Marjorie Mahan, No. 311-2009-ET-00513. Clayton was appointed executor of her estate on nomination in her Will, see R's Exh. Vol. 1, C at 1, Clause SECOND, in addition to Trustee of the Trust. See R's Exh. Vol.1, E at 1.

The Court finds that management and liquidation of the Trust's assets after Marjorie's death were greatly hampered by deep family dysfunction that preceded creation of the Trust and continued through trial. Simply put, the Randall/Mahan families suffer from deep distrust and animosity that has affected not only their relationships with each other, but, as relevant here, the administration, management and distribution of the Trust's assets. It is undisputed that Marjorie, in failing health, decided to create the Trust to ensure that her long-time husband, and father of Clayton, Margrethe and Rebecca, did not benefit from her estate. It is clear that Clayton, Rebecca, Margrethe, and their father, Ralph, struggle to communicate and/or interact with each other in any constructive, obliging, or positive manner.

Marjorie engaged New Hampshire Attorney Doria Aronson to draft a Last Will and Testament, Declaration of Trust, Advance Directive for Healthcare, Durable Power of Attorney, Personal Property Transfer, Trustee Acceptance and a Deed in 2008. See R's

Exhs. Vol. 1, A-G. The documents were executed on November 12, 2008 while Marjorie was a patient at Massachusetts General Hospital in Boston. As set forth more fully infra, Marjorie initially designated herself as trustee, and the Petitioner and Respondent as successor co-trustees. See R's Exh. Vol. 1, B. While in the hospital, she changed her mind and chose to designate Clayton as Trustee and Margrethe as successor trustee. R's Exh. Vol. 1, E. Margrethe and Clayton were named co-executors of the Will. R's Exh. Vol. 1, C. The changes to the documents were then faxed to the hospital. Marjorie transferred significant assets to the Trust including, most importantly for this inquiry, the Old Field Property. There was testimony at trial that the Old Field Property had been the primary family residence. At the time of the transfer, both Ralph and Rebecca resided there, at least part-time, along with Rebecca's boyfriend, Sterling Haight. Marjorie also transferred title to the Laconia Condo that Ralph also often resided at, and a part ownership in another property in North Carolina. Marjorie did not inform Ralph of the Trust or transfers, and in fact, he did not know about the Trust until after Marjorie's death in 2009.

When Ralph learned of the transfers, he hired counsel, Jeanne Saffan-Grill of Martin, Lord & Osman, P.A., who sent the Trustee a letter indicating that he might challenge the 2008 Will and the Trust. The letter also stated that all communication with Ralph should be directed through counsel and requested that the Trustee forward the name of a local attorney. See R's Exh. Vol. 3, B-3. After Ralph threatened to sue to invalidate the Trust, the Trustee, on the advice of Attorney Aronson, hired the McLane Law Firm to assist with potential litigation and to produce estate and trust accountings.[5]

[5] Since 1990, the Trustee has lived in Washington State where he owns an organic farm. Given his occupation, family discord, and his physical distance from the Trust properties, the Court, as set forth

The McLane Law Firm assisted with the production of three trust accountings for 2010, 2011, and 2012. After Trust funds dwindled, however, none were subsequently produced until the Old Field Property was sold and the sale proceeds were placed in escrow. See Order on Motion for Emergency Temporary Restraining Order (Index #63). In April 2017, this Court authorized release of funds from escrow for preparation of the accountings for 2013-2016. See Order on Motion To Release Funds For Completing Trust Accountings (Index #76).

In addition, various family members were particularly recalcitrant and did not cooperate with the Trustee in his efforts to liquidate Trust assets. That Ralph did not willingly vacate the Laconia Condo and a successful eviction proceeding was commenced so it could be put in condition for sale and sold was unrefuted. As set forth more fully infra, not only was the Trustee forced to pursue eviction proceedings against Rebecca, Sterling Haight, and Ralph in New York also, but their actions prolonged and made marketing the Old Field Property for sale difficult, tended to diminish its marketability and adversely affected its sale price. Finally, probate of the assets that remained in Marjorie's estate was complicated by family disputes over whether certain household objects belonged to Marjorie or Ralph, and whether Marjorie promised certain items to one or more of her children.[6] This inability to effectively communicate, lack of trust and discord made the process of accounting, marshalling, and distributing Trust assets lengthy and expensive.

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more fully infra, finds it was reasonable for him to employ local counsel in New Hampshire and New York for assistance.

[6] Both Margrethe and Clayton were named co-executors of the estate, see R's Exh. C, however, Margrethe declined, see R's Exh. O, and Clayton alone was appointed executor in February 2011. See R's Exh. P.

Margrethe filed an equity petition in July 2013 seeking accountings from Clayton and alleging financial mismanagement of the Trust. See *Petition* (Index #1). Clayton essentially claims he has complied with all his fiduciary duties, but has been hampered in the sale of assets and liquidation of the Trust by the family dysfunction, lack of cooperation, and dissention among its members in both New Hampshire and New York. *Answer* ¶36. In December 2016, Judge Garner issued an order authorizing sale of the Old Field Property and directing that the proceeds be held in escrow pending adjudication of the *Petition*. After many years of litigation, the matter finally came to trial in October 2017.

Although the Petitioner did not timely file a pretrial statement, and asserted at the pretrial conference that she would primarily pursue a claim premised on the sale of the Old Field Property, her late-filed pre-trial statement merely repeated prior allegations instead of focusing and addressing the issues for trial narrowed at the pretrial conference held September 26, 2017. See Order on Pretrial Conference (Index #82); Petitioner's Pretrial Statement (Index #83). At the start of trial, it was generally agreed that the remaining claims to be adjudicated were whether the Trustee breached his fiduciary duty to: (1) manage the sale of the Old Field Property – in particular whether it was a breach of fiduciary duty not to respond to a "24 hour offer" on the property for $620,000 in May 2015, see R's Exh. Vol. 3, G-7, and instead sell it for $405,000 in December 2016. R.'s Exh. Vol. 2, NN[7]; (2) produce accountings in a timely manner; (3) continue paying premiums on certain insurance policies on the life of Ralph; (4) hire the McLane law firm; and (5) retain New York counsel, Attorney Daly, to handle the

[7] Again, the alleged breach occurred after the *Petition* was filed, and the *Petition* was not amended. The Respondent, however, did not object on this basis and therefore the Court will proceed as if it was an agreed-upon amendment.

eviction/ejectment of Ralph, Rebecca and Sterling Haight and in endeavoring to market for sale and sell the Old Field Property.

