

THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

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

IN RE ALICE STEDMAN 1989 TRUST, DATED SEPTEMBER 26, 1989,  
RESTATEMENT DATED FEBRUARY 23, 2013

312-2014-EQ-00108

ORDERS

A two-day hearing was held on March 21-22, 2017 to consider a number of issues that remain outstanding in what originated as a dispute over the whether the February 22, 2013 Restatement of the Alice Stedman 1989 Trust (the "2013 Restatement")<sup>1</sup>, executed by ninety-three-year-old Alice Stedman ("Alice") nineteen (19) days before her death, should be set aside on the basis that she lacked sufficient capacity to execute it, or that it was the product of undue influence. See *Petition for Declaratory Judgment and To Impose Constructive Trust and Request for Injunctive Relief ("Petition")* (Index #1). A trial was held on the substantive claims in March 2016, after which this Court invalidated the 2013 Restatement on grounds that it was the product of undue influence exerted by the trustee of the 2013 Restatement, Claire Donahue ("Claire"). See Order dated October 27, 2015 (Index #40) (the "October 27<sup>th</sup> Order"). The Court's order was affirmed on appeal by the New Hampshire Supreme Court. See *In re Alice Stedman 1989 2013 Restatement*, No. 2015-0717 at 6 (unpublished order) (N.H. Sup. Ct. Nov. 10, 2016).

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<sup>1</sup> After invalidation of the 2013 Restatement, the operative trust instrument is the Alice Stedman 1989 Trust, as amended (the "Alice Trust"). See R's Exh. A.

Following receipt of the Supreme Court's order, this Court scheduled presentation and consideration of certain claims by the Petitioners, Stanley Stedman ("Stanley") and Tammy Soper ("Tammy") (collectively, the "Petitioners"), that it had deferred pending resolution of the appeal. See Order on Hearing On Respondent Claire Donahue's Second Amended First Accounting Dated June 23, 2016 (For the Period 3/12/13 through 11/30/15) and Third Amended Second Accounting Dated June 23, 2016 (For Period of 12/1/15 through 1/15/16) (July 18, 2016)(Index #101)("Order on Accountings"); Order on 1/10/17 Status Conference (Index #113 ); Order dated February 16, 2017 (Index #119). The issues presently before the Court for consideration are: (A) a *Petition for Surcharge*, see Index #61, concerning a \$35,000 loan by Alice to Claire's son and daughter-in-law, Michael and Lisa Donahue, see Order on Accountings at 4 (Index #101); (B) objections to the *Second Amended First Accounting* (Index #97) and *Third Amended Second Accounting* (Index #98)(collectively the "June 23, 2016 Accountings"), see Order on Accountings at 4-7 (Index #101), including payment by the 2013 Restatement of \$190,828.87 for attorney's fees incurred by Claire as trustee in her defense of it, see *Petitioners' Objection to Accounting Filed by Respondent On Or About December 23, 2015* ¶13 (Index #57); (C) *Petitioners' Motion for Instructions, Reformation and/or Modification of Paragraphs (3)B and (3)C of the Third Amendment dated April 8, 2009 to the Alice Stedman Trust Agreement*, see Index #115, and the Respondent's *Response and Partial Objection*, see Index #118; (D) an award of attorney's fees against Claire for those incurred by Stanley and Tammy in challenging the efficacy of the 2013 Restatement, see *Petition* at 12, Prayer F (Index #1); *Scheduling Order dated December*

1, 2015 at 2 (Index #44); and (E) entry of a surcharge against Claire for fees charged by the Special Trustee, Cynthia Worthen.

Non-witness participants at the hearing were: Christine M. Rockefeller, Esq. and Sarah E. Lavoie, Esq., counsel for the Petitioners; David W. Rayment, Esq. on behalf of respondent, Claire, as former trustee of the 2013 Restatement;<sup>2</sup> Special Trustee Cynthia L. Worthen, Esq.; and Lawrence M. Edelman her counsel,.

