THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

TRUST DOCKET
6TH CIRCUIT COURT
PROBATE DIVISION

TRUST OF MARY BAKER EDDY (CLAUSE VI & VIII)

317-1910-TU-00001

ORDER(S) ON MOTIONS

Presently before the Court are a series of approximately twenty-eight (28) pleadings filed over many months by the parties in this matter concerning: (1) an *Assented-to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act*, see Index #281 (the "*Assented-to Motion*"), submitted by the Trustees of the Trust of Mary Baker Eddy (Clause VI Trust), and the Trustees of the Trust of Mary Baker Eddy (Clause VIII Trust)(collectively the "Trusts" and "Trustees") and objections and responses thereto submitted by the Second Church of Christ, Scientist, Melbourne (Australia) (the "Second Church"), the Director of Charitable Trusts, Thomas J. Donovan (the "DCT"), and the Trustees, see Index ##282, 284-287, 298, 299; (2) the annual accountings for the Clause VI and Clause VIII Trusts for the period ending March 31, 2017, see Index ## 292-295, and objections and responses thereto, see Index ##300, 302; (3) recently filed[1] motions concerning the standing of the Second Church to object to accountings

[1] As set forth in its Scheduling Order dated September 21, 2017, see Index #289, the standing issue was first addressed nearly two years ago by the Court and briefed by the parties. See Index ##233-39,245, 252. Consideration of standing was deferred, however, after certain pleadings were withdrawn by the Second Church. See generally Order on Assented-To Motion for Continuance of Hearing at 2-3 (March

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and other motions concerning the Clause VI and Clause VII Trusts, and to file briefs as *Amicus Curiae*, see generally, Scheduling Order dated September 21, 2017 (Index #289), see also Index ##297, 304, 310, 312; (4) a *Motion for Leave to File Amicus Curiae with Brief*, see Index #282, and *Motion to Appoint an Independent Trustee*, see Index #303, filed by the Second Church in which it seeks, inter alia, appointment of an independent trustee, and objections thereto filed by the Trustees and the DCT, see Index ##307-09, and a *Response*, submitted by the Second Church, see Index #313; and finally, (5) the related issue concerning the authority of the DCT (and by extension, this Court) to address a recognized "embedded conflict" in the administration of the Clause VIII Trust given that the five trustees of that trust are also Directors of the Mother Church. See *DCT Memorandum Concerning Standing of Second Church* at 11 (Index #252); *Memorandum of the Second Church Concerning Application of the First Amendment Church Autonomy Doctrine to the Trustees of the Clause 8 Trust Under the Will of Mary Baker G. Eddy* (Index #305); *Trustees' Objection(s) to Appointment of an Independent Trustee* (Index ##307-08); *DCT Objection to Appointment of an Independent Trustee* (Index #309).

After thorough consideration of all the pleadings, applicable case law, and the extensive history in this 108-year-old matter, the Court, as more fully set forth infra, **ENTERS** the following **ORDERS**:

24, 2016)(Index #245)(discussing standing); Order on Hearing Held April 12, 2016 (dated April 25, 2016)(Index #253). In September 2017, the Court determined, sua sponte, that in light of affirmative relief requested by the Second Church, it was necessary to address standing and ordered briefing for its consideration. See Scheduling Order dated September 21, 2017 (Index #289). A hearing on the issue, and others pending, was held on November 3, 2017. See Order dated November 6, 2017 (Index #301). Additional briefing was allowed, see id. at 3, and the issue was submitted after the Second Church filed its final pleadings on December 11, 2017. See Index #304, 310, 312. The Court observes that although consideration of standing was effectively deferred in April 2016, see Index #253, standing was mentioned or discussed in an additional seven pleadings filed between April 2016 and September 2017 before the Court ordered formal address of the issue. See Index ##268, 270, 271, 273, 276, 284-85.

- As a preliminary matter, the Court concludes that at present, and importantly in light of the renewed and diligent participation by, and/or oversight of, the DCT, the Second Church lacks standing to object to: the accountings, see Index ##292-95; the *Assented-to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act*, see Index #281; petition for appointment of an independent trustee, see *Motion to Appoint an Independent Trustee* (Index #303); or seek to reopen accountings previously allowed by the Probate Division. See *Motion to File a Brief Amicus Curiae* at 9-18 (Index #282). That said, as this Court noted in its Order dated May 4, 2017 (Index #274), the Second Church may continue, as appropriate, to: (1) submit briefs as *amicus curiae*,[2] and cooperate with the "DCT, who, by statute, represents their interests in the matter." Id. at 10.

- The Trustees' *Assented-to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act* ("*Assented-To Motion*"), see Index #281, is **GRANTED IN PART AND DENIED IN PART**. The Court: (1) **GRANTS Prayer A**, and, subject to further conditions, **AMENDS** a prior court order from 1993 to comply with the terms of the Trusts; (2) it **GRANTS Prayer B** requesting conversion of both Trusts to unitrusts, see RSA 564-C:1-106(b); and (3) **DENIES Prayer C** requesting adoption of certain provisions of the Uniform Prudent Management of Institutional Funds Act ("UPMIFA") with respect to the Clause VIII Trust. See RSA chapter 292-A.

- The Court **GRANTS** the *Motion to File Brief Amicus Curiae* filed in response by the Second Church. See Index #282. It considered the *Brief Amicus Curiae* in rendering its decision on the *Assented-To Motion*.

- The Court **DENIES WITHOUT PREJUDICE** the *Motion to Appoint an Independent Trustee*. See Index ##303, 307, 309, 313. As noted supra, the Second Church lacks standing to petition for appointment of a trustee. Assuming without deciding, however, that the DCT's reluctance, on First Amendment grounds,[3] to actively seek appointment of an independent trustee opens the door

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[2] The Court reminds the parties, however, that should amicus curiae briefing be submitted, the Court is under no obligation to enter a ruling allowing submission, and even if a submission is allowed, rule on issues raised therein. See Order Dated May 4, 2017 (Index #274); cf. Order dated September 21, 2017, n. 1 (Index #289)(noting that the Court need not rule on issues raised in an unsolicited "Status Report," see Index #288, filed by the Second Church, and objections thereto. See Index ##290-91.

[3] The Court appreciates the extensive argument submitted by all parties, see Index ##305, 307-309, concerning whether the DCT, and by extension this Court, may properly oversee appointment of trustees without violating the "Church Autonomy Doctrine" of the First Amendment to the United States Constitution. See generally, Jones v. Wolf, 443 U.S. 595, 602, 604-605 (1979)(allowing for adoption of, inter alia, a "neutral principles test" to settle church property disputes "so long as it involves no consideration of doctrinal matters" and declining to adopt "a rule of compulsory deference to religious

to the Second Church to assert standing to petition for appointment of an independent trustee, see generally, Robert Schalkenbach Foundation v. Lincoln Foundation, Inc., 91 P.3d 1019, 1025-28 (Ariz. Ct. App. 2004), the Court, at the present time, will not overturn the 1949 ruling of Judge Lord holding that "it is not necessary to fill the vacancy" created by the death of the last independent trustee. See DCT Memorandum in Support of Trustee's Motion to Amend 1993 Order and to Convert Trusts to Unitrusts, Exh. 2 (Index #284); see generally, Indian Head Nat. Bank v. Theriault, 96 N.H. 23, 27 (1949)(reopening prior orders for good cause); cf. Ford v. New Hampshire Dep't of Transp., 163 N.H. 284, 290 (2012)("When asked to reconsider a holding, the question is not whether we would decide the issue differently de novo, but whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed" (quotations and brackets omitted)). It notes, however, that Judge Lord did not affirmatively require that the trustees be board members of the Mother Church, and as such, the Court will take into consideration the lack of an independent trustee when reviewing candidates the next time there is a trustee vacancy. See generally, Fernald v. First Church of Christ, Scientist, in Boston, 77 N.H. 108, 109 (1912)(confirming role of court to supervise the Trusts).