The Court pauses here to comment that although at the start of trial the Petitioner asserted that she would be seeking redress for the earlier noted alleged breaches, and indeed did introduce testimony concerning them, in her *Proposed Findings of Fact and Rulings of Law*, filed five-days prior to the start of trial, she seeks only the Trustee's personal payment of damages in an amount equal to the difference between the 2015 "24 Hour Offer" and 2016 sales price, in addition to her fees and costs for this litigation. See id. at 7 (Index #84). The focus of the Court's further recitation, therefore, will be on the damages alleged to have arisen from the sale of the Old Field Property, and, less-so on the remainder of her claims as: (1) it is uncertain whether they have been abandoned or there is an implicit recognition that no damages have resulted from them, leaving it to surmise that she raises them merely in support of her request for removal of the trustee; and (2) in any event, they are determined to be without merit.

II. Applicable Law

Resolution of matters before the Court require it to apply various aspects of trust law as set forth in the New Hampshire Trust Code, see RSA 564-B (the "NHTC"), as informed by the common law of trusts and principles of equity, see RSA 564-B:1-106, concerning: (1) breach of fiduciary duty, see RSA 564:B, Arts. 8 & 10; (2) fiducial standard of care, see RSA 564-B:10-1008(a); (3) the advice of counsel defense, see RSA 564-B:8-816(a)(27); (4) accountings; and (5) attorney's fees. RSA 564-B:10-1004.

A. Breach of Fiduciary Duty

As noted supra, the Petitioner asserts numerous allegations of breach of

fiduciary duty against the Trustee. Article 8 of the NHTC outlines various duties and obligations of a trustee in undertaking the responsibilities of his or her office. In particular, the following provisions are applicable to resolution of the matters before the Court. RSA 564-B:8-801 provides that: "[u]pon acceptance of a trusteeship, the trustee shall administer, invest and manage the trust and distribute the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter." RSA 564-B:8-803 specifies that:

> [a] trustee shall administer, invest, and manage the trust and distribute the trust property as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

Moreover, a Trustee must "take reasonable steps to take control of and protect the trust property." RSA 564-B:8-809. "A violation by a trustee of a duty the trustee owes a beneficiary is a breach of trust." RSA 564-B:10-1001(a); see RESTATEMENT (THIRD) OF TRUSTS, *What is a Breach of Trust?* §93 (2012). Generally, "[a] breach of trust occurs if the trustee, intentionally or negligently, fails to do what the fiduciary duties of the particular trusteeship require or does what those duties forbid, or if the trustee fails in performing a permissible act to conform to applicable fiduciary standards." Id., comment b (2012).

The Court now considers the appropriate remedy for breaches of trust. See RSA 564-B:10-1001(a)("A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust"). Remedies for breach include, among others: (1) removal of a trustee; (2) appointment of a special fiduciary; (3) restoration of trust property through monetary compensation to the trust; and (4) injunctive relief. RSA

564-B:10-1001(b). A trust beneficiary may also petition for removal of a trustee pursuant to RSA 564-B:7-706. That statute states in pertinent part:

> The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative. . . . the court may remove a trustee if: (1) the trustee has committed a serious breach of trust; (2) lack of cooperation among cotrustees substantially impairs the administration of the trust; [or] (3) because of unfitness, unwillingness, persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries . . . .

See also RSA 491:9, II (beneficiary may petition the court for such replacement of trustee with more suitable trustee upon consideration of various factors including trustee-beneficiary relationship, experience and skill of trustee, and "[a]ny other reasonable factors pertaining to the administration of the trust.")

A "trustee who commits a breach of trust is liable to the beneficiaries affected for . . . the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred." RSA 564-B:10-1002; In re Guardianship of Dorson, 156 N.H. 382, 387 (2007) ("When a breach of trust occurs, the beneficiary of the trust is entitled to be put in the position he would have been if no breach of fiduciary duty had been committed." (citation omitted)). "Other remedies include holding the trustee liable for any loss or depreciation in the value of the trust estate resulting from the breach of trust . . . ." Id. (citations omitted).

Damages for a breach of trust are proscribed in RSA 564-B:10-1002(a) as "the greater of: (1) the amount required to restore the value of the trust property and trust

distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach."[8]

Surcharge is a unique equitable remedy, "imposed when a trustee fails to exercise the requisite standard of care and the trust suffers thereby." In re Guardianship of Dorson, 156 N.H. at 386 (quotations omitted). A surcharge "is imposed to compensate beneficiaries for loss caused by the fiduciary's want of due care," id. (quotations omitted), and courts have broad discretion to fashion a remedy that appropriately protects the trust, compensates beneficiaries for losses caused by fiduciary breach, and, in some cases, acts prophylactically to discourage trustees from taking action that will harm beneficiaries. Id. at 386-87. As such, the remedial tools available to courts of equity are numerous and are designed to put beneficiaries "in the position [they] would have been if no breach of fiduciary duty had been committed." Id. at 387 (quotations omitted). "The court must find the following before ordering a surcharge: (1) that the trustee breached a fiduciary duty and (2) that the trustee's breach caused a loss to the trust." In re Estate of Warden, 2 A.3d 565, 573 (Pa. Super. 2010); see In re Estate of McCool, 131 N.H. 340, 346 (1998).

In a similar vein, the Court also has broad discretion to *relieve* a trustee from surcharge. Notably,

> [i]n determining whether and to what extent to grant a trustee relief from surcharge, it would be appropriate for the court to consider all circumstances of the breach and of the trustee, such as: what is reasonable to expect of the particular trustee; the sincerity of the trustee's efforts to understand and perform the responsibilities in question; and whether the

[8] At common law, "trustees have been surcharged where they have not personally profited from their breach, in situations where they have either negligently or knowingly permitted third parties to benefit from the trust property." Amara v. CIGNA Corp., 925 F. Supp. 2d 242, 255 (D. Conn. 2012), aff'd, 775 F.3d 510 (2d Cir. 2014).

> trustee reasonably relied on guidance from legal or other advisers, including whether the trustee was aware of the availability (in an appropriate situation) of court instruction, and, if so, the reasons for the trustee's decision not to seek instruction.

RESTATEMENT (THIRD) OF TRUSTS § 95(d) (2012)(citations omitted). Consequently, the determination of the proper surcharge, and by extension, the applicability of defenses to a surcharge, is particularly dependent on the unique facts of each case. Cf. In re Guardianship of Dorson, 156 N.H. at 386.