After consideration of the evidence presented,<sup>3</sup> oral argument by counsel, review of the outstanding pleadings and related orders, the Court enters the following **ORDERS**

A. The *Petition for Surcharge* (Index #61) against Claire for failing to properly inventory and account for and/or collect on the \$35,000 loan from Alice to Michael and Lisa Donahue, as a trust asset, is **DENIED**.

B. Claire is **ORDERED** to repay to the Alice Trust the \$190,828.87 in attorney's fees and costs incurred by her as former trustee in defending the 2013 Restatement, any and all other objections to the June 23, 2016 *Accountings* earlier proffered by Stanley and Tammy having been withdrawn by them before or in the course of the hearing.

Absent a sooner filed motion for the submission of amended accountings filed by the Successor Trustee that is granted, Claire shall provide the Court with written confirmation of the repayment within **sixty (60) days** of the date of the Clerk's Notice of Decision in remittance of these Orders.<sup>4</sup>

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<sup>2</sup> She was also named a former co-trustee of the Alice Trust.

<sup>3</sup> The Court observes that as set forth in its Order dated February 16, 2017, see Index #119, it received evidence only on the requested surcharge for the \$35,000 loan to Michael and Lisa Donahue, and interpretation of Section 3(C) of the 2009 Third Amendment to the Alice Trust. Id.

<sup>4</sup> Although Claire requested that this Court modify repayment to allow for partial repayment, it declines to do so at this time for the reasons set forth infra. It encourages the parties to cooperate with each other to bring this litigation to a close and to work with the Special Trustee to facilitate efficient administration, management and distribution of the Trust's assets.

C. Interpretation of Paragraph 3(C) has been resolved by stipulation. See Index #124. The stipulation is **APPROVED** and **ORDERS ARE ENTERED** in accordance with its terms and the further clarification that paragraph 2 is not to be construed as intending or requiring purchase of any item(s) of business property chosen by the "Respondent and Petitioner or the issue of a decedent by right of representation." The Petitioners' *Motion for Instructions, Reformation and/or Modification*, see Index #115, is therefore **DISMISSED AS MOOT**.

D. Claire is **ORDERED** to repay Stanley and Tammy for attorney's fees and costs reasonably incurred by them in the litigation to invalidate the 2013 Restatement. The Petitioners are **DIRECTED** to submit to the Court, and Claire, for consideration of reasonableness itemized invoices evidencing dates, activities undertaken, time allocations, billing rates and associated charges, appropriately redacted to protect attorney-client privilege, see generally, Hampton Police Ass'n, Inc. v. Town of Hampton, 162 N.H. 7, 14-16 (2011). See Cir. Ct. Prob. Div. R. 88. They shall do so **within ten (10) days** of the date of the Clerk's Notice of Decision in remittance of these Orders. The Respondent shall then be afforded **ten (10) days** from the Court's receipt of the Petitioners' billing submissions to file any objection she has based on particularized assertions of, and reasons for, claimed unreasonableness. Unless the parties are able to sooner independently reach agreement in resolution of the reasonableness of the Petitioners' incurred attorney's fees and expenses, after its review of what is received, the Court will enter an order for a hearing or directing payment, as it determines most appropriate.



E. The Court **DEFERS** consideration of and ruling on the Petitioners' request for surcharge related to the Special Trustee's fees and costs, as further explained infra.

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

#### Analysis

The Court now turns to address the claims at bar. It incorporates by reference all facts found in its October 27, 2015 Order, see Index #40, and will find additional facts as needed to resolve the specific issues before it.

