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THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY TRUST DOCKET

 6th Circuit Court Probate DivisioN

IN RE WILL, TRUST, AND AMENDMENT OF TRUST OF XXXXXX

CASE NO. XXXXXXX

Motion For ruling on rsa 551:22, II(c)’s and
rsa 564-b:10-1014(c)(3)’s safe harbor provisions

NOW COME interested persons XXXX (“Movants”) and state as follows:

**Introduction**

# Movants seek guidance from the Court as to whether certain proposed conduct would constitute a “contest” within the meaning of the no-contest provisions of Estate Planning Documents, thereby divesting them of any benefit thereunder. See RSA 551:22, II(c); RSA 564-B:10-1014(c)(3). Pursuant to applicable statutory safe harbor provisions, XXXX request that this Court determine whether the filing of the Petition attached as Exhibit A would trigger the no-contest provisions in [documents] attached as Exhibit B.

#

**Factual Background and Procedural Posture**

# [Insert background facts]

**Relevant Language from Estate Planning Documents**

# Each of the Estate Planning Documents contains a no-contest provision, also referred to as an “in terrorem” clause, as follows:

[Quote provisions]

For the purposes of this paragraph a “contest” or “attack” shall mean [describe utilizing the language of the above provisions].

**Treatment of No-Contest Provisions in New Hampshire**

# New Hampshire recognizes, by statute, the enforceability of no-contest provisions contained in wills and trusts. See RSA 551:22, II (providing that, relative to wills, “[a] no-contest provision shall be enforceable according to the express terms of the no-contest provision”); RSA 564-B:10-1014(b) (providing that, relative to trusts, “[a] no-contest provision shall be enforceable according to the express terms of the no-contest provision”); Burtman v. Butman, 97 N.H. 254, 257 (1952) (“The general rule is well established that a beneficiary who contests the will will forfeit his share in accordance with a provision in the will therefor.”).

# Although New Hampshire law requires that the terms of a no-contest provision be honored to the extent possible, such provisions must be interpreted in a manner consistent with statutory exceptions, commonly known as “safe harbor” provisions. See RSA 551:22, IV; RSA 564-B:1-105(b)(14); Hallett v. Hallett, 7th Circuit - Probate Division - Trust Docket, No. 317-2013-EQ-000865 at 5 (Jan. 15, 2014) (Order on Hallett Beneficiaries’ Motion for a Ruling on the Safe Harbor Provision of NH RSA 564-B:10-1014(c)(3), Cassavechia, J.) (“Under New Hampshire law, the terms of [a trust’s no-contest provision] are to be honored to the greatest extent possible, save for legislatively declared exceptions to enforceability or inapplicability . . . .”) (hereinafter “Hallett First Safe Harbor Order”).

# Relevant statutes contain various safe harbor provisions. For example, relevant here, RSA 551:22, III(c) and RSA 564-B:10-1014(c)(3) provide that the general rule of enforceability of no-contest provisions “shall not apply to the extent that a person initiates, maintains, or cooperates in . . . [a]ny action to determine whether a proposed or pending motion, petition, or other proceeding constitutes a contest within the meaning of a no-contest provision.”

#  Thus, even where a will or trust contains a no-contest provision, RSA 551:22 and RSA 564-B:10-1014 provide, among other safe harbors, a mechanism for beneficiaries of wills and trusts to seek the Court’s guidance as to whether a pending or proposed legal action will trigger no-contest provisions contained in relevant estate planning documents. XXXX now seeks such guidance.

**The Hallett Case**

# In Hallett, the Court (Cassavechia, J.) twice provided guidance relative to a no-contest provision contained in a settlor’s revocable trust and its multiple sub-trusts. See Hallett First Safe Harbor Order; Hallett v. Hallett, 7th Circuit - Probate Division - Trust Docket, No. 317-2013-EQ-000865 (Mar. 31, 2015) (Order on Hallett Beneficiaries’ Motion to Consider the Proposed Amended Petition; Invocation of Safe Harbor and NH RSA 564-B:10-1014, Cassavechia, J.) (hereinafter “Hallett Second Safe Harbor Order”). Copies of relevant court orders from the Hallett case are attached hereto as exhibits.