As noted earlier, a trustee cannot be surcharged for a breach of duty unless the breach caused a loss to the trust. In re Mendenhall, 398 A.2d 951, 954 n. 3 (1979); see, e.g., In re Scheidmantel, 868 A.2d at 493. Although generally, "a trustee bears the burden of justifying the propriety of items in a trust account[,] . . . when a trustee files specific accounts and makes a *prima facie* showing that the accounts are proper, the burden of persuasion shifts to the beneficiaries to show specific instances of impropriety." In re Riddle, 946 N.E.2d 61, 68 (Ind. App. Ct. 2011); see, e.g., RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. e (2012); Estate of Stetson, 345 A.2d 679, 690 (1975). As such, one who seeks to surcharge the trustee for breach of trust bears the burden of proving the particulars of the trustee's wrongful conduct. Estate of Stetson, 345 A.2d at 690. [9]

B. Standard of Care

The Court, in its evaluation of whether breach has occurred, must clarify the

[9] However, once a petitioner establishes that the fiduciary breached its duty and that the petitioner suffered a "related loss," the burden to disprove causation shifts to the trustee. Amara v. CIGNA Corp., 925 F. Supp. 2d at 258–59 (citing cases); see RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. e (2012) ("[W]hen a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach").

standard of care applicable to the Trustee's acts. RSA 564-B:1-105 provides that in general, the terms of the trust prevail over the dictates of the NHUTC.[10] One exception, however, is the "effect of an exculpatory term under RSA 564-B:10-1008." RSA 564-B:1-105(b)(8). That statute informs that: "(a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it: (1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries . . . ." RSA 564-B:10-1008.

Article V of the Trust includes an exculpatory clause. It says that: "[n]o successor trustee shall be held liable for his actions as trustee or successor trustee except for gross negligence or fraud." See R's Exh. Vol. 1, E. Although not an exemplary specimen of drafting formulation or clarity, the Court discerns that it was the Settlor's intent to extend this exculpation to the Trustee. It is well-established that the intent of the settlor is the veritable North Star guiding a court when it is interpreting a trust. See, e.g., 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"). "Similarly, it is the settlor's intent, as ascertained from the language of the entire instrument, that governs the distribution of assets under a trust." King, 152 N.H. at 18. Courts "determine that intent, whenever possible, from the express terms of the

[10] RSA 564-B:1-105 directs which provisions of the NHTC are mandatory and those which may be superseded by the terms of a trust. It has been observed that:

> [a] trustee has both (i) a duty generally to comply with the terms of the trust and (ii) a duty to comply with the mandates of trust law except as permissibly modified by the terms of the trust. Because of this combination of duties, the fiduciary duties of trusteeship sometimes override or limit the effect of a trustee's duty to comply with trust provisions; conversely, the normal standards of trustee conduct prescribed by trust fiduciary law may, at least to some extent, be modified by the terms of the trust.

RESTATEMENT (THIRD) OF TRUSTS § 76 comment b(1) (2015).

trust itself." Shelton, 164 N.H. at 495. "[I]f no contrary intent appears in the [trust], the words within the [trust] are to be given their common meaning. . . . [C]lauses in a [trust] are not read in isolation; rather, their meaning is determined from the language of the [trust] as a whole." In re Clayton J. Richardson Trust, 138 N.H. 1, 3 (1993); see In re Trust by Dumaine, 146 N.H. at 681. Technical rules of construction, however, are not iron-clad; rather they are intended to aid in the discovery of the settlor's intention. See In re Frolich's Estate, 112 N.H. 320, 325 (1972)("canons of construction always give way in this jurisdiction to a single broad rule of construction favoring the maximum validity of the [settlor's] dispositive plan" (quotations omitted)). "When interpreting an *inter vivos* trust evidenced by a written instrument, the terms of the trust are determined by the provisions of the instrument as interpreted in the light of all the circumstances and other competent evidence of the intention of the settlor with respect to the trust." In re Trust by Dumaine, 146 N.H. 679, 681 (2001)(quotations and ellipses omitted). "The relationship of the settlor to the beneficiaries and the duties toward them are among the facts to be considered by a court trying to place itself in the shoes of the creator of the trust in order to ascertain what was intended by the trust instrument." Bartlett v. Dumaine, 128 N.H. 497, 505 (1986)(quotations and brackets omitted). The New Hampshire Supreme Court has directed that in any effort to discern a settlor's intent, "[a]lthough extrinsic parol evidence is inadmissible to vary or contradict the express terms of a trust, such evidence may be received to determine the settlor's intent where the language used in the trust instrument is ambiguous."[11] Bartlett, 128 N.H. at 505; see, e.g., Simpson v.

[11] Ambiguity exists where there is reasonable disagreement as to a term's meaning. Cf. Anna H. Cardone Revocable Trust v. Cardone, 160 N.H. 521, 531 (2010)(interpretation of deed).

Calivas, 139 N.H. 1, 8 (1994) ("where the terms of a [trust] are ambiguous, . . . extrinsic evidence may be admitted to the extent that it does not contradict the express terms of the [trust]). Thus, "[e]xternal facts may be received to explain or resolve doubts, but not to create them." 7 C. DeGrandpre *New Hampshire Practice, Wills, Trusts and* Gifts, § 13.07, at 144 (4th ed. 2003) (quotations omitted). A settlor's comments before or after execution of a trust is not permitted to contradict the express language in the instrument, but where appropriate may serve as a helpful tool in discerning his or her intent. See, e.g., Merrow v. Merrow, 105 N.H. 103, 106 (1963); accord Simpson, 139 N.H. at 8.

The parties have posited reasonable disagreement over the meaning of Article V. The Petitioner asserted at trial that the exculpatory clause, by its terms, applies only to a "Successor Trustee." The Trustee asserts that the term granting partial exculpation for acts as "trustee or successor trustee" indicates that it was intended to apply to both. It is undisputed that the Settlor initially intended to be the "original trustee," with Clayton and Margrethe serving as the successor co-trustees. See R's Exh. B. However, just before execution, she changed her mind and decided that Clayton would solely serve as trustee. See R's Exh. E. Replacement pages were faxed by her attorney's office to the hospital where the trust was executed. In this instance, it was clear that the Settlor's original intent was to protect both Clayton and Margrethe from liability for breach of trust, whether as "trustee or successor trustee." Although the provisions naming the trustee and successor trustee were amended, the terms of the exculpatory clause remained unchanged. Compare R's Exh. B with R's Exh. E. There is no evidence that she intended that elevation of Clayton to original trustee should subject him to greater

liability. The Court views the failure to conform the exculpatory clause to the change in trustee was simply a scrivener's error. Indeed, the paragraph immediately preceding the exculpatory clause was not amended as well, even though it clearly contemplates that the Settlor would be original trustee, lending support to the conclusion that imprecise re-drafting, and not intent, led to the resulting ambiguity in the exculpatory clause. Compare R's Exh. Vol. 1, B with R's Exh. Vol. 1, E. As such, the Court has determined that the Trustee not be "held liable for his actions as trustee . . . except for gross negligence or fraud."[12]

C. Advice of Counsel Defense

The advice of counsel defense applicable to trustees is found in RSA 564-B:8-816(a)(27). As a subsection of a statute entitled "Specific Powers of Trustee," it authorizes a trustee to: "employ persons, including attorneys, [and] auditors, even if they are associated with the trustee, to advise or assist the trustee in the performance of the trustee's administrative duties and to act without independent investigation upon their recommendations . . . ." RSA 564-B:8-816(a)(27). Courts determine the meaning of a statute by analyzing its plain meaning. Landry v. Landry, 154 N.H. 785, 787 (2007). A plain reading of the statute confirms that a trustee is empowered to: (1) employ the assistance of legal counsel; and (2) use that assistance without the burden of independently investigating the advice or recommendations given.