#### A. Petition for Surcharge

In March 2016, the Petitioners filed a *Petition for Surcharge Against Claire Donahue*, see Index #61, as former trustee, in the amount of \$35,000, plus 3 percent interest from the date of Alice's death, for her failure to "tak[e] all steps necessary to collect" on an alleged promissory note (the "Note") of Michael and Lisa Donahue to Alice. Id. Claire responded that: she was unaware of the loan until "just before the second day of her deposition" in March 2015; Alice intended for the loan to be "confidential"; payment(s) had been made toward satisfaction of what was due on it; and that prior to her death, Alice had forgiven the remaining unpaid balance. See Respondent's Preliminary Objection to Petition for Surcharge Against Claire Donahue (Alleged \$35,000 Promissory Note) (Index #68). She alleged that she did not have any

obligation to report it as an asset or collect on the Note, as, inter alia, it had no fixed term, "at most there might be a moral obligation to pay," as the 2013 Restatement was still in effect at the time of her deposition there was no obligation on her part to collect it, and, it was unlikely that Michael and Lisa had the resources to repay it. Id.

Two months later, after the Court had scheduled a hearing to address the matter, the parties filed an *Assented-to Motion to Cancel the May 12, 2016 Hearing*, see Index #85, requesting that it decide the issue on briefs submitted by them, and witness depositions in lieu of live testimony. Id. Although the Court initially agreed to decide the issue upon submitted briefs, see id.; see also Index ##88, 89, 91, after review of those submissions it decided that it was "unable to fulfill its duty to fairly and fully consider the *Petition* without the benefit of live testimony." Order on Accountings at 4 (Index #101). Because the Supreme Court appeal was then pending, it deferred consideration of the issue until after the Supreme Court issued its ruling on the appeal. Id.

RSA 564-B:8-809 directs that a trustee has a duty to "take reasonable steps to take control of and protect the trust property." See also 564-B:8-801 (Duty to Administer, Invest and Manage Trust, and Distribute Trust Property). The comments to an identical provision in the Uniform Trust Code note that: "[t]he duty to take control normally means that the trustee must take physical possession of tangible personal property and securities belonging to the trust, and must secure payment of any choses in action." UNIF. TRUST CODE §809, cmt., citing RESTATEMENT (SECOND) OF TRUSTS § 175 cmt. a, c and d (1959). This does not mean, however, that a Trustee must collect on all debts, rather he/she need not

bring an action to enforce a claim which is a part of the trust property if it is reasonable not to bring such an action, owing

to the probable expense involved in the action or to the probability that the action would be unsuccessful or that if successful the claim would be uncollectible owing to the insolvency of the defendant or otherwise.

RESTATEMENT (SECOND) OF TRUSTS § 177 cmt. c (1959).

Failure to reasonably collect on a debt to the trust, however, may be considered breach of duty by the trustee. See RSA 564-B:8-809. A "trustee who commits a breach of trust is liable to the beneficiaries affected for . . . the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred." RSA 564-B:10-1002; In re Guardianship of Dorson, 156 N.H. 382, 387 (2007) ("When a breach of trust occurs, the beneficiary of the trust is entitled to be put in the position he would have been if no breach of fiduciary duty had been committed." (citation omitted)). "Other remedies include holding the trustee liable for any loss or depreciation in the value of the trust estate resulting from the breach of trust . . . ." Id. (citations omitted).

Damages for a breach of trust are proscribed in RSA 56-B:1002(a) as "the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach."<sup>5</sup> That said, "[a] surcharge is an equitable penalty imposed when a trustee fails to exercise the requisite standard of care and the trust suffers thereby." In re Guardianship of Dorson, 156 N.H. at 386. (citation omitted); see, e.g., In re Scheidmantel, 868 A.2d 464, 493 (Pa. Super. 2005) ("the purpose of a surcharge is to compensate beneficiaries for the loss caused by the fiduciary's want of

<sup>5</sup> At common law, "trustees have been surcharged where they have not personally profited from their breach, in situations where they have either negligently or knowingly permitted third parties to benefit from the trust property." Amara v. CIGNA Corp., 925 F. Supp. 2d 242, 255 (D. Conn. 2012), *aff'd*, 775 F.3d 510 (2d Cir. 2014).