# In Hallett, certain beneficiaries and remainderpersons of the relevant trust (collectively referred to herein as “beneficiaries”) sought a ruling that no part of their petition constituted a “contest” of the trust within the meaning of the trust’s no-contest provision and that, consequently, they did not violate the no-contest provision by filing their petition. Hallett First Safe Harbor Order at 2. They further requested that, in the event the Court found any part of their petition to violate the no-contest provision, the Court identify the violative portions of the petition and grant them leave to amend the petition accordingly. Hallett First Safe Harbor Order at 2–3. Additionally, they sought a ruling that the no-contest provision was unenforceable. Hallett First Safe Harbor Order at 3.

# In response to the beneficiaries’ petition and motion seeking the Court’s guidance, the trustees of the Hallett trust objected, arguing that guidance could only be provided after an opportunity for discovery and trial and, alternatively, that the Trust’s No-Contest provision had been triggered because the beneficiaries’ petition sought to impair, invalidate or set aside provisions of the Trust. See Hallett First Safe Harbor Order at 2; (Objection of Respondents William E. Brennan and Barbara D. Hallett to Petitioner’s Motion for a Ruling on the Safe Harbor Provision of NH RSA 564-B:10-1014(c)(3).)

# The no-contest clause in the Hallett trust provided, in relevant part:

Contest of Will or Trust. It is the Grantor’s will and direction that if any beneficiary under this Trust or any other person, shall, directly or indirectly institute, conduct or in any manner whatsoever take part in or aid in any proceeding to oppose the administration of this Trust, or any amendment hereto, or impair, invalidate or set aside the same, or any of their provisions, then, in such event, the provision herein made for the benefit of such person or persons shall thereupon be revoked. Such person or persons shall thereafter be excluded from any participation in this Trust and shall, thenceforth, have no right, title or interest in the assets of this Trust. Any property, devise, bequest or distribution to such person or persons shall thereafter pass as if such person or persons did not survive the Grantor.

Hallett First Safe Harbor Order at 5 (ellipses omitted).

# The case was transferred to the Complex Trust Docket and the Court ruled upon the pending motions. Hallett First Safe Harbor Order at 3–4. Specifically, the Court ruled that: (1) Counts II–XI[[1]](#footnote-1) of the beneficiaries’ petition “pose[d] a ‘contest’ within the meaning of the no-contest clause capable of possibly triggering forfeiture of the [beneficiaries’] interest in the [trust]”; (2) Count I[[2]](#footnote-2) of the beneficiaries’ petition “constitutes a permissible action for a determination of whether the [petition] is a contest in violation of, and, therefore, triggering enforcement of the no-contest provision”; (3) it would construe “the initial filing of the [petition] . . . as an inquiry falling under RSA 564-B:10-1014(c)(3)”[[3]](#footnote-3); and (4) it was unable to rule on the issue of enforceability of the no-contest provision until after discovery and trial. Hallett First Safe Harbor Order at 3–4.

# In finding that Counts II–XI of the beneficiaries’ petition constituted “contests,” the Court reasoned that the terms of the trust’s no-contest clause demonstrated the settlor’s intent to discourage “any proceeding both directly or indirectly challenging the administration of the [t]rust or seeking to impair, invalidate, or set aside it or any of its terms,” Hallett First Safe Harbor Order at 8, and that each of those counts alleged claims falling within this definition, Hallett First Safe Harbor Order at 9–11.