The Court's inquiry, however, does not end with awareness that RSA 564-B:8-816(a)(27) allows trustees some protection from liability. Although the statute does not explicitly address the nature of the liability shield afforded trustees who "act without

[12] As seen infra, however, the Trustee cannot be adjudged to be in breach under either standard proposed by the parties.

independent investigation" under 564-B:8-816(a)(27), it is axiomatic that courts discern the contours of the Uniform Trust Code through the common law. See RSA 564-B:1-106 ("The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state"). Indeed, it is well-recognized that engagement of counsel is often dictated by a trustee's duty to act prudently when managing a trust, cf. RSA 564-B:8-804, and "a trustee's reliance on the advice of financial, legal, and other advisers is a significant factor in determining whether the trustee's conduct was prudent." RESTATEMENT (THIRD) OF TRUSTS § 93, comment c (2012). Indeed, because "the work of trusteeship . . . can raise questions of legal complexity[,] [t]aking the advice of legal counsel on such matters evidences prudence on the part of the trustee." RESTATEMENT (THIRD) OF TRUSTS, *Duty of Prudence* §77 (2007).

At common law, fiduciaries who, in the exercise prudence, hire counsel are not charged with liability for reliance on that advice. See Estate of Stetson, 345 A.2d 679, 688 (Pa. 1975)(collecting cases); see generally, Dodge v. Stickney, 62 N.H. 330, 337 (1882). The immunity afforded trustees is not unlimited, however, as:

> [r]eliance on relevant professional advice does not afford a complete defense to allegations of breach of trust, for that protection should not apply, for example, if the trustee acted unreasonably in following the advice or in procuring it, as might be the case in shopping for advice to support a desired course of conduct. If, however, a trustee has selected an adviser prudently and in good faith, has provided the adviser with relevant information, and has relied on plausible advice on a matter within the adviser's competence, this conduct provides significant evidence of the prudence of the trustee's action or inaction in the matter at issue.

RESTATEMENT (THIRD) OF TRUSTS § 93, comment c (2012); see also id. § 77; Estate of Heller, 401 N.W. 2d 602, 609-610 (Iowa Ct. App. 1986). When deciding whether to impose a surcharge for acts committed with advice of counsel, it is appropriate therefore to evaluate "all circumstances of the breach and of the trustee, such as: what is reasonable to expect of the particular trustee; the sincerity of the trustee's efforts to understand and perform the responsibilities in question; and whether the trustee reasonably relied on guidance from legal or other advisers . . . ." RESTATEMENT (THIRD) OF TRUSTS § 95, comment d (2012).

D. Accountings

The Petitioner asserts that the Trustee breached his fiduciary duty to provide accountings to her in a timely fashion. Article X of the Trust provides: "[r]eports shall be rendered by the TRUSTEE *as of each December 31*. . . . If the SETTLOR for any reason cannot accept said accounting, said accounting shall be made to the beneficiaries of this trust." R's Exh. Vol. 1, E (emphasis added). In addition, RSA 564-B:8-813(d), governing the duty to inform and report, provides in pertinent part:

> A trustee of an irrevocable trust shall send a report at least annually and at the termination of the trust to the distributees or permissible distributees of trust income or principal, unless the terms of the trust provide otherwise . . . . The report shall include a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets, and, if feasible, their respective market values.

See also Cir. Ct. – Prob. Div. R. 108.

E. Attorney's Fees

Both sides have requested that the costs of litigation and attorney's fees be awarded to them in this matter. "As a general rule, costs are allowable only when

authorized by statute or court rule." Grenier v. Barclay Square Commercial Condo. Owners' Ass'n, 150 N.H. 111, 118 (2003)(quotations omitted). Circuit Court Probate Division Rule 59 recites that the "Court may assess reasonable costs, including reasonable counsel fees, against any Party or Attorney whose frivolous or unreasonable conduct makes necessary the filing of any Pleading or hearing thereon." Similarly, RSA 564-B:10-1004 states that: "[i]n a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." As to an award of fees to "any party," the New Hampshire Supreme Court has observed that the NHTC:

> provides an exception to the American Rule that generally each party is responsible for his or her own fees. . . . [T]he words 'as justice and equity may require' establish a broad standard, one that certainly reaches beyond bad faith or wrongful conduct. Nevertheless, before an award of fees is made, the trial court must provide a reason, grounded in equity, as to why such an award should be made. We acknowledge at the outset that, when acting in the proper exercise of her official duties, a trustee should not generally be held personally liable under the Uniform Trust Code for attorney's fees incurred by any party. We note, however, that the use of the word 'any' conveys broad authority upon the trial court to award attorney's fees to any party 'to be paid by another party as justice and equity may require.' While the statute does not provide specific criteria for such an award, it gives the trial court flexibility to determine what is fair on a case by case basis.

Shelton, 164 N.H. at 502 (quotations, citations and ellipses omitted). As to recovery by a trustee, RSA 564-B:7-709(a)(1) directs that a trustee is only "entitled" to reimbursement from the trust for "expenses that were *properly incurred* in the administration of the trust."

The Court is mindful that as part of its determination whether justice and equity requires payment, "it should be emphasized that the allowance of attorneys' fees is not a matter of right but rests in the cautiously exercised discretion of the court. Attorneys' fees should be allowed only in those cases where the litigation is conducted in good faith for the primary benefit of the trust as a whole in relation to substantial and material issues essential to the proper administration of the trust." Concord Nat. Bank v. Town of Haverhill, 101 N.H. 416, 419 (1958). The Court also recognizes, however, that "the proper exercise of such discretion [to award fees and costs] is not limitless," Cutter v. Town of Farmington, 126 N.H. 836, 843 (1985), and courts will not award fees where "it would be contrary to the ordinary principles of justice that [each party] should pay the costs of the proceeding." Medico v. Almasy, 108 N.H. 324, 325 (1967).