the appropriate level of care"). It may be an appropriate remedy when a trustee fails "to exercise common prudence, common skill and common caution in the performance of the fiduciary's duty and is imposed to compensate beneficiaries for loss caused by the fiduciary's want of due care." In re Estate of McCool, 131 N.H. 340, 346 (1998) (quotation omitted). "The court must find the following before ordering a surcharge: (1) that the trustee breached a fiduciary duty and (2) that the trustee's breach caused a loss to the trust." In re Estate of Warden, 2 A.3d 565, 573 (Pa. Super. 2010); see In re Estate of McCool, 131 N.H. at 346.<sup>6</sup>

Although generally, "a trustee bears the burden of justifying the propriety of items in a trust account[,] . . . when a trustee files specific accounts and makes a *prima facie* showing that the accounts are proper, the burden of persuasion shifts to the beneficiaries to show specific instances of impropriety." In re Riddle, 946 N.E.2d 61, 68 (Ind. App. Ct. 2011); see, e.g., RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. e (2012); Estate of Stetson, 345 A.2d 679, 690 (1975). As such, one who seeks to surcharge the trustee for breach of trust bears the burden of proving the particulars of the trustee's wrongful conduct. Estate of Stetson, 345 A.2d at 690.<sup>7</sup>

In this matter, although certain facts are undisputed, many of those key to the dispute and the testimony of witnesses to the events was sometimes vague, often contradictory, and without indicia of credibility. As such, the Court has confidence in only

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<sup>6</sup> Although "courts have surcharged trustees for deterrence purposes, even if their breaches caused no harm to their respective trusts," Amara v. CIGNA Corp., 925 F. Supp. 2d at 256, the Petitioners made no such argument. As such, the Court will not proceed to impose a surcharge for the purposes of deterrence.

<sup>7</sup> However, once a petitioner establishes that the fiduciary breached its duty and that the petitioner suffered a "related loss," the burden to disprove causation shifts to the trustee. Amara v. CIGNA Corp., 925 F. Supp. 2d at 258–59 (citing cases); see RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. e (2012) ("[W]hen a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach").



one "fact," namely that it cannot discern many of the key events in question with any persuasive measure of certainty.

What is convincingly discernable is that in late January 2012/early February 2012, Attorney Paul Pike drafted a \$35,000 "Promissory Note" from Alice as "Lender" to Michael and Lisa Donahue as "Borrowers." P's Exh. 4. The draft Note had no established schedule for amortized installment payments, but instead provided that "[t]he entire amount shall become immediately payable upon DEMAND by the Lender or holder of this note." Id. Interest was to be charged at a fixed rate of 3 percent per annum. Id. An unsigned cover letter from Attorney Pike to Borrowers dated February 1, 2012, with an attached unsigned copy of the Note, was produced from Attorney Pike's file, see P's Exh. 4., stating inter alia: "Attached is a draft Promissory Note for your review. If the note is agreeable to you, please sign in front of a notary public and a witness. Please return the signed document to Mrs. Stedman. Kindly contact me if you have any questions or comments." Id. Purportedly, no executed version of the Note has been found. Attorney Pike's testimony concerning the existence of the executed Note ranged from vacillatory to contradictory.<sup>8</sup> He further testified that Alice asked him to draft the Note because she wanted to ensure that she was paid back<sup>9</sup>, and she paid Attorney Pike for drafting the Note. Tr.'s Exh. B (check dated 2/4/12). A check for \$35,000 to the order of Michael Donahue, was signed by Alice and dated the same day as her check to Attorney Pike cleared her account, on February 8, 2012. Id. (check dated 2/4/12). For

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<sup>8</sup> He testified both that the Note was executed, but also that he has no memory of seeing the executed Note.

<sup>9</sup> He also testified that his memory was that she asked for a note to be drafted, and because of that request, he presumed she wanted to be paid back.

his part, Michael Donahue testified that he never received the Note and never executed it.

There is no dispute, however, that a loan for \$35,000 was made to at least Michael and that it was to assist him in the purchase and/or rehabilitation of a building. He testified that he and Alice agreed he could pay it back when he sold the subject building. He also testified that he paid back \$25,000 of the Note *in cash*, because his grandmother "liked cash" and that she forgave the balance of his obligation. There was no evidence introduced of a \$25,000 withdrawal from any account held by Michael or of a related deposit made by Alice. Michael testified further that Alice gave away \$20,000 to two of her other grandsons, his brothers Edward (who's current whereabouts is unknown) and Bobby (who is deceased).

