

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

TRUST DOCKET  
6<sup>TH</sup> CIRCUIT COURT  
PROBATE DIVISION

IN RE: BEATRICE C. SKILLEN 1995 TRUST AGREEMENT

320-2018-EQ-0074

ORDER ON MOTION TO DISMISS

Presently before the Court is a *Motion to Dismiss*, see Index #16, filed by Respondents Richard Skillen, as beneficiary and trustee of the Beatrice C. Skillen 1995 Trust Agreement (the "Beatrice Trust"), Charlotte Croft, Richard J. Croft, Jr., Whitney Skillen, and Olivia Skillen, (collectively the "Respondent-Beneficiaries")<sup>1</sup> seeking dismissal of Petitioner Maisley Paxton's *Petition to Set Aside Certain Amendments to the Beatrice C. Skillen 1995 Trust Agreement*, (the "*Petition*"), see Index #1, on the basis that it was not timely filed. The Petitioner filed an *Objection*, see Index #18, to which the Respondent-Beneficiaries replied, see Index #22, and the Petitioner filed a *Sur-Reply*. See Index #23. The Court held a hearing on the *Motion to Dismiss* and to address scheduling the matter as necessary on July 2, 2018. See Index ##20, 24. Attending the hearing were: Attorney Courtney H.G. Herz and Attorney Nicole AnnMarie Faille on behalf of the Petitioner; and Attorney Barry Charles Schuster on behalf of the Respondent-Beneficiaries. After consideration of the pleadings and arguments made

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<sup>1</sup>The above-named Respondents are all beneficiaries of the Beatrice Trust. In addition, the *Petition* names eight additional individual or institutional beneficiaries and an institutional trustee as "interested persons." These eight have not filed pleadings responding to the *Motion to Dismiss*, and consequently, the Court, for purposes of efficiency, will refer to the interested parties who *have filed* pleadings as the "Respondent-Beneficiaries" even though others technically are respondents and beneficiaries as well.

by counsel at the hearing, the *Motion to Dismiss*, see Index #16, is **GRANTED**.<sup>2</sup> The Clerk is **DIRECTED** to close the file as is customary under Circuit Court – Probate Division – Rule 74.

In ruling on a motion to dismiss, this court must determine “whether the plaintiff’s allegations are reasonably susceptible of a construction that would permit recovery.” Harrington v. Brooks Drugs, Inc., 148 N.H. 101, 104 (2002) (quotation omitted). In doing so, the Court must “assume the truth of the facts alleged in the plaintiff’s pleadings and construe all reasonable inferences in the light most favorable to [them].” Id. (quotation omitted). “Although the trial court’s decision on a motion to dismiss is normally based solely on the allegations in the pleadings, if additional evidence is submitted, without objection, the trial court should consider it when making its ruling.” Delaney v. State, 146 N.H. 173, 175 (2001)(quotations omitted). Because a motion premised on the statute of limitations/statute of repose<sup>3</sup> constitutes an affirmative defense, the defendant bears the burden of proving that it applies in a given case. Donnelly v. Eastman, 149 N.H. 631, 633-34 (2003); Glines v. Bruk, 140 N.H. 180, 181 (1995).

The Court notes the following relevant facts as gleaned from the Petitioner’s *Petition* for purposes of this order. See, e.g., Suprenant v. Mulcrone, 163 N.H. 529, 530

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<sup>2</sup> As a matter of housekeeping, the Court observes that it had earlier deferred consideration of the *Motion to Deem Service on All Interested Parties Completed*, see Index #15, filed by the Petitioner in order to determine whether the Director of Charitable Trusts (the “DCT”) should be noticed and joined in the matter. See Order dated June 11, 2018 (Index #20). The DCT has since filed an appearance. See Index #25. Consequently, the Court, to the extent it may be necessary should there be an appeal, **GRANTS** the *Motion to Deem Service on All Interested Parties Completed*. See Index #15.

<sup>3</sup> Although the parties indicate that the statute at issue in this matter is a statute of limitation, it appears that it may in fact be a statute of repose. Cf. In re Wintersteen Revocable Trust Agreement, 907 N.W.2d 785, 793-94 (S.D. 2018).

(2012). The Court also relies on the trust documents submitted without objection for this Court's review. See Delaney, 146 N.H. at 175.