- The Court **ALLOWS** the annual accounts for the Clause VI and Clause VIII Trusts for the period ending March 31, 2017, see Index ##292-295, noting that although the Second Church has objected, the DCT, aware of those objections, has reviewed them and has not objected. In addition, the Court reminds the Trustees that all future accounts are to continue to be audited by an independent auditor at least until such time as there is no longer an embedded conflict between the Trustees of the Trust(s) and the Directors of the Mother Church.

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authority" in resolving church property disputes); Berthiaume v. McCormack, 153 N.H. 239, 248-49 (2006)(recognizing adoption of the "neutral principles test" and directing courts to first consider "secular documents such as trusts" in order to "avoid any perception of entanglement"); cf. Glover v. Baker, 76 N.H. 393 (1912)(gift was not to church, but made in trust and so long as bequests comply with terms of trust, there is no breach). Although it need not decide the issue at present, and declines to do so in order to avoid rendering an advisory opinion, see, e.g., Duncan v. State, 166 N.H. 630, 640 (2014)(courts not authorized "to render advisory opinions to private individuals"); Piper v. Town of Meredith, 109 N.H. 328, 330 (1969); N.H. CONST. Part II, art. 74, after an extensive review of case law, the Court strongly deduces that pursuant to the terms of the Clause VIII trust, see Berthiaume, 153 N.H. at 248, the DCT and Court may appropriately continue to oversee appointment of trustees, as it has since 1910, without becoming unduly entangled in church doctrinal controversies. Cf. Family Federation for World Peace v. Hyun Jin Moon, 129 A.3d 234, 246 (D.C. Ct. App. 2015)(record did not suggest that claim would make court "entangle itself in church doctrine" and that to conclude otherwise "would approach granting immunity to every non-profit corporation with a religious purpose from breach of fiduciary suits and present any scrutiny of questionable transactions."(quotations and ellipses omitted)). Certainly, the Court will entertain argument on this issue at such time as there is a vacancy in the trustees of the Trusts and the issue is properly before it.

A. Brief Background

The Court recites the following facts for background purposes only and incorporates by reference all prior orders issued by it. See, e.g., Index ##245, 253, 274, 289. This matter involves two testamentary trusts, the Clause VI Trust and Clause VIII Trust, established in the Will of Mary Baker Eddy, founder of the Christian Scientists, upon her death in May 1910. The Clause VI Trust bequeathed to the "Christian Science Board of Directors of the Mother Church" $100,000 in trust "for the purpose of providing free instruction for indigent, well-educated, worthy Christian Scientists." Clause VIII of Ms. Baker Eddy's Will devised "all the rest, residue and remainder of my estate . . . to the Mother Church – The First Church of Christ, Scientist, in Boston Massachusetts, in trust," for certain "general purposes." She directed, inter alia, that: "I desire that such portion of the income of my residuary estate *as may be necessary* shall be used for the purpose of keeping in repair the church building" (emphasis added) and her former home in Boston (or other buildings "substituted therefore"), and that:

> the balance of said income, and such portion of principal as may be deemed wise, shall be devoted and used by said residuary legatee for the purpose of more effectually promoting and extending the religion of Christian Science as taught by me.

Notably, a 1912 Massachusetts Supreme Judicial Court case observed that this latter purpose:

> is not a gift to the particular ecclesiastical organization for its special needs. It manifests a broader design, and authorizes the use of the gift for spreading the tenets of faith taught by the testatrix over an area more extensive than could possibly be gathered in one congregation. It includes the most catholic missionary effort, both as to territory, peoples and times. It is the founding of a trust of comprehensive scope

> for the upbuilding of the sect which the testatrix made the object of her bounty. While in a general sense it may be said that every church is devoted to 'promoting and extending the religion' of the denomination to which it belongs, a gift to the particular use described in this will is not a gift to the church to do with as it chooses. The testamentary statement of the purpose of the gift when coupled with its magnitude and express fiduciary words manifests an intent that it shall be devoted as a trust fund to the specified ends.

Chase v. Dickey, 99 N.E. 410, 413-14 (Mass. 1912); see Glover v. Baker, 76 N.H. 393, 401 (1912) (finding that "[t]he testatrix gave the bulk of her property in trust to be devoted and used for the purpose of promoting and extending the religion of Christian Science as taught by her.")

This is not the first time there has been litigation concerning the Eddy Trusts, as there are two reported New Hampshire decisions, Glover v. Baker, 76 N.H. 393 (1912) and Fernald v. First Church of Christ, Scientist, in Boston, 77 N.H. 108 (1912) discussing the Will, Trusts, and key provisions at issue in this case and denying both Mrs. Baker Eddy's family's challenge(s) to the will and trusts and the Mother Church's request that funds be distributed directly to it. Notably for our purposes today, the Glover case, upheld the validity of the Eddy Trusts, 76 N.H. at 425, and established that the residuary bequest in Clause VIII was not a gift to the church, but to be held in trust for two purposes, church building repair and "promoting and extending the religion of Christian Science as taught by me." Id. at 400.[4] In the Fernald case, 77 N.H. at 109, the Mother Church sought direct payment of the residuary to them as administration of the estate was concluded. The Supreme Court reaffirmed that Ms. Baker Eddy intended "to create a public trust for promoting and extending Christian Science as

[4] In the Chase matter, 99 N.E. 410, the trustees of the Clause VIII Trust agreed to use all distributions from it for "promoting and extending religion." Id. at 416.

taught by her to all parts of the world," and that her gift was "to a charity" administered "under the direct supervision of the court." Id. The New Hampshire Supreme Court directed the administrator, Josiah E. Fernald, to "hold the property in his hands on the settlement of the final account until a trustee or trustees are appointed by the probate court." Id. at 110. As such, unchallenged court oversight of the trusts commenced, and annual accounts for both trusts, and requests for appointments of trustees, have been filed in the Concord Probate Court for over one hundred years.

It is agreed by the parties that initially the trustees of the Clause VIII Trust were comprised of the Board of Directors of the Mother Church and Josiah Fernald, the administrator of Ms. Baker Eddy's estate. Upon Mr. Fernald's death in 1949, Judge Lord ruled that it was "not necessary to fill the vacancy" and that the "five members of the Christian Science Board of Directors who are the surviving trustees" shall remain the "sole trustees" of the Clause VIII Trust. See *DCT Memorandum in Support of Trustee's Motion to Amend 1993 Order and to Convert Trusts to Unitrusts*, Exh. 2 (Index #284). Since that time, the trustees have all been Mother Church Board of Directors members, and the probate courts have reviewed and approved appointment of successor trustees. See, e.g., Index ##32, 41 (example, in 1998-99, of a petition to replace a trustee and appointment of successor trustee).

Of note for the Court's purposes today, is a 1993 Order by Judge Cushing approving a *Stipulation* between then-DCT William B. Cullimore and the trustees of the Clause VIII Trust in their dual capacities as trustees and directors of the Mother Church. See *DCT Memorandum Concerning Standing of Second Church of Christ, Scientist*, Exh. 2 (Index #252). That *Stipulation* arose after DCT Cullimore investigated a five

million dollar loan from the Clause VIII Trust to the Mother Church to be used to fund a failed television venture. See generally, Weaver v. Wood, 680 N.E.2d 918, 921 (Mass. 1997)(describing the venture). In the *Stipulation*: (1) the Mother Church agreed to repay the loan; (2) it was decreed that Clause VIII Trust income was to be used to repair the church; (3) further loans were prohibited; and (4) the principle of the Clause VIII Trust could only be invaded with court approval. See *DCT Memorandum Concerning Standing of Second Church of Christ, Scientist*, Exh. 2 (Index #252).

The current litigation began when the Second Church sought to review and potentially object to, the annual accounting filed by the Trustees on September 30, 2015. See Index ##234, 237. That accounting was approved by the Concord Probate Division on November 2, 2015. See Index ##229-230. The DCT assented to the Second Church's motion, however, the Trustees objected on the basis that the Second Church, as a "branch church," lacked standing to sue. Although the Court scheduled a hearing to address standing, see Order dated March 24, 2016, the parties agreed at the hearing that the Second Church would withdraw its motions and the DCT, Second Church, and Trustees would cooperate to resolve concerns raised by the Second Church and DCT. See Order dated April 25, 2016.