# The Court’s order also clarified the extent to which the statute permits it to offer guidance to litigants under the safe harbor provisions of RSA 564-B:10-1014(b)–(c). It explained:

[Statutory safe harbor provisions provide] a “safe harbor” for beneficiaries who seek an advance judicial determination of whether a proposed legal challenge would be a contest . . . . [T]he issue permitted to be decided in that “safe harbor” proceeding is justifiably confined to the question whether a proposed action would be a contest. Upon obtaining an adverse ruling, the beneficiary is put to an election: either to accede to the will or trust or to pursue the contest. If the beneficiary chooses to pursue the contest, she may, in another proceeding, assert the exemptions within the statute from the enforceability of the no-contest clause. However, a beneficiary is not entitled to an additional ruling in advance on whether, if the proposed contest were to be pursued, the no-contest clause would nonetheless be unenforceable.

# Hallett First Safe Harbor Order at 7 (quotation, brackets, and ellipsis omitted).

# Rather than accede to the trust after issuance of the Hallett First Safe Harbor Order, the Hallett beneficiaries submitted a proposed amended petition and filed a motion seeking a second safe harbor ruling—this time, with respect to the proposed amended petition. Hallett Second Safe Harbor Order at 1. In this second safe harbor motion, the petitioners sought rulings that: (1) so long as they prevailed upon one claim for breach of trust, RSA 564-B:10-1014 insulated the entire action from the no-contest provision; (2) the no-contest provision was unenforceable because their action sought interpretation of the trust, see RSA 564-B:10-1014(c)(4); (3) no part of the proposed amended petition constituted a contest and that the beneficiaries, therefore, were not in violation of the trust’s no-contest provision; and (4) in the event the Court found that any part of their proposed amended petition violated the no-contest provision, the Court once again identify the violative portions of the petition and grant them leave to amend the petition accordingly. Hallett Second Safe Harbor Order at 2–3.

# The trustees of the Hallett trust opposed the motion, and cross-moved for a ruling that: (1) the beneficiaries’ actions—which by then included, among other things, engaging in discovery—had irrevocably triggered the no-contest clause contained in the trust; and (2) the beneficiaries could not seek further amendment and preliminary safe harbor rulings. Hallett Second Safe Harbor Order at 3. In support of their opposition, they asserted, among other things, that the proposed amended petition “simply re-allege[d] more of the same”—namely, allegations challenging the administration of the trust, and that beneficiaries were, in essence, seeking to retitle old allegations. Hallett Second Safe Harbor Order at 22 n.13; (see also Objection of Co-Trustees William E. Brennan and Barbara D. Hallett to Hallett Beneficiaries’ Motion to Consider the Proposed Amended Petition Invocation of Safe Harbor and NH RSA 564-B:10-1014(c)(3) and Co-Trustees’ Cross-Motion for Ruling that Hallett Beneficiaries’ Actions to Date Constitute a “Contest” and Prohibiting Beneficiaries from Seeking Further Amendments or Preliminary Rulings Regarding the Trust’s No-Contest Provision ¶¶ 6, 16.)

# The Hallett beneficiaries responded, asserting, among other things, that: (1) the beneficiaries’ actions had not irrevocably triggered the no-contest clause contained in the trust; and (2) the Court should not prohibit the Hallett beneficiaries from seeking further safe harbor rulings. See Hallett Second Safe Harbor Order at 8; (see also Hallett Beneficiary Petitioner’s Response to the Trustee Respondent’s Objection for a Motion to Consider a Proposed Amended Petition and Invocation of Safe Harbor and NH RSA 564-B:10-1014 and Objection to Co-Trustees Cross Motion for a Ruling that Hallett Beneficiary Petitioners and Respondents have Violated the No-Contest Provision and Objection to Co-Trustees Cross Motion Prohibiting Hallett Beneficiary Petitioners from Seeking Further Amendments at 2–6.)