Beatrice died on December 18, 2014 at age 97. The original Beatrice Trust was executed in 1995 and amended in 2000 (the "First Amendment"). The First Amendment, drafted by Attorney Wells, provided that upon her death, the Petitioner and her uncle, Respondent/Trustee Richard Skillen would share equally in the "majority of the estate." *Petition* ¶ 22. The Trust was amended two additional times in April 2006 and July 2006 – by different attorneys – with each amendment dramatically changing Maisley's share of the trust. The *Petition* alleges that Richard falsely told Beatrice in early 2006 that Maisley had stolen from her, and accordingly the Second Amendment, drafted by Attorney Adams, reduced her share. Much of that reduction was reinstated in the July 2006 Third Amendment, drafted by Attorney Wells. In April 2007, Beatrice executed a Fourth Amendment, drafted by a third lawyer, Attorney Dunn, dramatically decreasing Maisley's share of the estate. In June 2007, a Fifth Amendment was executed that was substantially similar to the Fourth. It is further alleged that Richard attended the meetings with Beatrice and Attorney Dunn. Notably, the Beatrice Trust, in all iterations, was revocable by the settlor, Beatrice, during her lifetime. See, e.g., Original 1995 Beatrice Trust Agreement Art. One; Fifth Amendment to the Beatrice Trust Agreement §19 (Index #7).

In April 2007, Beatrice, then nearly 90 years old, executed a Durable Power of Attorney (DPOA) drafted by Attorney Dunn, naming Richard as her agent. It is alleged that while acting as agent, Richard improperly gifted to his daughters and himself money from Beatrice's bank accounts and improperly used her funds to make certain

renovations to property. An action was filed in Superior Court by Maisley against Richard in 2016, challenging Richard's actions as agent. It is alleged in the *Petition* that on January 19, 2018, the Sullivan County Superior Court issued an order finding Richard in breach of his duties as agent for writing checks to himself and adding his daughter to an account as designated payee. *Id.* ¶34. Maisley, however, entered a voluntary non-suit on claims concerning funds spent on property renovations just before trial.

The case before this Court was brought on February 22, 2018 by the Petitioner. The *Petition* alleges fraud and undue influence by Richard, and seeks to invalidate the Second, Fourth, and Fifth amendments to the Trust. It seeks reinstatement of either the Third or First Amendment. See Index #1. The Respondent-Beneficiaries filed a *Motion to Dismiss*, contending that pursuant to the applicable provisions of the New Hampshire Trust Code, see RSA 564-B:4-406, the Petitioner was required to file her petition three years after Beatrice's death, specifically by December 18, 2017. The Petitioner replies that the Respondent-Beneficiaries' argument is grounded in the wrong section of RSA 564-B:4-406, and under proper application of that statute, the Petitioner filed her cause of action two days before the deadline to file.

The statute in question, RSA 564-B:4-406, provides in pertinent part:

(b) A person may commence a judicial proceeding to contest the validity of a trust within the earlier of:

(1) in the case of a trust that was revocable at the settlor's death, 3 years after the settlor's death;

(2) in the case of an irrevocable trust, including a formerly revocable trust that has become irrevocable, 3 years after the trustee sent to the beneficiary a notice described in RSA

564-B:8-813(c)(3); or

(3) in the case of an irrevocable trust, including a trust that was revocable at the settlor's death or a formerly revocable trust that has become irrevocable, 180 days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, the trustee's name, address, and telephone number, and the time allowed for commencing a proceeding to contest the validity of a trust.

(Emphasis added.) The Respondent-Beneficiaries assert that the *Petition* is untimely pursuant to RSA 564-B:4-406(b)(1) since the Beatrice Trust was revocable until her death, and thus the Petitioners must have filed on or before December 18, 2017, three years after Beatrice's death.

The Petitioner objects, see Index #18, contending that because the Beatrice Trust was no longer revocable after Beatrice died, Section 4-406(b)(1) of RSA 564-B:4-406 is not applicable, and instead Section 4-406(b)(2) applies. She alleges that on February 24, 2015, the trustee, pursuant to RSA 564-B:8-813(c)(3), sent a notice to all beneficiaries as required by that statute. Id.<sup>4</sup> See *Objection* Exh. B (Index #18). Consequently, she contends that Section 4-406(b)(2) applies in this matter, and since the *Petition* was filed on February 22, 2018, it was timely. She further contends that "the date of Beatrice's death is inapplicable" since the clock began to run on February

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<sup>4</sup> RSA 564-B:8-813(c)(3) governs a trustee's "Duty to Inform and Report." It provides that:

[a] trustee of an irrevocable trust: . . . by no later than 60 days after the date the trustee acquires knowledge of the creation and initial funding of an irrevocable trust and the death of the last surviving settlor, or by no later than 60 days after the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, that the trust has been initially funded, and that the last surviving settlor has died, shall notify the qualified beneficiaries who have attained 21 years of age and those who have the rights of a qualified beneficiary of the trust's existence, of the right to request a copy of the trust instrument, and of the right to a trustee's report . . . .