Notably, prior to the Court's initial scheduling order, the DCT had not weighed in on the concerns voiced by the Second Church. See Order dated February 24, 2016 (Index #241). In response to the Court's request that the DCT or an attorney from his office attend the hearing, the DCT filed a *Memorandum Concerning Standing of Second Church of Christ Scientist* with detailed briefing on the matter. See Index #252. As this Court has observed, the DCT noted prior litigation arising from "tensions" between the

two beneficial purposes of the Clause VIII Trust, namely: (1) repair of Mother Church building(s); and (2) "promoting and extending the religion of Christian Science." He stated that there were potential procedural infirmities in the 1993 *Stipulation* approved by the Probate Court allowing for distributions from the Clause VIII Trust for repairs only, because it was approved in the absence of a decree of cy pres or deviation. See generally RSA 547:3-c (deviation statute); 547:3-d (cy pres statute); *Memorandum Concerning Standing of Second Church of Christ Scientist* at 11 (Index #252). Importantly, the DCT also indicated his belief that "[b]ecause the trustees of the Clause VIII Trust are also the Board of Directors of the Mother Church, they have *embedded conflicting fiduciary obligations*." Id. (emphasis added). The DCT then outlined the "Charitable Trusts Unit's Planned Review," setting a planned assessment he intended to undertake with the Trustees/Mother Church, id., and concluding that he "plans to review the distributions made from the Clause VIII [Trust] either in context of this docket or separately as part of the Charitable Trust Unit's oversight responsibilities." Id. at 12. On the standing issue, he observed that because his office had, and continued to take, an active role in monitoring the Clause VIII Trust, "special interest standing is not warranted." Id. at 9. He observed, however, that where an "attorney general adopts a neutral position on pending litigation brought by a charity, . . . standing may be appropriate." Id.

The DCT thereafter became actively involved in the matter, filing objections to accounts filed in September 2016, see Index #259, and working directly with the Trustees/Mother Church to voice his concerns. See Order dated May 4, 2017 (Index #274). The Trustees/Mother Church and DCT reached an agreement and the Trustees

filed a *Motion to Approve Amended Account and Amend 2001 Order*, assented-to by the DCT. See Index #274. The Second Church filed motions to file briefs as *Amicus Curiae*, see Index #269, continuing to raise concerns. After a hearing, the Court denied in part and granted in part the *Motion to Amend the 2001 Order*, see Order dated May 4, 2017 (Index #274), and required the Trustees to file accounts audited by an independent auditor.[5] The Court denied the Second Church's motion file an *amicus* brief, concluding that although thorough, it was not necessary to assist the Court with making a decision on the *Motion to Amend*. Id. at 9. It, however, indicated to the Second Church that it would "not be adverse to accept future *amicus curiae* submissions should it decide that in light of the questions before it," if the additional submissions would be helpful to the Court. Id. at 10 citing 4 AM. JUR. 2D *AMICUS CURIAE* §1 (Supp. 2017). It also encouraged the Second Church "to share their information with the DCT who, by statute, represents their interests in this matter." Id.; see generally, RSA 7:19-7:32; cf. Concord Nat. Bank v. Town of Haverhill, 101 N.H. 416, 419 (1958)("While the Attorney General . . . represents the public in the enforcement and supervision of charitable trusts, this does not preclude other interested parties from presenting their views particularly where they are acting for the benefit of the charitable trust as a whole").

This Order addresses disputes that arose after the Trustees submitted an *Assented-to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act*, see Index #281 (the "*Assented-to Motion*"), to which the DCT filed a *Memorandum in Support*, see

[5] The Court observes that despite a court-order, the Trustees had failed to file audited accounts for thirteen years, however, the DCT had not entered any objections, nor had the court enforced its own order requiring audited accounts. See id. at 5.

Index #284, seeking amendment of a 1993 Probate Court Order, conversion of the Clause VI and Clause VIII Trusts to unitrusts, see RSA 564-C:1-106, and approval of the application of certain provisions of the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"), see RSA chapter 292-A, to the Clause VIII Trust, as it is proposed to be amended. The Second Church, also sought to submit a brief as *amicus curiae*, see Index #282, to which the Trustees have objected, see Index #285, and the Second Church filed a responsive pleading. See Index #286-287. The Second Church additionally filed a *Status Report and Request for Time for Discovery*, see Index #288, seeking affirmative relief, despite the fact that its standing to participate as a party in this matter has not yet been determined. See Order on Hearing Held April 12, 2016 (dated April 25, 2016)(Index #253)(noting that the Court "made no orders concerning the standing of the Second Church to challenge the trust accountings in this matter, [so that] withdrawal of pleadings by the Second Church has no preclusive effect whatsoever on determination of the standing issue."); see generally Order on Assented-To Motion for Continuance of Hearing at 2-3 (March 24, 2016)(Index #245)(discussing standing). The DCT and Trustees objected. See Index ##290-91.

The Trustees also filed *Accountings* for the year-ending March 31, 2017 for both the Clause VI and Clause VIII Trust(s), see Index ##292-295, to which the Second Church objected and the Trustees filed a responsive pleading. See Index ##300, 302.

The Court scheduled a hearing for November 3, 2017, see Index #289, and shortly before it, the Trustees submitted a *Memorandum Concerning the Issue of Standing*, see Index #297, and a *Memorandum In Support of the Assented-To Motion to Amend*. See Index #299. The DCT filed a *Supplemental Memorandum Concerning*

Proposed Conversion of Clause VIII Trust to Unitrust and Use of UPMIFA. See Index #298. The Second Church also filed a *Motion to Appoint an Independent Trustee*, see Index #303, a *Memorandum on Standing*, see Index #304, and a *Memorandum Concerning Application of the First Amendment Church Autonomy Doctrine to the Clause VIII Trust*. See Index #305. Objections and replies were submitted by the Trustees, see Index ##307-311, as were follow-up responses by the Second Church. See Index ##312-313.

Having reviewed the avalanche of pleadings ripe for decision,[6] the Court now proceeds to evaluate and rule on them.

B. Standing

As a preliminary matter, the Court will address the standing of the Second Church, under the "special interest doctrine" to: (1) object to accountings; (2) petition for appointment of an independent trustee; and (3) otherwise seek affirmative relief.[7]

Generally, "[i]n evaluating whether a party has standing to sue, [courts] focus on whether the party suffered a legal injury against which the law was designed to protect." Petition of Lath, 169 N.H. 616, 620 (2017). New Hampshire common law concerning the ability of a possible beneficiary of a trust to have standing is unclear. The New Hampshire Supreme Court in In re Burnham, 74 N.H. 492, 494 (1908), stated the

[6] The Court observes that the first relevant pleading, the Trustee's *Assented-to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act*, see Index #281, was filed on July 26, 2017, with the final volley in this protracted battle submitted nearly six months later on December 11th. See Index #313. It apologizes for the delay in issuing this order, however, it aspired to a thorough review of the matters before issuing a comprehensive order.

[7] As discussed supra, the standing issue had been raised previously and a ruling on it was deferred by agreement. See Order Dated April 25, 2016 (Index #253). The Court later concluded in its Order Dated September 21, 2017, that it had become necessary to decide the standing issue as the Second Church's pleadings were seeking affirmative relief. Id. at 3 (Index #289). By the Court's informal count, at least twenty-seven pleadings have been filed since November 2015 raising or actively addressing this issue.

general rule that once "it was determined that the trust was charitable it became the duty of the Attorney General to see that the rights of the public in the trust were protected and that it was properly executed. The heirs had no interest in the question apart from the general public, whose rights were represented by the Attorney General." Id. Fifty years later, however, the Supreme Court, called the DCT an "indispensable party," but, awarded attorney's fees to counsel for potential beneficiaries, noting: "[w]hile the Attorney General or his representative represents the public in the enforcement and supervision of charitable trusts, this does not preclude other interested parties from presenting their views particularly where they are acting for the benefit of the charitable trust as a whole." Concord Nat. Bank v. Town of Haverhill, 101 N.H. 416, 419 (1958). The Supreme Court recognized that the respondent towns in that case "were not direct beneficiaries of the charitable trust," but that their "participation in the litigation can be considered a service to the trust and aid to the Court," justifying the award of fees. Id. at 418-19.