# After a hearing, the Court ruled that: (1) all five counts asserted in the proposed amended petition[[4]](#footnote-4) “would constitute a “contest” within the meaning of the no contest clause . . . potentially triggering the no contest provision”; (2) the claims set forth in the proposed amended petition were not “simply actions brought regarding construction and interpretation of the terms of the [trust]”; (3) “in certain instances safe harbor may be reached where only some of the claims are successful,” but it could not then rule “whether the mix of claims included in the [proposed amended petition would] render the no-contest clause unenforceable”; (4) the second safe harbor motion did not itself trigger the no-contest clause contained in the trust; (5) it could not advise the beneficiaries “whether the no contest provision of the [trust was] unenforceable pursuant to RSA 564-B:10-1014(b) . . . because . . . [the beneficiaries could] only find statutory sanctuary from the no-contest provision of the [trust] after, and to the extent possible, they successfully prove at trial the matters alleged in [the proposed amended petition]”; and (6) it would not “allow further amendment or request for advice substantially similar to that requested in [the beneficiaries’ first safe harbor motion].” Hallett Second Safe Harbor Order at 3–4. It also granted the trustees’ cross-motion to the extent it sought to prohibit further safe harbor motions, and otherwise denied it. Hallett Second Safe Harbor Order at 4. Ultimately, the Court directed the beneficiaries to either pursue the allegations in the proposed amended petition or withdraw the action. Hallett Second Safe Harbor Order at 4.

# In its order, the Court engaged in a thorough analysis of, among other things, the trustees’ claims that the beneficiaries triggered the no-contest provision by engaging in discovery. Hallett Second Safe Harbor Order at 17–21. The Court considered the interplay between the no-contest provision, the safe harbor statute, and “the policy considerations underlying no-contest provisions.” Hallett Second Safe Harbor Order at 18. After weighing these considerations, the Court “f[ound] wisdom” in the method of allowing “limited discovery . . . that would provide a beneficiary with information of potential value or relevance in order to make a determination.” Hallett Second Safe Harbor Order at 20 (quotation omitted). It cautioned that its decision should not be interpreted “as carte blanche to conduct unlimited discovery,” but ruled that the beneficiaries’ “discovery activities to date”—activities that included: (1) the service of interrogatories and request for production of documents on the trustees; (2) the review of documents produced by one of the co-trustees; (3) the answering of interrogatories propounded upon them by one of the co-trustees; and (4) the service of expert disclosures—had “remained, on balance, within the realm of acceptable inquiry consistent with determination whether” they had a viable claim against the trustees. Hallett Second Safe Harbor Order at 17, 21. Accordingly, it found no triggering of the no-contest clause on the basis of discovery. Hallett Second Safe Harbor Order at 21.[[5]](#footnote-5)

# A number of the Hallett beneficiaries thereafter amended their petition and the case proceeded to trial, while certain of the beneficiaries non-suited. Hallett Merits Order at 19. After trial, the Court (Cassavechia, J.) ruled that the trustees had breached their fiduciary duties in various respects, but not in others. Hallett Merits Order at 19–38. The Court surcharged and removed the trustees, but declined to award damages due to lack of evidence. Hallett Merits Order at 38–42. With respect to the enforceability of the trust’s no-contest provision, the Court concluded that “the [beneficiaries] proved and prevailed on very significant claims of breach against [the trustees] such that the [no-contest] clause should not be invoked.” Hallett Merits Order at 44. In support of this conclusion, the Court reasoned that the beneficiaries had “advanced claims of such merit as to offer safe haven from the destructive waters formented by determinations of the lack of merit in regard to others.” Hallett Merits Order at 44.