Like many aspects of this matter, when Claire came to first know that Alice had loaned the money to Michael is obscured and rendered indeterminate, at best by the passage of time, but more significantly by the self-serving, and otherwise absence of credible, testimony. Michael stated that the loan was intended to be "confidential." Claire gave conflicting testimony concerning when she found out about the loan and her discovery of a copy of the "contract." She testified that she had no prior knowledge about it until depositions were taken in this case in March 2015.<sup>10</sup> Attorney Pike's billing records indicate, however, that he billed for "[c]alls to and from Mrs. Stedman and Mrs. Donahue re: loan to family members." Attorney Pike could not remember the content of

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<sup>10</sup> The Court notes that her testimony on the "discovery" of a contract/note was inconsistent and simply not credible. Claire alternatively testified that she found the Note in a black box between two non-consecutive days of a deposition of her taken in March 2015. That black box, however, also contained key estate documents she retrieved many months earlier as Trustee of the 2013 Restatement, and as such, it is unlikely that she would not have known about the Note before March 2015. When faced with that possibility, she modified her testimony, claiming that the note was discovered in an "accordion folder."

any discussion with Claire, and his testimony concerning whether he met with Alice and Claire, or just Alice, or simply by telephone was at various points materially confounding when not outright inconsistent.

Claire's testimony concerning the actions she took to investigate and collect on the Note was also contradictory. She variously testified that it was mostly/entirely paid off, installment payments were made on it by Lisa, Michael paid some of it, some was forgiven, and Alice directed that when Michael sold the building he could give the unpaid balance to his mother. At the hearing, she insisted that Michael told her the debt was satisfied and her prior counsel directed her "not to worry about it." When asked why she never doubted or tried to independently verify Michael's claim that the loan was repaid, she responded that she simply believed him.<sup>11</sup> To whatever measure Claire's testimony was determined not to be credible, calling almost all of Michael's testimony not believable is a vast understatement. One need only read or listen to his testimony should there be the slightest doubt over that assessment.

Consequently, the Court can find with a certain measure of confidence that Alice in fact loaned \$35,000 to Michael and Lisa Donahue in 2012. Whether a duty to collect on that debt exists, however, is unclear as: (1) a duly executed version of the Note was never produced, nor was there firm testimony that one ever existed; and (2) whether any or full repayment was made cannot be readily established. As unconvincing as the testimony of Claire and Michael was, still the Court finds the absence of convincing affirmative evidence presented by the Petitioners a deficiency that undermines, and ultimately has defeated, their endeavor to meet their onus for proof. In such instances it

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<sup>11</sup> The Court observes that Claire reported that she had informally loaned him approximately \$100,000 that he repaid, implying that given her experience, she had no reason to doubt his story.

is not enough to simply endow the Court with circumstantial suspicion but to present evidentiary facts that justify its reasonable inference that it is more probable than not that the Note was executed, remained held by or subject to Alice's control until her death, and the obligation for repayment remained unsatisfied at that time in an amount capable of determination. While the Court has been vexed by the nature, quality and manner of the delivery of much of Michael Donahue's disbelieved testimony, as well as the inconsistent, vague, confusing and therefore unhelpful testimony presented by Attorney Pike and Claire in illuminating the events in question, on the proof it is yet still left to chance a ruling on the surcharge requested based on guess, speculation and conjecture among a range of possibilities.