Notwithstanding the lack of clarity under New Hampshire common law, it is nearly uniformly recognized[6] that in the case of charitable trusts, "[t]he general rule is that one who is merely a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust," and instead, that power is given to the state attorney general who is tasked with representing the public's interest in enforcement of a charitable trust. Alco Gravure, Inc.

[6] The DCT, in his pleadings, see *DCT Reply to Second Church's Memorandum on Standing* at 2, observes that the Probate Division, in In re: Nashua Center for the Arts, No. 316-2017-EQ-00191 (August 30, 2017) recently held that because the DCT represented the rights of the public in a charitable trust, the petitioners only had standing if they could demonstrate a direct and distinct interest in the matter. Id. at 4. That case is not relevant to our inquiry here, however, because, on its face, it did not involve application of the special interest doctrine, and relies on a case concerning the standing of a DCT, and not the application of the "among others" language in RSA 564-B:4-405(c) as it pertains to the special interest doctrine. See infra.

v. Knapp Found., 479 N.E.2d 752, 755 (1985); see, e.g., State ex rel. Nixon v. Hutcherson, 96 S.W.3d 81, 83-84 (Mo. 2003). The purpose for this restriction is that:

> The persons affected by such trusts are usually some or all of the members of a large and shifting class of the public. If any member of this class who deemed himself qualified might begin suit, the trustee would frequently be subjected to unreasonable and vexatious litigation. Often no individual can prove that he will necessarily benefit from the charity. All may be prospective or possible beneficiaries, but no one can be said to be a certain recipient of aid. In ultimate analysis it is the public at large which benefits, and not merely the individuals directly assisted. Obviously, there is good reason for vesting in a single authority the discretion and power incident to the enforcement of such trusts, rather than in leaving the matter to the numerous, changing, and uncertain members of the group directly to be aided.

State ex rel. Nixon, 96 S.W.3d at 84, quoting George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 411, at 8 (Rev. 2d ed. 1991).

However, an exception to the general rule has been recognized "where an individual seeking enforcement of the trust has a 'special interest' in continued performance of the trust distinguishable from that of the public at large." Hooker v. Edes Home, 579 A.2d 608, 612 (D.C. 1990); see RESTATEMENT (THIRD) OF TRUSTS §94 comments g-g(1) Standing to Enforce a Trust (2012). This exception arises from both: (1) a recognition that where there is an identifiable litigant with a special interest, the concern that there may be unduly vexatious litigation is lessened, see Robert Schalkenbach Found., 91 P.3d at 1025-26; and (2) that given the realities of budgetary constraints on a state's attorney general, he or she may be unwilling or unable to properly represent the public good. See City of Paterson v. Paterson Gen. Hosp., 235 A.2d 487, 494-95 (N.J. Ch. Div. 1967).

The UTC provides that "[t]he settlor of a charitable trust or the director of charitable trusts, *among others*, may maintain a proceeding to enforce the trust." RSA 564-B:4-405(c)(emphasis added). The Second Church contends that this provision gives it standing to sue to enforce the trust as a person with a "special interest" in the Eddy Trusts. See Milton v. Milligan, No. 4:12CV384-RH/CAS, 2013 WL 828607, at *4 (N.D. Fla. Mar. 5, 2013)(finding that person with a "special interest" falls under the "among others" clause of the UTC); cf. Family Federation for World Peace v. Hyun Jin Moon, 129 A.3d 234, 244 n. 16 (D.C. Ct. App. 2015)(ousted directors are "among others"); In re United Effort Plan Trust, 296 P.3d 742, 750 (Utah 2013)(assuming without deciding that "among others" includes those with a special interest).

Although the "special interest" doctrine is broadly recognized, see generally, Mary Grace Blasko, Curt S. Crossley, David Lloyd, Standing to Sue in the Charitable Sector, 28 U.S.F.L.Rev. 37 (Fall 1993)(hereinafter "Blasko on Standing"); RESTATEMENT (THIRD) OF TRUSTS §94 Standing to Enforce a Trust comments g-g(1) (2012), it has been rightly observed that "'special interest' is a term of uncertain scope." Hooker, 579 A.2d at 612. State courts addressing the issue have applied the doctrine with little uniformity and New Hampshire case law has not addressed it. However, the reported cases have generally been divided into three categories, see RESTATEMENT (THIRD) OF TRUSTS §94 Standing to Enforce a Trust comment g(1) (2012), namely those that: (1) narrowly apply the doctrine; (2) use a balancing test; and (3) broadly allow for standing.

Cases narrowly applying the doctrine require that the interest be presently and clearly identified. See State ex rel. Nixon, 93 S.W. 3d at 85 (requiring a "clear, identifiable, and present claim to any benefits"); Hardman v. Feinstein, 195 Cal. App. 3d

157, 161-62 (Cal. Ct. App. 1987)(requiring a "special and definite interest"); Weaver v. Wood, 680 N.E.2d 918, 923 (Mass. 1997)(in a matter involving the Mother Church, requiring a "personal right that directly affects the individual member").

Some courts balance specific factors to determine whether there is a special interest. A number of courts employ a two-part test, namely: (1) whether the person is one of a sharply defined and limited in number class of potential beneficiaries; and (2) whether the challenged act is "fundamental" in nature (meaning related to the core purpose of the charitable trust), rather than a challenge to the trustee's normal exercise of discretion. See Hooker, 579 A.2d at 614; Alco Gravure, Inc., 479 N.E.2d at 465-66; see also Family Federation for World Peace, 129 A.3d at 244 (noting that key consideration in Hooker is "is whether finding a justiciable interest in a given plaintiff would contravene the considerations underlying the traditional rule"); cf. In re United Effort Plan Trust, 296 P.3d at 750 (noting and applying, but not adopting, the two-part test).

Some courts adopt an even more comprehensive five-part test that was developed in Blasko on Standing. Id. at 61-75 (the "Blasko Test"). That test was developed from the various cases deciding the issue, and directs courts to evaluate: "(1) the nature of the benefitted class and its relationship to the charity; (2) the extraordinary nature of the acts complained of and the remedy sought; (3) the state attorney general's availability or effectiveness to enforce the trust; (4) the presence of fraud or misconduct on the part of the defendants; and (5) subjective and case-specific circumstances." Robert Schalkenbach Found., 91 P.3d at 1026. The Blasko Test developed these factors based upon a comprehensive survey of case law, Blasko on

Standing, supra at 61-75, and discussed how to weigh each one relative to the others. Id. at 75-79; see Robert Schalkenbach Found., 91 P.3d at 1026 (court gave "special emphasis to several of those factors—the nature of the benefitted class and its relationship to the trust, the nature of the remedy requested, and the effectiveness of attorney general enforcement of the trust").

Finally, some jurisdictions jettison most of the considerations discussed supra and allow private individuals, and often broad swaths of people, to sue for enforcement of a charitable trust where it is found that the Attorney General did not, or cannot, properly supervise the trustees. See Kapiolani Park Pres. Soc. v. City & Cty. of Honolulu, 751 P.2d 1022 (Haw. 1988); Fitzgerald v. Baxter State Park Auth., 385 A.2d 189 (Me. 1979); State of Del. ex rel. Gebelein v. Florida First Nat. Bank of Jacksonville, 381 So. 2d 1075 (Fla. Dist. Ct. App. 1979); City of Paterson v. Paterson Gen. Hosp., 235 A.2d 487 (N.J. Ch. Div. 1967).