In addition, Circuit Court-Probate Division Rule 87 governs allowance of costs to a prevailing party. It states that certain costs be awarded to the prevailing party and grants courts the discretion to allow other costs "reasonably necessary to the litigation." See Cir. Ct. – Prob. Div. R. 87(c). Specifically, the rule provides:

> The following costs shall be allowed to the prevailing Party: Court fees, fees for service of process, witness fees, expense of view, cost of transcripts, and such other costs as may be provided by law. The Court, in its discretion, may allow the stenographic cost of an original transcript of a deposition, plus one copy, including the cost of videotaping, and may allow other costs including, but not limited to, actual costs of expert witnesses, if the costs were reasonably necessary to the litigation.

Id.

III. Analysis

A. Breach of Fiduciary Duty

1.) Sale of Old Field Property

The Court begins with the only alleged breach that the Petitioner seeks surcharge for, namely, her claim that the Trustee failed to timely accept a "24-hour offer" from a neighbor for a price approximately $215,000 more than the eventual selling price. See *Petitioner's Proposed Findings of Fact and Rulings of Law* (Index #84).

In order to properly analyze whether the foregoing constitutes a breach, the Court makes the following findings of facts associated with the eventual sale of the Old Field Property. When Marjorie executed the Trust, and at her death in July 2009, Rebecca and Sterling Haight were living full-time in the home on the property, with Ralph a seasonal or occasional occupant.[13] In November, 2010, the Trustee sent a notice addressed to all three that he would be taking possession of the property as of December 1, 2010. See R's Exh. Vol. 3, I-4. He also informed them that he would be listing the property for sale at $599,000. Id. They refused to cooperate or vacate the property, and the Trustee engaged New York Attorney Timothy Daly to assist with negotiating its sale and pursuing an eviction proceeding. Attorney Daly filed for the eviction on or about June 16, 2011. See R's Exh. Vol. 8, J-8 (Daly Depo. Exh. 3) . Although initially default judgments were obtained, the efforted eviction process was ultimately unsuccessful after the trial court concluded that service was defective and that, as Rebecca was a "tenant-in-common," she could not be removed from the property. See id. (Daly Depo. Exhs. 4; 5)[14] Attorney Daly then commenced a quiet title/ejectment action and was granted a temporary restraining order directing that the occupants of the property not interfere with its sale. Eventually, that New York court, in

[13] The testimony at trial suggests that, at least since Marjorie's death, but for periodic stays in New York while addressing concerns associated with a lawsuit involving a brother over co-owned real property, Ralph spent the majority of the time living in New Hampshire at the Laconia Condo.

[14] Acknowledging up front that it is unschooled in New York law or procedure in such matters, it strikes this Court that the latter may likely have been based upon a misreading of the terms of the trust.

September 2014, issued an order directing Rebecca to vacate the property by October 1, 2014. R's Exh. Vol.2, DD.[15] Rebecca ignored the order, and, under the threat of being held in contempt, she entered into a stipulated agreement in December 2014 whereby she was to leave the property by January 1, 2015. R's Exh. Vol. 2, EE. She eventually vacated the premises on or about January 5, 2015 – approximately five-and-one-half years after Marjorie's death. See R's Exh. Vol. 2, OO. For reasons unapparent to this Court, the New York trial court only awarded the Trust $7,583 in damages, concluding that rent was due the Trust only from October 2014 to January 2015. Id.

In addition to being recalcitrant occupants of the home, the evidence satisfies the Court that Rebecca and Sterling Haight maintained the property in deplorable, if not disgusting, condition. See R's Exhs. Vol. 2, W; KK. There was testimony and documentary evidence introduced that the interior was filthy, extremely unkempt, "unlivable" and likely malodorous. See R's Exhs. Vol. 3, E-5; Q-5; C-6; D-6; O-6.[16] In addition, it appears that while the action to evict was underway, Mr.Haight threatened to contaminate the property if forced to leave. R's Exh. Vol. 3, E-6.

While the proceedings to involuntarily oust the occupants were pending, the Trustee persisted in his endeavor to sell the property. Sometime in 2010, after Marjorie's death, the Trustee engaged real estate agent Leslie Delboy to list the

[15]Since this order and the earlier denied eviction order were focused on Rebecca alone, the Court presumes that Ralph and Sterling Haight, the latter having died, were no longer residing at the property.
[16]These agreed-to exhibits consist of reports from realtors after touring or showing the property and thus are hearsay to which the Court gives such weight as it considers appropriate. The record reflects that they were admitted without objection, and, in any event, there is no dispute but that Rebecca and Sterling Haight maintained the home in appalling condition.

property.[17] Multiple appraisals and market analyses were submitted into evidence that were commissioned by both the Trustee and potential buyers.[18] See R's Exhs. Vol. 5, S-7 – D-8. The Court observes that an appraisal completed for the Trust in July 2009, set the value at $525,000. R's Exh. Vol. 5, W-7. A later appraisal commissioned by a potential buyer in January 2015 estimated the property's value at $570,000. See R's Exh. Vol. 5, A-8. Another completed in March 2016 estimated the property's value at $485,000. See R's Exh. Vol. 5, C-8. In April 2011, the Trustee informed the family that he was going to list the home for $599,000.

In May 2011, after receiving some interest from potential buyers at or near the $599,000 listing price, Realtor Linda Hickey introduced adjacent property owners Stephen and Pam Della Pietra as potential buyers. While other parties appeared interested in purchasing the property at or near the price at which it was then listed, the Della Pietras verbally offered $700,000 and initially agreed to purchase the property "as is" and subject to the continued occupancy of Ralph, Rebecca and Mr. Haight.[19] However, after Attorney Daly drafted an initial sales contract, and potential competing bidders did not match the above-market offer, the terms of the sale were unilaterally modified by the Della Pietras. See R's Exh. Vol. 3, U-4; V-4. Changes included a request that the property be transferred vacant and "broom clean." R's Exh. Vol. 3, N-4. Additional concerns were voiced about an oil tank that Ralph informed the potential

[17] Margrethe took umbrage to the engagement of Ms. Delboy, apparently on the basis that she and Clayton dated in high school many decades before. See R's Exh. Vol. 3, B-4. This is but one example of the nearly complete lack of cooperation and constructive communication between family members.

Yet further, the New York Court with which the case was docketed refused to award attorney's fees to Margrethe after she petitioned to be dismissed from the quiet title/ejectment action, noting that: "[i]n this long-standing family dispute, the Court cannot single out one party as being more culpable than another for failure to resolve the conflict over the subject premises . . ." See R's Exh. Vol. 5, L-8 (Trippett Depo. Exh. 3).

[18] The Court has not been asked, nor will it, to comment on the validity or accuracy of the appraisals.

[19] This verbal agreement meant, in effect, that the Della Pietras would be responsible for evicting Rebecca, Ralph, and Sterling Haight.

buyers was buried on the property, as well as "concerns over damage to the premises and environmental hazards that are left behind" by occupants forced to vacate, and "purposeful damage or harm" caused by them. R's Exh. Vol. 3, V-4.