Apart from the foregoing, however, the Court agrees with the Special Trustee that under the all attendant circumstances Claire did not breach her fiduciary duty to enforce the possible remaining obligation under the loan from Alice to Michael. See Notice of Position of Special Trustee on Petition for Surcharge Against Claire Donahue ¶16 (Index #84). Although Michael states that if ordered by a court, he would repay \$35,000 to the Trust,<sup>12</sup> the Court is not convinced that her decision not to "chase" this asset was unreasonable. See RESTATEMENT (SECOND) OF TRUSTS § 177 (1959). It recognizes that Alice, though proficient in business software, managed some of her affairs in a less than strictly appropriate or virtuous manner. Thus while it does not find the testimony of either Claire, and particularly Michael, credible, the lack of the production of the executed Note combined with the uncertain testimony of Attorney Pike does not give the Court sufficient

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<sup>12</sup> He is not a party to this action. As such, the Court lacks jurisdiction over him and will not so order, even if it has its doubts about the veracity of his claim that the debt was partially repaid in cash and otherwise forgiven.



comfort that Claire, assuming that the obligation is a Trust asset,<sup>13</sup> could have successfully collected on it. "A surcharge is an equitable penalty imposed when a trustee fails to exercise the requisite standard of care and the trust suffers thereby," In re Guardianship of Dorson, 156 N.H. at 386 (citation omitted), and the Petitioners bear the burden of demonstrating that surcharge is warranted. Estate of Stetson, 345 A.2d at 690. In this instance the Court determines that they have not satisfied that burden, and as such, exercises its juridical discretion not to impose the sought surcharge.

#### B. Objection to Accounting(s) – Claire's Attorney's Fees

As noted supra, the Court deferred allowance or disallowance of the June 23<sup>rd</sup> Accountings, see Index ##97-98, pending resolution of the Supreme Court appeal. See Order on Accountings at 3 (Index #101). In July 2016, it reviewed the numerous objections registered by the Petitioners to these accountings, see id. at 4-7, and the parties' efforts to resolve them. Id. In that order, it specifically reserved for consideration after resolution of the Supreme Court appeal nine objections that then remained unresolved. Id. at 7. After the Supreme Court issued its order in November 2016, this Court held a status conference on January 10, 2017 during which the Petitioners and Special Trustee agreed to waive four of those objections. See Order on 1/10/17 Status Conference at 3-4 (Index #113). Those that still remained unresolved were scheduled

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<sup>13</sup> The Special Trustee had argued that the obligation was not an asset of the Trust. See Notice of Position of Special Trustee on Petition for Surcharge Against Claire Donahue ¶¶2-5 (Index #84). The Petitioners contended that it was a Trust asset pursuant to blanket assignment(s) executed by Alice in 1997 and 2012, see P's Exhs. 1-2, or that it otherwise should be as it was her intent for all assets to flow to the Trust such that the Court should give deference to that objective. See Petitioners' Requests for Findings of Fact and Rulings of Law ¶¶42-43, 45, 66-72 (index #123). The Court need not reach this issue, as even assuming it could be considered an asset of the Trust, it will not impose surcharge in view of the determination that the Petitioners have not overcome their legal burden for the proof needed to warrant it.

for formal presentation at the hearing. Id. They concern: (1) certain "Cash Receipts," see *Petitioners' Objection to Respondent's First Amended Accounting and Objection to Amended Second Accounting* ¶1 (Index #99); (2) an \$11,000 payment to Claire, see *Petitioners' Objection to Amended First Accounting (For Period of 3/13/13 through 11/30/15) and Second Accounting (For Period of 12/1/15 through 1/15/16)* ¶7 (Index #82); (3) a purported salary paid to Claire, see *Petitioners' Objection to Amended First Accounting (For Period of 3/13/13 through 11/30/15) and Second Accounting (For Period of 12/1/15 through 1/15/16)* ¶¶10-11 (Index #82); (4) the net principal balances of the trust reported by Claire, see *Petitioners' Objection to Amended First Accounting (For Period of 3/13/13 through 11/30/15) and Second Accounting (For Period of 12/1/15 through 1/15/16)* ¶15 (Index #82); and (5) \$190,828.87 of attorney's fees paid by the Trust to Claire's former legal counsel(s), Attorney Jon Hanson, the McLane Law Firm and Attorney Pike. See *Petitioners' Objection to Accounting Filed by Respondent On Or About December 23, 2015* ¶13 (Index #57).