In this matter, the Court will use the "Blasko Test" to evaluate whether the Second Church has standing under the special interest doctrine. The "Blasko Test" is premised on a comprehensive review of the law and comports with the principles developed and expanded upon by our sister courts. Cf. Robert Schalkenbach Foundation, 91 P.3d at 1026. By balancing a number of factors, it allows courts flexibility of application[9] to address the myriad of factual situations that may present

[9] The Trustees suggest adoption of Section 6.05 the Tentative Draft American Law Institute's Restatement of the Law Charitable Nonprofit Institutions defining a "Private Party with a Special Interest for the Purposes of Standing (Approved May 22, 2017)." See *Trustees' Memorandum Concerning the Issue of Standing* at 9 (Index #197). Section 6.05 sets forth a five-part test and requires that all conditions be met. Id. The Court will not adopt that test in this case as it discerns that the flexibility of the Blasko Test better suits the pursuit of a just outcome. That said, even if the Court used Section 6.05 for evaluative purposes, the outcome would be the same.

themselves in the realm of charitable trusts.[10] Importantly, the Court's application of this test allows it to properly focus on the "key consideration" of whether the plaintiff has a "justiciable interest" distinct from the public at large that justifies application of the special interest exception. Cf. Federation for World Peace, 129 A.3d at 244. As such, it comports with New Hampshire common law directing that a "mere general interest" is insufficient to confer standing. Petition of Lath, 169 N.H. at 621; cf. Clipper Affiliates v. Checovich, 138 N.H. 271, 277 (1994). Consequently, the Court proceeds to determine whether the Second Church has standing under the Blasko Test. See Blasko on Standing at 61-76.

(1) Extraordinary Nature of Acts/Remedy

In this matter, the Second Church seeks a number of fairly extraordinary remedies. They seek to object to currently pending accountings and re-open over twenty-years of accountings allowed by the Probate Division without meaningful objection by the DCT and no prior contemporaneous attempt to object on the part of the Second Church or any other potential beneficiary. It also seeks appointment of an independent trustee, and in so-doing, implicit reconsideration of a 1949 Order of the Probate Court. Finally, they seek to object to the *Assented-to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act* which was submitted by the Trustees after consultation with the DCT.

In each of its requests, the Second Church seeks to undo prior court orders and suggests remedies that the DCT has not chosen to adopt despite the Second Church's

[10] It is this lack of flexibility that convinces the Court that it is unwise to narrowly apply the special interest doctrine, and as such, it rejects the approach used in Weaver, 680 N.E.2d at 923.

informative and thorough *amicus* submissions that the Court assumes the DCT has reviewed. As such, it appears to the Court that the Second Church seeks standing as it disagrees with the judgment of the DCT, who is granted authority to represent their interests. See generally, RSA 7:19-20; Attorney General by Anderson v. Rochester Trust Co., 115 N.H. 74, 76 (1975); Petition of Burnham, 74 N.H. at 494; but cf. Concord Nat. Bank v. Town of Haverhill, 101 N.H. at 419. Simply because a potential charitable beneficiary disagrees with the judgment of the DCT is not sufficient to justify standing. Cf. Kapiolani State Park Pre'n Soc, 751 P.2d at 1025 (HI 1988)(standing conferred when Attorney General does not take action). Consequently, this factor weighs against a finding of special interest standing.

(2) Bad Faith, Fraud or Misconduct

While the Second Church has provided a thorough history of sometimes sloppy management by the trustees, in most cases, the complained-of accountings have been allowed by the Court without objection by the DCT. It is true that the Trustees did not, for many years, comply with Judge Hampe's 2001 Order requiring independent audits, however, that fact was known and was not objected to by the DCT and implicitly approved by the courts. Certainly, ignoring the 2001 Court Order amounts to misconduct on the Trustees' part.

The Court does not find, however, sufficient evidence of outright fraud or bad faith. The Second Church offers conclusory examples of bad faith on the part of the Directors-Trustees, including "shutting down branch churches" and going so far as to suggest that they have attempted "to wipe [the] Second Church off the face of the earth." See *Memorandum Concerning Standing of the Second Church In Response to*

Order of November 6, 2017 at 26 (Index #304). These assertions, however, lack sufficient factual underpinnings on which to support a finding of fraud or bad faith. Cf. generally, Lamprey v. Britton Const., Inc., 163 N.H. 252, 262-263 (2012); Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 449 (2002)(insufficient to allege fraud in general terms). As such, the Court finds this factor is neutral in its analysis of standing.

(3) Attorney General Participation/Effectiveness

As noted supra, our statutes and common law empower the DCT to represent the public and potential beneficiaries of New Hampshire Charitable Trusts. See generally, RSA 7:19-20; Attorney General by Anderson, 115 N.H. at 76; Petition of Burnham, 74 N.H. at 494; but cf. Concord Nat. Bank, 101 N.H. at 419. As the authors of Blasko on Standing recognized, "[a] court's evaluation of the availability and effectiveness of the attorney general . . . will weigh heavily in its decision to grant or deny standing to a private party." Id. at 70. As the DCT himself recognized, when "an attorney general adopts a neutral position on pending litigation brought by a charity . . . unnamed beneficiary standing may be appropriate." *DCT's Memorandum Concerning Standing of Second Church of Christ, Scientist* at 9, citing Coffee v. William Marsh Rice Univ., 403 S.W.2d 340, 341-342 (Tex. 1996); see, e.g., Robert Schalkenbach Foundation, 91 P.3d at 1028 (standing may be appropriate where "lack of enforcement by the Attorney General is due to a conflict of interest, ineffectiveness, or lack of resources").

Certainly, during the long history of these trusts, the quality and thoroughness of the DCT's performance of his oversight duties has been mixed, and at times, arguably deficient. However, during the pendency of the present dispute, the DCT has been an

active participant, importantly identifying the "embedded conflict" due to the dual role of the Trustees as Directors of the Mother Church and Trustees, and suggesting ways to mitigate the effect of that embedded conflict on the interests of potential distributees. As such, this important factor does not support standing on the part of the Second Church. Certainly, the Court continues to encourage it to share information with the DCT, and, should the present diligence diminish to the detriment of the Trusts, the Court could revisit the standing issue.

(4) Nature of Benefitted Class

As noted supra, one purpose of tasking the DCT with the authority to represent the interests of the public and potential charitable distributees is that the class of persons with an interest may be "large and shifting" and thus a charity may need protection from costly and "vexatious litigation that would result from recognition of a cause of action by any and all of a large number of individuals who might benefit incidentally from the trust." Hooker, 579 A.2d at 612. Consequently, as Blasko on Standing observes, special interest standing is appropriately granted to a litigant that is "a member of a small identifiable class that the charity is designed to benefit.". Here, income from the Clause VIII Trust is to be utilized for the purpose of "effectually promoting and extending the religion of Christian Science as taught by me." It is undisputed that the Second Church is one of over 1,400 worldwide branch churches that although "identifiable," is not small by any measure, and as such, the potential for vexatious litigation is heightened, and this factor weighs against standing.