The Della Pietras again attempted to make a $700,000 offer on the property, see R's Exh. Vol. 3, I-5, in March 2012. This offer was made with specific terms requiring vacancy, that it be delivered "broom clean," and consummated only after environmental and soil testing as well as removal of any underground storage tanks. That offer never came to fruition in the form of a sale contract as Rebecca remained in the home and the eviction/quiet title/ejectment actions dragged on.

After Rebecca eventually did vacate the property, it took months to clean it out and remove the debris left behind.[20] The Trustee also hired Michael Ardolino as a new listing agent. Cf. R's Exh. Vol. 3, H-7. Attorney Daly testified that after Rebecca vacated the property, he contacted the Della Pietra's lawyer, then Carey Kessler. See Exh. Vol. 8, J-8. The attorney indicated that they wanted to appraise the property and conduct environmental testing. Attorney Daly was concerned that depending on the type and depth of the testing, it might not be in the Trust's best interest to agree. Consequently, the Della Pietras were requested to specify the type of testing and the company that would be conducting it. On February 27, 2015, Attorney Daly sent a draft sales contract with spaces left blank for Attorney Kessler to specify the environmental companies and tests considered. See Exh. Vol. 3, E-7. As the lawyers continued to

[20] Margrethe testified that she was horrified to discover that family possessions were being discarded into dumpsters. Although the Trustee conceivably may have been more chary in his efforts to clean out the home, the Court received no testimony or evidence that the other beneficiaries attempted to assist in preparing it for sale and there was little adduced indicating that the items disposed of had any significant market value. Indeed, given the time and effort he had need to expend to get to that point because of the difficulties posed by family members, and the condition the property once freed of all its occupants, one can perhaps appreciate and understand the prospect of what further disagreement and delay any self-generated invitations on his part would likely have engendered.

negotiate, Pam Della Pietra sent a "24 hour offer" of $620,000 via email to Michael Ardolino on May 14, 2015. See R's Exh. Vol.3, G-7. In that email, Mrs. Della Pietra specified that she would require environmental testing and that any contract would need "to include an opt[-]out clause in the event an area test is abnormal." Id. Mr. Ardolino forwarded the email to the Trustee,[21] who responded that he believed that Ms. Della Pietra was requesting additional environmental testing because of previous "purported threats of pollution made by occupants," and his belief that these threats "continue[d] to burden the property." R's Exh. Vol. 3, H-7. He ended the email with the following instruction: "[i]f it is made clear to me who Pam is being represented by, her intention of communicating in good faith I have contacted Tim Daly and contract will be issued. I hope this helps you in your negotiations should they exist." Id. The following day, Ms. Della Pietra emailed both Mr. Ardolino and the Trustee, stating "I didn't hear anything back so I assume you are not interested. The offer is off the table." R's Exh. Vol.3, G-7.

Following this exchange, Mr. Ardolino's listing agreement ended and the Trustee engaged realtor Sharon Bloch, who listed the property at $429,000. R's Exh. Vol. 2, LL. The property finally sold in December 2016 for $405,000 on an "as is" basis to an all-cash buyer. R's Exh. Vol. 2, MM – NN. The Petitioner sought to enjoin the sale, alleging it was being sold for less-than fair market value. See Index #63. The Laconia Probate Division (Garner, J.) found that; '[t]he history of the current listing of the property, with multiple showings, at least one recent reduction in the asking price, and an eventual cash offer chosen from among three competing offers supports the

[21] The Trustee resided in Washington State, so it is unclear when he received the email from Mr. Ardolino and how soon his response was received.

Respondent's claim that he has diligently sought to obtain the highest possible offer for the property. Id. The proceeds from the sale are being held in escrow, id., and have not been distributed except to fund completion of accountings for 2013-2016. See *Order on Motion to Release Funds for Completing Trust Accountings* (Index #76).

After consideration of the difficult history of the Mahan Family, the extended litigation in New York (and Laconia), and the circumstances preceding the "24 hour offer," the Court does not find that the Trustee breached his fiduciary duties to the beneficiaries of the Trust. First, it is mindful that to be considered a breach, the Trustee's performance must have been grossly negligent or fraudulent. See Trust Art. V. In this matter, counsel for the Trust had been negotiating in the months preceding the offer with the Della Pietra's counsel and had indicated a willingness to negotiate provided they knew more specifics about the requested environmental tests. The offer, however, was communicated to the listing agent directly by Ms. Della Pietra. The Trustee responded in a fashion consistent with on-going communications and indicated a willingness to negotiate. Ms. Della Pietra rescinded the offer apparently before Mr. Ardolino responded. Moreover, the Court discerns that there was a history of negotiations with the Della Pietras in which a verbal above-market offer was tendered, only to have crucial terms changed as the offer moved to contract. There was testimony that legal counsels for the Trust and Della Pietras had been negotiating for a few months before Mrs. Della Pietra circumvented the ongoing process with a semi-direct email offer that the Trustee attempted to respond to through his broker/agent. See R.'s Exhs. Vol. 3, E-7; F-7. Although his email response reflected pessimism, the Court does not find that such pessimism was unwarranted given the history of prior dealings with the Della Pietras. As such, it does not conclude that the Trustee acted in

a grossly negligent or fraudulent manner[22] and the Petitioner's request for damages is **DENIED**.

2.) Accountings

Although not entirely clear given the Petitioner's representation at the Pretrial Conference and in her *Request for Findings and Rulings*, the Court draws from the *Petition* and testimony at trial that she takes issue with what she believes to be the Trustee's deficient management and provision of the accountings as a basis for removal. After review of testimony and documentary evidence, the Court concludes that in light of intra-family discord and the ensuing depletion of Trust funds, the Trustee acted reasonably.

As noted supra, Article X of the Trust provides: "Reports shall be rendered by the TRUSTEE *as of each December 31*. Such reports shall be made to the SETTLOR . . . . If the SETTLOR for any reason cannot accept said accounting, said accounting shall be made to the beneficiaries of this trust." R's Exh. Vol. 1, E at 6, Art. X (emphasis added). It also directs that: "[t]he records of the TRUSTEE with respect to the Trust shall be open at all reasonable times to the inspection of the Settlor or the . . . persons then entitled to receive reports." It appears that the Petitioner presently objects[23] to the

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[22] Indeed, the Court is satisfied that the Trustee responded with "reasonable care, skill, and caution," see RSA 564-B:8-804, and thus, even if Article V did not apply to the Trustee's acts, the Court does not find breach of duty under the standard set forth in the NHUTC.

[23] The Petitioner, in the *Petition*, not only objects to the length of time, but appears to assert that the Trustee did not properly or quickly enough respond to certain requests in 2010. See *Petition* at 4-5. After review of responses by the Trust's then legal counsel, see R's Exh. Vol. 3, M-4, there appeared to be confusion concerning the estate accountings and trust accountings.