24, 2015, as the Beatrice Trust was not "revocable at the settlor's death" since it became irrevocable at her death. The Respondents assert that the Petitioner's interpretation "renders [section (a)(1)] superfluous[,] since a trust whose sole settlor dies become[s] irrevocable, no reason would exist for providing the three year period of subsection (1) since subsection (2) would cover every circumstance involving a revocable trust." *Reply* at 2 (Index #22).

Resolution of this matter requires the Court to interpret RSA 564-B:4-406. In particular, it must determine whether the Beatrice Trust was "revocable at the settlor's death" such that Section 4-406(b)(1) applies, or if it qualifies as "a formerly revocable trust that has become irrevocable," such that Section 4-406(b)(2) applies. Indeed, the Petitioner admits that if the Beatrice Trust was revocable at her death, then the three year limitations/repose period ended in December 2017. *See Petitioner's Surreply to Respondents' Reply to Petitioner's Objection to Respondents' Motion to Dismiss* at 3 ¶9 (Index #23). Courts determine the meaning of a statute by analyzing its plain terms. Hodges v. Johnson, 177 A.3d 86, 93 (2017); Landry v. Landry, 154 N.H. 785, 787 (2007). In order to discern the plain meaning of a pivotal term, courts may permissibly consult the dictionary for its common definition. *See, e.g., State v. Flodin*, 159 N.H. 358, 363 (2009); Board of Water Comm'rs, Laconia Water Works v. Mooney, 139 N.H. 621, 626 (1995)(an undefined statutory term is given its "plain and ordinary meaning"). In addition, courts "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." Hodges, 177 A.3d at 93. Finally, as in all instances where it must interpret a statute based upon a uniform law, such as the Uniform Trust Code, courts properly consult the official comments to that law. Id.; see

generally, Rabbia v. Rocha, 162 N.H. 734, 737-38 (2011)(courts look to the comments of the model act for guidance as to its meaning). In fact, the notes to the Uniform Trust Code carry particular weight, as the New Hampshire Supreme Court recently reiterated that “[w]hen interpreting a uniform law, such as the Uniform Trust Code, the intention of the drafters of a uniform act becomes the legislative intent upon enactment.” Hodges, 177 A.3d at 93 (quotations omitted)(quoting In the Matter of Ball, 168 N.H. 133, 137 (2015)(interpreting UIFSA)).

The language in Section 4-406(b)(1) was included in the original version of the New Hampshire Trust Code enacted in 2004, see 2004 LAWS 130:1, as RSA 564-B:6-604.<sup>5</sup> The comments to the Uniform Trust Code explaining then Section 6-604, which mirrors the current Section 4-406(b)(1), observed: “[t]his section applies only to a revocable trust that becomes irrevocable by reason of the settlor’s death. A trust that became irrevocable by reason of the settlor’s lifetime release of the power to revoke is outside its scope.” See Uniform Laws Commission, *Trust Code – Final Act §604*, Comments at 114 (2010). It further stated that the purpose of including notice provisions was to allow “[a] trustee who wishes to *shorten* the contest period [to] do so by giving notice.” Id. (emphasis added). Accordingly, the comments to the Uniform Trust Code make clear that Section 4-406(b)(1) applies to the Beatrice Trust. Consequently, the Court concludes that Section 4-406(b)(1) sets forth the applicable repose period, and the *Petition* was late filed by more than two months.

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<sup>5</sup> When the Trust Code was amended in 2014, the language in current Section 4-405(b)(1) at issue was relocated from RSA 564-B:6-604 (governing revocable trusts only) to RSA 564-B:4-406, and Section 4-406(b)(2), upon which the Petitioner relies, was added to the code. See 2014 LAWS 195:15.

The Court does not accept the Petitioner's argument that a plain reading of the term "at" in Section 4-406(b)(1) implies that since an revocable trust such as the Beatrice Trust necessarily becomes irrevocable *when* a settlor dies, this section only applies to trusts that remain revocable after the settlor's death. First, such a plain reading is not consistent with the intent of Section 4-406(b)(1) as expressed in the uniform law, cf. Hodges, 177 A.3d at 93 (intent of uniform law drafters becomes that of the legislature upon enactment), but it would also, practically, render Section 4-406(b)(1) nearly inapplicable. Cf. id. (courts "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result"). The Court's interpretation is consistent with commentators who noted that the NHUTC "includes many provisions favorable to trust settlors, beneficiaries, and fiduciaries." Burke, S. et al., Why the Granite State Rocks at Trust Administration, 43 Est. Pln. 3, 10 (2016). This article points to RSA 564-B:4-406 as one such provision as it "limits the period in which one can challenge the validity of a trust to: . . . [t]hree years after the settlor's death for a revocable trust established during the settlor's lifetime."<sup>6</sup>