(5) Other Case Specific Considerations

This factor looks at the "social desirability" of allowing special interest standing. Blasko on Standing describes it as instances "the general policy concern that charities not be harassed by suits brought by a near infinite number of potential beneficiaries . . . gives way to a court's concern that an improper action will not be challenged." Although in this matter the Court remains concerned about the embedded conflict, it does not conclude that the claim that Second Church is "well positioned to monitor and enforce the terms of the Trusts" due to its status as a branch church and knowledge of the religion, *Memorandum Concerning Standing of the Second Church of Christ, Scientist of Melbourne (Australia), in Response to Order of November 6, 2017* at 34 (Index #304), weighs heavily in its determination of standing. As noted supra, the Second Church is encouraged, and in fact has acted, to share its perspective with the DCT, and, where appropriate, as an *amicus curiae* in this Court. The DCT has acted on that information, and as such, the social desirability of special interest standing is diminished.[11]

Consequently, the Court finds that the Second Church has not satisfied its burden to demonstrate that it qualifies under the special interest exception to justify standing in this matter, at this time, to: object to the accountings, see Index ##292-95; object to the *Assented-to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act*, see Index #281; petition for appointment of an independent trustee, see *Motion to Appoint an Independent Trustee* (Index #303); or seek to reopen accountings previously

[11] The Court observes, however, that should the DCT be unable or unwilling to monitor the management of the Trust(s), it will entertain re-evaluation of the standing issue. See e.g. Robert Schalkenbach Foundation, 91 P.3d at 1028. Indeed, as noted supra, the DCT has advised that the Second Church may have standing should he take a neutral stand on controversies between potential beneficiaries and the Mother Church/Trustees. See *DCT's Memorandum Concerning Standing Of Second Church of Christ, Scientist* at 9 (Index #252)(where "an attorney general adopts a neutral position on pending litigation brought by a charity[,] . . unnamed beneficiary standing may be appropriate.")(citing Coffee v. William Marsh Rice Univ., 403 S.W.2d 340, 341-42 (Tex. 1966).

allowed by the Probate Division. See *Motion to File a Brief Amicus Curiae* at 9-18 (Index #282).[12]

C. *Assented-to Motion to Amend 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act*

The Court now considers the Trustees' *Assented to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act*. See Index #281. The Trustees reached an agreement with the DCT to "amend" Judge Cushing's 1993 Order approving a *Stipulation* between then-DCT William B. Cullimore and the trustees of the Clause VIII Trust directing that income from that trust be used first for repairs on the Mother Church and then to support of church doctrine. In the *Assented-To Motion*, the Trustees state that the primary purpose of the Clause VIII Trust is to "more effectively promot[e] and extend[] the religion of Christian Science as taught by me." Id. at 2-5. They seek an order that the Court "restore the original intent" of the Clause VIII Trust directing them to distribute trust income to "third party recipients" chosen by the Trustees, but not as part of programs offered by the Mother Church. Id. at 6. Distributions may be used for church repairs, but only after approval by the DCT. Finally, the Mother Church will no longer be a permissible beneficiary of the Trust. Id.

The Trustees also seek an order directing conversion of both Trusts to unitrusts under the Uniform Principle and Income Act ("UPIA"), see RSA 564-C:1-106(b), id. at 6-

[12] The Court notes that even if the Second Church had standing to seek re-opening of many years of prior accountings, it would not be inclined to grant that relief. Although the Second Church has alleged mismanagement of the Trusts, it has not, heretofore, objected to the accounts filed. Prior courts have reviewed the accounts, as presumably had the DCT, and as such it is not inclined to reopen them. Going forward, the accounts will be audited, and, if the DCT is unable or unwilling to undertake a proper review, the Second Church may have standing to intervene and object.

7, reserving powers to distribute principal from the Clause VI Trust "as they may deem best," and finally, adoption of the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"), see RSA chapter 292-A, for the larger of the two trusts, the Clause VIII Trust. Id.

The Second Church filed a *Motion to File a Brief Amicus Curiae* with the *Amicus* brief attached, see Index #282, seeking submission of the amicus brief in which it addresses the relief sought in the *Assented-To Motion* and additionally sets forth alleged misdeeds/self-dealing by the Trustees/Directors of the Mother Church. Id. As a preliminary matter, the Court must determine whether it will consider the Second Church's *Amicus* brief. As set forth in prior orders, see Order dated May 4, 2017 (Index #274), the rules of the Circuit Court-Probate Division do not address submission of *amicus curiae* briefs. However, even if the Probate Division rules are silent, it has been recognized that "[p]ermission to appear as amici curiae . . . rests in the sound discretion of the trial court." Witty v. Planning & Zoning Comm'n of Town of Hartland, 784 A.2d 1011, 1018 (2001)(Conn. Ct. Ap. 2001); see, e.g., Parsons v. State, Dep't of Soc. & Health Servs., 118 P.3d 930, 934 (2005)(Wash. Ct. App., Div. 1, 2005); State ex rel. Com'r of Transp. v. Med. Bird Black Bear White Eagle, 63 S.W.3d 734, 758 (Tenn. Ct. App. 2001)("courts have inherent authority to appoint an amicus even in the absence of a rule or statute")(collecting cases). New Hampshire courts recognize the useful role *amici* can play in assisting courts to reach the proper result. See e.g. In re Peterson's Estate, 104 N.H. 508, 510 (1963)(courts are "not averse to wisdom in any form, from any source" (quotations omitted)). Parties seeking to submit *amicus curiae* briefs, however, "bear the burden of demonstrating that they specifically could contribute

expertise and arguments not presented by the parties." 4 AM. JUR. 2D *Amicus Curiae* §3 (Supp. 2017).

Although the Court previously declined to consider the Second Church's *amicus* submissions as it was able to make its determination without assistance from the Second Church, see Order dated May 4, 2017 (Index #274), given the issues presented by the *Assented-To Motion*, it deems it prudent to accept and consider the *amicus* submission of the Second Church. Although it agrees with the Trustees that it is likely that the Second Church has provided information to the DCT, see Trustees' *Objection to Motion for Leave to File Brief Amicus Curiae* at 2 (Index #285), it does not agree that no further expertise is needed to assist the Court with understanding and ruling on the *Assented-To Motion*. The DCT's submission, while demonstrating an understanding of the Trusts and New Hampshire laws governing investment of institutional/endowment funds, is not as comprehensive as that of the Second Church, and as such the Court finds review of the *Brief Amicus Curiae* assistive. As such, the Court **GRANTS** the *Motion to File Brief Amicus Curiae* filed in response by the Second Church. See Index #282.

In its submissions, the Second Church suggests that the 1993 Order be vacated as it argues that the *Motion to Amend* is an admission that the trustees "have failed to safeguard the Clause VIII Trust for more than two decades." *Brief Amicus Curiae* at 14. They also assert that the proposed restrictions do not safeguard the trust and are insufficient to deal with the embedded conflicts. Id. at 14-16. They seek appointment of an independent trustee and investigation into prior accountings submitted to the Court. Id. at 17-18.

The DCT subsequently filed a *Memo in Support of Trustee's Motion*, see Index #284, in which he argues that the agreement he reached with the Trustees restores the original intent of the donative provisions of the Mary Baker Eddy testamentary trusts, namely, to support worldwide dissemination of church doctrine. Id. at 8. As to an independent trustee, he states that the Trustees alleged that forcing them to appoint an independent trustee would violate their prerogative to control distributions of a religious nature, and that he "does not wish to test the limits of the application of the Free Exercise Clause of the First Amendment to the qualifications of Trustees for a religiously oriented Trust." Id.

The DCT also explains the reasons for seeking conversion of both trusts to unitrusts under the UPIA and to make the Clause VIII Trust subject to the UPMIFA. Id. at 9-11. Essentially, the DCT opines that the asset management provisions of UPIA and the UPMIFA, see RSA chapter 292-A, are more applicable to the long term needs of the Trusts, as both the UPIA and UPMIFA would allow the Trustees to choose investments vehicles that balance the twin goals of capital appreciation and income production, rather than "a focus on investments that produce adequate current income." See *Memo in Support of Trustee's Motion* at 10 (Index #283). In order for UPMIFA and the UPIA to apply, however, the DCT contends that both Trusts must be converted to unitrusts, id., see RSA 564-C:1-106(b), to allow for application of the "total return and distribution" requirements of RSA 564-C:1-106(d) that usually target long-term growth strategies. Id. He recommends subsequent application of UPMIFA to the Clause VIII Trust so that the trustees "may apply to the court for permission to use" different distribution requirements of UPMIFA set forth in RSA 292-B:3-:7. Id.; compare RSA

564-C:1-106(d)(3)(establishing a "payout provision" between 3%-5%) with RSA 292-B:3-:7 (allowing for flexible asset accumulation/distribution with a 7% appropriation for expenditure deemed presumptively imprudent). Notably, the DCT does not recommend application of the UPMIFA to the smaller trust, asserting that it "could result in additional accounting requirements" and that the Trustees wish to retain the right to distribute principal of the Clause VI Trust as they see fit. See id. at 11.