**The Proposed Petition**

# “The interpretation of a trust is a question of law.”  Hodges v. Johnson, 177 A.3d 86, 93 (N.H. 2017) (quotation omitted). “The rules of construction that apply to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of trust property.”  Id. (quotation omitted). “It is well established in this jurisdiction that our courts have shown a signal regard for the intention of a settlor of a trust.”  Id. (quotation omitted). The Court “first look[s] to the language of the trust instruments.”  Id. “In searching for the proper interpretation of words used in a written instrument, [the Court] require[s] that the words and phrases be given their common meaning.”  Id. (quotation omitted). “Moreover, [it] examine[s] the instrument as a whole.”  Id. “When, as in this case, [the Court is] construing inter vivos trusts evidenced by written instruments, [it] interpret[s] the terms of the trust documents in light of all the circumstances and other competent evidence of the settlor’s intent.” Id. at 93–94 (citation omitted). The relevant intent for the Court’s purposes “is the intent of the settlor when the trust was created.”  Id. at 94.

# In the no-contest context, the Court “look[s] to the language of [the relevant no contest provision] as its guide in determining if a ‘contest’ has been proffered within the meaning of the [provision] and whether the claims asserted in the [proposed petition, responsive pleading, or motion] exonerate the [movant] from the legal consequence of ‘no-contest’ enforcement.” Hallett First Safe Harbor Order at 6. Additionally, as there is little decisional guidance available, the Court “review[s] the text of the safe harbor statute[s] in light of [applicable no-contest provisions] and the stated goal [of the statutes] to construe and apply the safe harbor statute in a manner consistent with . . . the [testator or] settlor’s intent.” Hallett Second Safe Harbor Order at 8. When a beneficiary seeks the Court’s guidance under these provisions, he or she carries “the burden of demonstrating that the no-contest provision should not be enforced.” Hallett First Safe Harbor Order at 5.

# The Proposed Petition will not trigger the no-contest provisions contained in the Estate Planning Documents because [explanation and argument as to why claims/allegations of Proposed Petition do not constitute a “contest” within the meaning of the terms of the estate planning document].

# WHEREFORE, XXXX ask this Honorable Court to:

## Determine that the filing of the Proposed Petition would not trigger the no-contest provisions contained in the Estate Planning Documents; and

## Grant such further relief as justice may require.

Respectfully submitted,

XXXX

By Their Attorneys,

McLANE MIDDLETON
 PROFESSIONAL ASSOCIATION

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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CERTIFICATE OF SERVICE

I hereby certify that this Motion was served on the following persons on this date and in the manner specified herein:

XXXX

1. Counts II–XI asserted the following claims: Preliminary Injunction; Removal of Trustees; Failure to Act as Trustees; Accounting and Reporting; Breach of Trust and Damages; Breach of Fiduciary Duty; Unjust Enrichment; Modification of the Trust; Enforcement of the No-Contest Provision Against Barbara D. Hallett as Beneficiary; and Request for Attorney’s Fees and Costs. Hallett First Safe Harbor Order at 10–11; (see also Hallett Verified Pet. ¶¶ 174–274 (not attached here)). [↑](#footnote-ref-1)
2. Count I of the petition asserted a claim for a “Preliminary Safe Harbor Request.” Hallett First Safe Harbor Order at 9; (see also Hallett Verified Pet. ¶¶ 168–73). [↑](#footnote-ref-2)
3. The Court recognized that the filing of a petition “may not be the best vehicle for instituting a [safe harbor] inquiry,” noting that “a simple motion pursuant to [the statute] with a proposed pleading appended [as] an exhibit would be a more appropriate vehicle.” Hallett First Safe Harbor Order at 13 n.6. [↑](#footnote-ref-3)
4. As articulated by the Court, the proposed amended petition asserted the following claims: “Count I (Breach of Duty – life insurance proceeds and trust liquidity); Count II (Breach of Duty – no-asset affidavit and Milford Lumber/Muir lumber promissory note); Count III (Record Keeping and Identification of Trust Property – improper collection of trust Property and improper recordkeeping); and Count IV (Breach of Duty – annual reporting and improper accounting).” Hallett Second Safe Harbor Order at 13. [↑](#footnote-ref-4)
5. The Hallett court’s treatment of the discovery issue is addressed in further detail in XXXX’s Discovery Memorandum. [↑](#footnote-ref-5)