Given the clarity of the comments to the model Uniform Trust Code on the applicable statutory language, the Court need not look to the dictionary to understand the plain meaning of the statute. The Court observes, however, that despite the Petitioner's argument(s) to the contrary, see Petitioner's Surreply to Respondents' Reply to Petitioner's Objection to Respondents' Motion to Dismiss at 3-4, recourse to a

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<sup>6</sup> Although the Court's ruling is premised on an analysis of the plain language of the statute, and thus it need not make further inquiry, see, e.g., Forster v. Town of Henniker, 167 N.H. 745, 750 (2015) (unless court finds language ambiguous, it will not consult the legislative history), the Court reviewed the legislative history of the creation of the New Hampshire Trust Code, see 2004 LAWS 130 (HB 1224), and the 2014 amendments to it, see 2014 LAWS 195 (SB 289), and observes that there is nothing in that history that contradicts the Court's interpretation, nor even addresses the specific the statute of limitations/statute of repose provisions.



strict dictionary definition of the term "at" also supports this Court's interpretation of the statute.<sup>7</sup> As the Petitioner notes, "at" is used as a function word to indicate presence or occurrence in, on, or near [the event in question]." *Id.* at 3 ¶11 (quoting the Merriam-Webster Dictionary). RSA 564-B:4-406(b)(1) applies to trusts that are "revocable at the settlor's death." In this statute, "presence or occurrence in, on, or near," indicates a state of being at the precipice of the occurrence, or, as applicable here, the state of being revocable upon the settlor's death.<sup>8</sup>

Moreover, the Court must interpret Section 4-406(b)(1) in harmony with the other sections of 4-406. *See, e.g., Hodges*, 177 A.3d at 93 (courts "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result"). Notably, Section 4-406(b)(3) specifically recognizes a difference between "a trust that was revocable at the settlor's death" and "formerly revocable trust that has become irrevocable," indicating that Section 4-406(b)(1) must apply to trusts like the instant one that are revocable until the settlor's death and become irrevocable upon the settlor's death.<sup>9</sup>

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<sup>7</sup> The Court makes this observation for explanatory purposes only. It does not intend to imply that it is proper for courts or litigants to seek clarity in the dictionary when interpreting a uniform law. As noted *supra*, the better recourse is to look to the notes in the uniform law.

<sup>8</sup> For example, when one talks of being "at" the door of a house, it does not indicate being inside the house.

Moreover, the Court rejects the Petitioner's contention that because the Legislature, in RSA 564-B:5-505(b), used the term "immediately before death" when identifying a standard revocable trust, use of the term "at" in Section 4-406(b)(1) indicates a different meaning. *See Petitioner's Surreply to Respondents' Reply to Petitioner's Objection to Respondents' Motion to Dismiss* at 5-6 ¶21 (Index #23). The Court notes, however, that this interpretation ignores the clear intent as expressed in the notes to the Uniform Trust Code, and as such, it views the language in RSA 564-B:5-505(b) as simply expressing the same concept as indicated by the use of the term "at" in Section 4-406(b)(1).

<sup>9</sup> Finally, the Petitioner contends that the date the notice was sent by counsel to the Respondent-Beneficiaries to her pursuant to RSA 564-B:8-813 on February 24, 2015 triggered the start of the limitations/repose period. *See Petitioner's Surreply to Respondents' Reply to Petitioner's Objection to Respondents' Motion to Dismiss* at 4 ¶14 (Index #23). The Court observes, however, that the notice was not sent for purposes of starting a period of limitation/repose, and certainly the text of the letter does not mention it at all. Instead, this notice was in the form required, by RSA 564-B:8-813(c), namely to notify them of successor trustee Richard Skillen's name, address, and telephone number, and their right to

As such, the Petitioner had until December 18, 2017 to file the instant action. Having failed to do so, the Court concludes that the *Petition* is untimely and the *Motion to Dismiss* is **GRANTED**.<sup>10</sup>

SO ORDERED

Dated:

8/22/2018



David D. King, Judge

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receipt of certain information concerning the Beatrice Trust. See *Objection to Motion to Dismiss*, Exh. B (Index #18).

<sup>10</sup> The Court is aware that dismissal based upon application of a statute of repose/limitation results in a harsh outcome for the Petitioner. However, this is simply a matter of the Petitioner misapplying the applicable statute. Although apparently intending for many months to file the instant action, she chose to defer filing until after resolution of the Superior Court matter. One does so at their peril. Cf. *Donnelly v. Eastman*, 149 N.H. 631, 633-34 (2003)(admonishing the trial court that statutes of limitations periods should be strictly applied by the courts).