In response, the Second Church filed a *Motion for Leave to Reply*, and a *Response to the Objection*. See Index ##286-287. The Second Church alleges that the DCT "has overlooked and misinterpreted" certain aspects of church history and thus has improperly sanctioned conversion of the Clause VIII Trust to a unitrust and sought application of certain provisions of UPMIFA. It also argues that the proposed resolution is "fundamentally flawed" because it does not cure the "embedded conflict;" ignores the intent of the trust(s); and does not account for, and allow recovery of losses from, prior alleged financial transgressions of the trustees. Finally, it argues that unitrusts cannot be governed by the UPMIFA as it is not an "endowment fund" subject to that chapter.

The Court **GRANTS Prayer A of** the *Assented-To Motion*, subject to certain conditions set forth infra. It agrees with the Trustees and the DCT that under the 1993 Order, one of the primary purposes of the Clause VIII Trust, namely, to "more effectively promot[e] and extend[] the religion of Christian Science as taught by me," is not fully realized. It is well-settled that the intent of the testator/settlor is the veritable North Star guiding a court when it is interpreting a will and testamentary trusts. King v. Onthank, 152 N.H. 16, 18 (2005)(intent of testator is the "sovereign guide"); see, e.g., Shelton v. Tamposi, 164 N.H. 490, 495 (2013)(intent of settlor is "paramount"). "Similarly, it is the

[testator's/] settlor's intent, as ascertained from the language of the entire instrument, which governs the distribution of assets under a [testamentary] trust." King, 152 N.H. at 18. Courts "determine that intent, whenever possible, from the express terms of the [instrument] itself." Shelton, 164 N.H. at 495. "[I]f no contrary intent appears in the will, the words within the will are to be given their common meaning . . . clauses in a will are not read in isolation; rather, their meaning is determined from the language of the will as a whole." In re Clayton J. Richardson Trust, 138 N.H. 1, 3 (1993). Finally, testators/settlors are presumed to understand the import of the words *used* in the instrument, see, e.g., Blue Ridge Bank & Trust, Co. v. McFall, 207 S.W.3d 149, 157 (Mo. App. W.D. 2006); and similarly, testators/settlors have been found to understand how to include limiting language in a will. See Cowan v. Cowan, 90 N.H. 198, 201 (1939). Here, the simple terms of the Clause VIII testamentary provisions provide for two categories of distributions: church repair and "promoting and extending the religion of Christian Science as taught by me." As noted supra, the Glover v. Baker, 76 N.H. 393 (1912), Fernald v. First Church of Christ, Scientist, in Boston, 77 N.H. 108 (1912), and Chase v. Dickey, 99 N.E. 410 (Mass. 1912) cases reviewed the Clause VIII testamentary provisions and deemed "promoting and extending" to be an important purpose of the Clause VIII Trust. The 1993 Order upends this intent, and, since the terms of the trust should be given full realization,[13] the Court is comfortable partially amending that order to the extent it gave priority to church repair. However, in light of the conditions that gave rise to the 1993 Order and the embedded conflict, the Court agrees with the DCT that certain conditions should be in place, namely: (1) any

[13] In addition, the parties to the Stipulation giving rise to the 1993 Order agree to partially amending that order.

distributions for repairs need to be disclosed to, and approved by, the DCT; and (2) the Mother Church may not receive distributions intended to "promote and extend" directly or for its programs, rather, they will be distributed to third parties; and (3) availability of those funds/potential distributions will be published prominently in the *Christian Science Monitor*. The Court notes that the Second Church argues that under this arrangement the embedded conflict will still be present as the Trustees, who are also Directors of the Mother Church, will decide which institutions receive the income from the trust(s) and thus can exclude branch churches it does not favor. The Court, however, cautions the Trustees that should they endeavor to unfairly distribute funds to those entities in their favor or withhold distributions from those they would "punish," they risk violating the specific intent of Mrs. Baker Eddy that distributions be made to "more effectually" promote and extend the Christian Science religion and their fiduciary duty of impartiality. See generally, RSA 564-B:8-803. In order to assist the DCT with monitoring the distributions to third parties in accordance with the agreement between the DCT and the Trustees, and this Order, the Trustees are further **DIRECTED** that they must furnish the DCT, along with the annual audited accounts, a schedule of recipients of Clause VIII distributions and provide affidavit(s), under oath, that these distributees are in fact "third party recipients" and not affiliated with the Mother Church.

The Court now addresses the request that it approve conversion both Trusts to unitrusts under the UPIA, see RSA 564-C:1-106(b), id. at 6-7, reserving powers to distribute principal from the Clause VI Trust "as they may deem best," and adoption of certain provisions of UPMIFA, see RSA chapter 292-A, for the Clause VIII Trust. Id.

RSA 564-C was re-enacted in 2006 to establish a set of rules to, inter alia, assist trustees with the determination of whether receipts or distributions are from "income" or "principal." See generally, Michelle M. Arruda and William F.J. Ardinger, The Policy and Provisions of the Trust Modernization and Competitiveness Act of 2006 N.H. Bar J. Fall 2006. RSA Chapter 564-C enables a trustee to convert a trust to a "unitrust" and seek a total return on investments in the trust in order to foster long term asset growth targeted to the intent of the trust "without violating the duty of impartiality [as set forth in the NHTC] and without running afoul of, and in fact better able to satisfy, the prudent investor rule." Id.; see generally, UNIFORM LAWS COMMISSION, *Uniform Principal and Income Act, Prefatory Note*, 3-4 (Feb. 9, 2009)(discussing tension between "modern investment theory" and "traditional income allocation" approaches to trust asset management).

The UPIA authorizes a trustee, subject to the terms of the trust, to convert a trust to a unitrust provided that certain requirements are met. See RSA 564-C:1-106(a). In addition, a trustee or qualified beneficiary may petition a court to authorize conversion to a unitrust, and directs that: "[t]he court shall approve the conversion or direct the requested conversion if the court concludes that the conversion will enable the trustee to better carry out the intent of the settlor and the purposes of the trust." RSA 564-C:1-106(b)(3).

As discussed infra, the Clause VI Trust was established to assist with "free instruction for indigent, well-educated, worthy Christian Scientists", and multiple courts, including the New Hampshire Supreme Court, have concluded that with respect to the Clause VIII Trust, "[t]he testatrix gave the bulk of her property in trust to be devoted and

used for the purpose of promoting and extending the religion of Christian Science as taught by her." Glover, 76 N.H. at 401. She intended "to create a public trust" supervised by this Court, with the intent of "promoting and extending" her religion "to all parts of the world." Fernald, 77 N.H. at 109. The Massachusetts Supreme Judicial Court observed that Clause VIII "was the founding of a trust of comprehensive scope for the upbuilding of the sect which the testatrix made the object of her bounty." Chase, 99 N.E. at 414. After consideration of the submissions by the DCT, Trustees, and Second Church, the Court agrees with the DCT that an investment plan that properly balances returns for capital appreciation and income, while fostering long term growth of the trust, will enable the Trustees to continue to carry out Mrs. Baker Eddy's century old intent to support the education of Christian Scientists and the broad design to carry out a "most catholic missionary effort, both as to territory, peoples *and times*. . . ." Chase, 99 N.E. at 414. Consequently, the Court **GRANTS Prayer B** of the *Assented-To Motion* seeking court approval of conversion of the Trusts to unitrusts under RSA chapter 564-C.