In addition, the Court observes that the Petitioner objected to the tone of correspondence sent directly by Clayton. Although it agrees that his tone was at times accusatory and/or dismissive, it is apparent that siblings Clayton and Margrethe were not inspired to commonly engage in polite discourse. Moreover, after review of all correspondence between them, it discerns that Margrethe could be equally unpleasant, distrustful, and accusatory herself, and at times her responses and/or demands contradicted earlier communications. In sum, the record is replete with communications between siblings who lacked any sustained ability to be cooperative and cordial with each other. Assuming, but without finding, that the

length of time it took to provide reports[24] and the format in which they were initially provided.[25] In sum, it appears from her presentation at trial that her remaining objection(s) are that the Trustee: (1) provided a preliminary inventory of "Probate and Non-Probate Assets," see R's Exh. Vol. 3, L-3, in February 2010 that was incomplete; (2) produced an eighteen-month accounting for the period from Marjorie's death in July 2009 through December 31, 2010; and (2) failed to provide accountings *on* December 31, 2011 and December 31, 2012 for each year, and as such he acted unreasonably and in breach of trust. The Court finds that all are without merit.

As noted supra, the Petitioner has the obligation to demonstrate sanctionable breach. See, e.g., Estate of Stetson, 345 A.2d at 690. The Court must evaluate "all circumstances of the breach and of the trustee, such as: what is reasonable to expect of the particular trustee; the sincerity of the trustee's efforts to understand and perform the responsibilities in question; and whether the trustee reasonably relied on guidance from legal or other advisers . . . ." RESTATEMENT (THIRD) OF TRUSTS § 95, comment d (2012). In this instance, the Court has determined that the Petitioner has not carried this burden.[26]

Petitioner has properly raised this objection before this Court, she has not demonstrated that the rough-edged tone of his communication rose to any level of sanctionable breach by the Trustee.

[24] Exhibits submitted at trial indicate that the Petitioner, through her counsel, peppered the Trustee's then counsel with multiple inquiries – some of which apparently had already been answered. See R's Exhs. Y-4; H-5; O-5; P-5; U-5; Y-5; P-6; T-6; . Questions were posed not only concerning the Trust's accountings, but the estate assets and accountings as well. See id. The Court will only address those claims pertinent to the Trust.

[25] The Court incorporates by reference its Order on Motion to Release Funds to Complete Trust Accountings. See Index #76. In that Order, the Court observed that until it released funds from escrow, the Trustee was unable to produce accountings from 2013 through 2016. Those accountings were produced at trial and remain in the record. As such, it assumes, and there was no request otherwise, that the objections apply only to the accountings from the date of Marjorie's death through December 31, 2012.

[26] It so concludes under *either* standard of care proposed by the Petitioner or Respondent. See supra.

Moreover, the Petitioner alludes to a claim of breach based upon the Trustee's management of certain insurance policies taken out by Marjorie on husband Ralph's life for the benefit of the Trust. See

First, the Court is satisfied that the Trustee's attorneys provided an estimate to Margrethe without assurance that the preliminary inventory was just that – preliminary. As has been discussed supra, Marjorie's estate plans came as a surprise to certain members of her family who became quite angry and obdurate, posing material significant barriers to the Trustee's efficient marshalling of assets. It was reasonable to provide her with only estimated or preliminary numbers given the continued difficulty in managing and accounting for the assets under difficult conditions. In a similar vein, it strikes the Court that it was entirely reasonable for the first accounting to be for an extended period given the time needed to marshal assets and prepare an opening accounting. It was more efficient to combine a partial and full accounting period. As to the final objection, that the Trustee was required to provide an accounting *on* December 31, the Court finds that neither the terms of the Trust, nor established practice require such instantaneous performance. It deduces that in requiring accountings "as of" December 31st, the Settlor intended that the reporting period would end "as of" that date. She did not intend for an annual report running through that date to be concomitantly provided. Beyond that, it would be impossible to render such accounts on that basis as asserted by the Petitioner given that the underlying year-ending financial documents normally are not ready or received on that date. Consequently, the Court posits that the Trustee did not breach his fiduciary duty under the Trust in that regard.

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generally R's Exh. Vol. 3, H-5 at 4-5. During the course of this multi-year litigation and multi-day trial, the Petitioner did not make clear the substance of the policy based claim, and indeed, despite attempting to discern one while reviewing the exhibits, the Court cannot find that this claim has been so developed as to permit the Petitioner to prevail on a demonstrated breach of the Trustee's duty. As such, any claim based on management of the insurance policies, to the extent raised, is **DENIED**. See, e.g., Estate of Stetson, 345 A.2d at 690 (beneficiary seeking surcharge bears the burden of demonstrating the particulars of breach).

Indeed, even assuming the Court found a breach, the Trustee can find shelter as he properly retained and relied on the counsel of well-trained and experienced attorneys. See Estate of Stetson, 345 A.2d at 688 (Pa. 1975)(collecting cases); see generally, Dodge v. Stickney, 62 N.H. at 337. The Petitioner has not alleged that the McLane Firm is not capable of providing competent trust and estate counsel. The Trustee chose that firm on the recommendation of Attorney Aronson, and it was prudent for him to seek, and rely on, their advice. When he hired McLane in 2009, the Trustee, a farmer living in Washington State, did not possess the skill to manage an estate and trust with assets in multiple states and a potential challenge to its efficacy. He possessed the valid authority under RSA 564-B:8-816(a)(27) to employ counsel and "to act without independent investigation upon their recommendation." There was no evidence presented that would indicate that his choice of counsel was imprudent or was impermissibly motivated by "shopping for advice" that would negate the advice of counsel liability shield. See RESTATEMENT (THIRD) OF TRUSTS §95, comment d (2012). Consequently, he is not found responsible for his reasonable reliance on their counsel.

3.) Retention of Law Firms/Performance

Similarly, the Court has determined that to the extent that Margrethe has challenged the reasonableness of retention of counsel in New Hampshire and New York, presumably as a basis for removal as trustee, her assertion is without merit. Again, the nature of her objection in this regard is rather uncertain, beyond: (1) implicitly criticizing McLane's billing rates through her questioning at trial of the Trustee; and (2) criticizing tactical decisions and the performance of New York counsel in the

eviction/ejectment proceedings through deposition questioning.[27] Again, it is well established that under the NHTC a trustee is empowered to employ counsel and "to act without independent investigation upon their recommendation." RSA 564-B:8-816(a)(27).

As discussed supra, the Court has determined that the Trustee reasonably retained the McLane firm to assist with administration of the Trust. At trial, Margrethe questioned the Trustee whether he was justified in retaining McLane attorneys based upon their billing rates. In that regard, the Court finds that although on the high end of the hourly-rate spectrum, rates charged by the McLane attorneys were not greatly dissimilar from those of other firms having attorneys with the experience, reputation and ability to provide like legal services. See generally, Cir. Ct. Probate Div. R. 88; In re Estate of Rolfe, 136 N.H. 294, 298 (1992). Indeed, given the level of discord, threat of litigation, and detailed questioning by Margrethe concerning the accountings, it was in the best interest of the Trust that the Trustee retain experienced, competent, counsel. See RESTATEMENT (THIRD) OF TRUSTS § 77, comment b(2) (Taking advice of legal counsel on complicated matters "evidences prudence on the part of the trustee").

In addition, Margrethe, at trial, appeared to implicitly argue that the Trustee was in breach because the eviction/ejectment/quiet title process was unusually long, difficult, and costly. She also questioned whether he acted competently in pursuing the unsuccessful eviction proceeding and by naming her as a party in the ejectment/quiet title action. As noted supra, a Trustee is authorized to rely on the advice of counsel. The Court is of the view that the Trustee acted reasonably in retaining Attorney Daly to

[27] Counsel for Margrethe did question Attorney Daly during his submitted deposition about certain billing entries. He did not, at trial, develop a cogent argument as to the asserted basis why these payments should be returned to the Trust.

assist in removing the recalcitrant beneficiaries from the Old Field Property and to assist in negotiating and bringing about its sale. He hired Attorney Daly on the advice of Leslie Delboy. See R's Exh. Vol. 8, J-8. Attorney Daly testified, and it is not disputed, that he had participated in negotiating over 1,000 real estate purchase and sale agreements. He also practices litigation and has experience as a designated court-appointed referee and receiver.

Although the eviction action was not successful, and Margrethe was granted summary judgment dismissing her from the ejectment/quiet title action, the Court finds that the Trustee cannot be found in breach. As stated supra, if

> a trustee has selected an adviser prudently and in good faith, has provided the adviser with relevant information, and has relied on plausible advice on a matter within the adviser's competence, this conduct provides significant evidence of the prudence of the trustee's action or inaction in the matter at issue.

RESTATEMENT (THIRD) OF TRUSTS § 93, comment c (2012). Indeed, as long as the Trustee prudently selects and supervises an attorney, he or she cannot be "charged with errors made by legal counsel. This is particularly true in situations where the fiduciary is a non-lawyer and the attorney's error was purely a legal matter." Estate of Heller, 401 N.W.2d at 610 (citations omitted)(relying in part on New Hampshire common law). Margrethe does not contend, nor is there sufficient evidence to support, that the Trustee failed to properly supervise or communicate with Attorney Daly. She only implicitly asserted that Attorney Daly did not act competently[28] and that the Trustee should be held responsible. Accordingly, even assuming the attorney's judgment or

[28] The Court notes that she alleges incompetence, however, the Court does not so find.

advice to pursue eviction was indeed deficient, her attempt to use such allegations to support an imposed sanction for a breach of duty is without merit.

B. Trustee Removal

As noted supra, removal is one of many remedies a Court may impose where a trustee has breached his or her fiduciary duty. See RSA 564-B:10-1001(b). Having concluded that the Trustee did not breach his duty to the Trust, it declines to remove him.

The Court is empowered by the NHUTC to remove a trustee if: "the trustee has committed a serious breach of trust; . . . [or] because of unfitness, unwillingness, persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries." RSA 564-B:7-706(b). At this juncture, it would not be in the best interest of the Trust to remove the Trustee. Certainly, intra-family dysfunction has resulted in litigation and other disputes that have drained trust resources. However, the Court cannot conclude that the Trustee was so markedly at singular fault as to warrant removal. In addition, if it were to remove the Trustee, it would not appoint another family member. As such, it would unduly waste what resources remain in the Trust to appoint a third-party trustee who would need to review not only the trust documents, but lengthy history of this, and other, litigation. This is particularly the case where, as here, all the assets have been liquidated, sit in escrow, and remain only to fund trust expenses in advance of final distribution.

C. Attorney's Fees

Finally, the Court, in the exercise of its discretion to award attorney's fees determines that each side shall be responsible for bearing his or her own attorney's

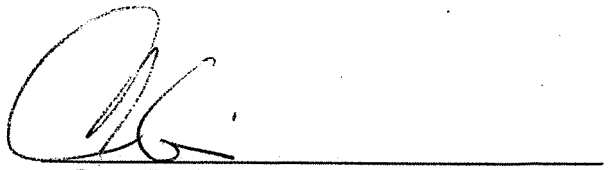
fees. Although the Court has concluded that the Trustee cannot be held to be in breach of his fiduciary duties, it decides, in the exercise of its discretion under RSA 564-B:10-1004, that the circumstances of this case does not justify an award of fees to the prevailing party under either RSA 564:B-10-1004 or Circuit Court Probate Division Rule 59. Simply put, the Court will not hold Margrethe personally responsible for the Trustee's attorney's fees as, given the family dysfunction and distrust, it cannot determine that she possesses sufficient equitable culpability to impose fees upon her. The Trustee, however, having successfully defended his acts, may have his reasonable attorney's fees funded by the Trust. See RSA 564-B:7-709. Further, he is entitled to have his costs reimbursed by the Petitioner as set forth in Circuit Court Probate Division Rule 87(c) as the prevailing party in this matter. He is **DIRECTED** to submit a motion for taxation of costs within **ten (10) days** of the date of the Clerk's Notice of Decision in remittance of this Order. The Court will review any submission for reasonableness and upon consideration of any objection by Margrethe that may be seasonably filed will issues order(s) as it deems appropriate. See Cir. Ct. Prob. Div. R. 58.

IV. Requests for Findings and Rulings

As the Court is satisfied that it has sufficiently set out the facts and applicable law essential to support its rulings on appeal, the parties' respective requests for findings of fact and rulings of law are granted so far as consistent with the narrative facts, rulings and law set out within. Any of their requests that are inconsistent, either expressly or by necessary implication, are denied or determined otherwise unnecessary. See Crown Paper Co. v. City of Berlin, 142 N.H. 563, 571 (1997).

RECOMMENDED:

Dated: 12/19/17

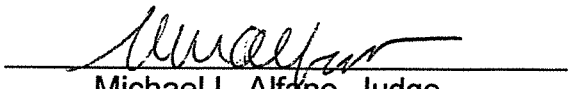


Gary R. Cassavechia, Retired Judge
and current Judicial Referee

SO ORDERED.

I hereby certify that I have read the foregoing recommendation(s) and agree that, to the extent the Judicial Referee has made factual findings, he has applied the correct legal standard to the facts determined by him.

Dated:
12/19/17



Michael L. Alfano, Judge