However, it is unable to likewise to grant the request make the Clause VIII Trust subject to UPMIFA as it is not authorized to do so pursuant to the plain language of the statute. Although adoption of UPMIFA may allow the Trustees more flexibility in managing trust assets to effectuate the same purposes that allow for conversion to unitrusts, the Court may not authorize that request without proper statutory authority. It is well-established that Courts determine the authority granted to it in a statute by analyzing its plain terms. See generally e.g., Hogan v. Pat's Peak Skiing, LLC, 168 N.H. 71, 73 (2015). Courts "interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the

legislature did not see fit to include." Id. (quotations omitted). Here, the investment/distribution provisions of UPMIFA set forth in RSA 292-B:3-:7 apply to an "endowment fund" or "institutional fund." Id. The term "endowment fund" is defined as: "an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis." RSA 292-B:2, II. An "institutional fund," is defined as "a fund held by an institution exclusively for charitable purposes." RSA 292-B:2, V. The notes to an identical provision in the Uniform Act[14] clarify that an institution "includes a trust organized and operated exclusively for charitable purposes, but only if a charity acts as trustee."[15] UNIFORM LAWS COMMISSION, *Uniform Prudent Management of Institutional Funds Act*, §2, comments at 9 (Nov. 8, 2007). The statute expressly does not include a "fund held for an institution by a trustee that is not an institution." RSA 292-B:2, V(b). The notes to the Uniform Act state: "[t]he term institutional fund includes any fund held by an institution for charitable purposes, whether the fund is expendable currently or subject to restrictions. The term does not include a fund held by a trustee that is not an institution." UNIFORM LAWS COMMISSION, *Uniform Prudent Management of Institutional Funds Act*, §2, comments at 9 (Nov. 8, 2007). As such, even if the Clause VIII Trust is converted to a unitrust, the Court was not granted authority by the Legislature to adopt certain provisions of UPMIFA for *this trust*. It must presume that the Legislature did not intend for UPMIFA to apply here as it did not include a testamentary trust with individual trustees as one of the qualifying

[14] The New Hampshire Supreme Court has directed courts to look to the comments of a model act for guidance as to its meaning. See, e.g., Rabbia v. Rocha, 162 N.H. 734, 737-38 (2011).

[15] An "institution" includes "a person, other than an individual, organized and operated exclusively for charitable purposes." RSA 292-B:2, IV(a). A "person" in turn can include a "trust." RSA 292-B:2, VI. However, the notes to the Uniform Law direct that: "the definition of person includes trusts, but only trusts managed by charities can be institutional funds. UPMIFA does not apply to trusts managed by corporate trustees or by individual trustees." UNIFORM LAWS COMMISSION, *Uniform Prudent Management of Institutional Funds Act*, §2, comments at 14 (Nov. 8, 2007).

trusts.[16] Of course, the Legislature "is free, subject to constitutional limitations, to amend the statute," Hogan, 168 N.H. at 74 (quotations omitted), however, this Court cannot, by court order, effectuate the statutory change the DCT and Trustees implicitly request. As such, the Court **DENIES Prayer C** of the *Assented-To Motion*. See Index #281.

D. Motion to Appoint Independent Trustee

In November, 2017, the Second Church filed a *Motion for Appointment of an Independent Trustee*, see Index #303, to which the Trustees and DCT objected, see Index ##306-309, and the Second Church responded. See Index #313. As discussed supra, the Second Church lacks standing to seek appointment of an independent trustee at this time. The Court, however, pauses to make clear that it is not inclined, at this time, to appoint an additional trustee *in the absence of a vacancy* on the current board of trustees, even if standing was conferred.

As the Court observed in its Order dated May 4, 2017 at 7 (Index #274), "[w]hile the authority of the probate court to reopen its decrees is undoubted, it will not be exercised except for good cause." Indian Head Nat. Bank v. Theriault, 96 N.H. 23, 27 (1949); see also Merrimack Valley Wood Prod., Inc. v. Near, 152 N.H. 192, 203 (2005)("[T]here can be no question of the inherent power of the Court to review its own proceedings to correct error or prevent injustice"); Adams v. Adams, 51 N.H. 388, 396 (1872)("[a]s a general proposition, courts have power to set aside, vacate, modify, or amend their judgments for good cause shown"). Similarly, "[w]hen asked to reconsider a holding, the question is not whether we would decide the issue differently de novo, but

[16] The Court observes that the Legislature is very experienced in supplementing or amending statutes applicable to trusts. See, e.g., 2017 LAWS Ch. 257 (approximately sixty-eight page piece of legislation revising the New Hampshire trust laws).

whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed." Ford v. New Hampshire Dep't of Transp., 163 N.H. 284, 290 (2012)(quotations and brackets omitted).

In 1949, Judge Lord refused to fill the vacancy created by the death of Josiah E. Fernald, and decreed that the five surviving trustees would constitute the trustees of the Clause VI and Clause VIII Trusts. See *DCT Memorandum in Support of Trustee's Motion to Amend 1993 Order and To Convert Trusts to Unitrusts*, Exh. 2 (Index #281). Since that time, numerous probate courts have granted motions to fill a vacancy with a director of the Mother Church without objection. See, e.g., Index ##32, 41. Additional orders have issued pursuant to stipulations between the DCT and Trustees where the Trustees were alleged to have failed to act impartially. See *DCT Memorandum Concerning Standing of Second Church of Christ, Scientist*, Exhs. 1-2 (Index #252). Although the Second Church has alleged, and the DCT has recognized, that there remains an embedded conflict between the Trustees and the Directors of the Mother Church, the Court notes that recently the DCT has taken affirmative steps to mitigate that conflict. This Court has today, and in previous orders, directed additional protections be put in place to ensure that the Trustees honor their obligations to treat all potential beneficiaries impartially. In addition, the Court has accepted, and reviewed to the extent that they do not seek affirmative relief, *amicus* submissions from the Second Church. As such, it does not, at the present time, find that there is good cause to effectively vacate Judge Lord's 1949 Order by adding a sixth member to the board of Trustees. That said, it will continue to encourage the Second Church to provide the DCT with any information it deems helpful to the DCT in its oversight responsibilities

and, as appropriate, it will continue to consider acceptance of *amicus* submissions. Finally, it notes that nothing in Judge Lord's order requires that future vacancies be filled by Directors of the Mother Church.

E. Accountings

The Trustees submitted independently audited accountings for both the Clause VI and Clause VIII Trusts for the period ending March 30, 2017. See Index ## 292-295. The Second Church filed an objection, see Index #300, seeking, inter alia, additional information concerning the details of certain entries, the independent auditor's work papers, and justification of the Trusts' investment policies. See Index #300.[17] The Trustees responded, see Index #302, alleging that the Second Church lacks standing to object. Id. They also stated that the DCT "reviewed in detail the Trustees' investment policies." Id. The DCT has had the opportunity to review the independently audited statements, and, as discussed supra, has encouraged changes to the management of the Trusts' investments.[18] The Court observes that the DCT has not filed an objection to accountings filed and it has reviewed them.

The Clause VI and Clause VIII Accountings for the period ending March 31, 2017, see Index ##292, 294, are **ALLOWED**. As noted supra, the Second Church lacks standing to object, however, it is encouraged to share its concerns with the DCT after each accounting is filed. The Court encourages the Trustees to share data with the

[17] The Court notes that although the Second Church implicitly seeks re-opening of prior years' accountings, those have been approved without timely objection by the DCT and Second Church. It is disinclined to re-open decades of accountings when either the Second Church could have registered its objections with the DCT, and in the absence of response, likely would have had standing in this Court, or DCT could have objected in a timely fashion. Neither of the acts occurred, and as such, the Court will not re-open those accounts at this time.

[18] The Court also notes that in 2016, significant changes to the management of the Trusts' assets and reporting were made after the DCT's objections were resolved by agreement and further restrictions were instituted by the Court. See Order dated April 4, 2017 at 2-9 (Index #274).

DCT going forward and reminds them of their obligation to submit independently audited statements.

F. Other Rulings

In light of its orders set forth supra, as a matter of housekeeping, the Court **ENTERS** the following additional **ORDERS:**

- The Trustees' *Assented-to Motion for Extension of Time to File an Objection to the Second Church's Motion for Appointment of an Independent Trustee*, see Index #306 is **GRANTED.**
- The Second Church's *Status Report and Request for Time for Discovery*, see Index #288, is **DENIED AS MOOT**.

SO ORDERED

Dated: 3/19/2018

David D. King, Judge