At the hearing, however, the Petitioners' counsel informed the Court that they were withdrawing all objections except that concerning the \$190,828.87 paid by the Trust for advice about, or in defense of, the now invalidated 2013 Restatement. As such, the Court now addresses the question of whether Claire, then acting as Trustee of the 2013 Restatement, may properly have had payment of these fees funded by the Trust.<sup>14</sup>

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<sup>14</sup> The Court observes that the Petitioners contend that because McLane Law Firm's Attorney Daly filed an appearance on behalf of Claire she never represented her in her capacity as Trustee of the 2013 Restatement, see Index #26, and thus she was not entitled to seek reimbursement from the Trust for those fees. This Court, in its October 27<sup>th</sup> Order, see Index #41, and also the Supreme Court in its order, see *In re Alice Stedman 1989 2013 Restatement*, No. 2015-0717 at 6 (unpublished order)(N.H. Sup. Ct. Nov. 10, 2016), identified Claire, in her status as Trustee, as respondent, without objection by any party. See also Index ##45 & 46 (Briefing concerning Claire's ability as Trustee to access Trust funds for appeal in defense of the Restatement).

As the Court referenced in a pre-hearing order, see Order dated February 16, 2017 (Index #119), RSA 564-B:10-1004 provides: "In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." As to an award of fees to "any party," the New Hampshire Supreme Court observed that the New Hampshire Trust Code:

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

Shelton v. Tamposi, 164 N.H. 490, 502 (2013)(quotations, citations and ellipses omitted). As to recovery by a trustee, RSA 564-B:7-709(a)(1) directs that a trustee is only "entitled" to reimbursement from the trust for "expenses that were *properly incurred* in the administration of the trust." This directive is in line with the common law<sup>15</sup> that in trust matters, "the allowance of attorneys' fees is not a matter of right but rests in the cautiously exercised discretion of the court. Attorneys' fees should

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<sup>15</sup> The Trust Code directs that the "common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state." RSA 564-B:1-106.

be allowed only in those cases where the litigation is conducted in good faith for the primary benefit of the trust as a whole in relation to substantial and material issues essential to the proper administration of the trust." Concord Nat. Bank v. Town of Haverhill, 101 N.H. 416, 419 (1958).

The Court thus has broad discretion to determine fee and expense awards to either the Petitioners as the prevailing party and/or the Respondent as fiduciary so long as it "provide[s] a reason, grounded in equity." Tamposi, 160 N.H. at 502. In their pre-trial submissions, the parties disputed whether a finding of undue influence results in a per se rule that a fiduciary may not recover his or her own fees, or if the probate court has discretion despite its ultimate conclusion that the instrument is invalid. See Request for Evidentiary Hearing on Attorney's Fees Issues and Memorandum in Support Thereof at 2-3 (Index #114); Objection at ¶7 (Index #117); compare Matter of Estate of Pflighar, 670 P.2d 677, 680 (Wash. App. 1983) ("a conclusion of undue influence perpetrated by a [fiduciary] and sole beneficiary . . . imports a finding of bad faith") with Fields v. Mersack, 577 A.2d 376, 381-82 (Md. App. 1990) (rejecting per se rule in favor of discretionary one); see generally, In re Estate of Herbert, 979 P.2d 1133, 1136-37 (Haw. 1999). Although Tamposi allows that generally fees will not be awarded where a trustee is "acting in the proper exercise of her official duties," Tamposi, 164 N.H. at 502, it also emphasized that "the use of the word 'any' [in the New Hampshire Trust Code] conveys broad authority upon the trial court to award attorney's fees to any party 'to be paid by another party' 'as justice and equity may require.' While the statute does not provide specific criteria for such an award, it gives the trial court flexibility to determine what is fair on a case by case basis." Id. The Court notes that the Tamposi decision rather clearly and firmly



indicates that probate courts possess broad discretion, made on a "case-by-case basis," to decide if a trustee's fees may be reimbursed by a trust.

It has been stated that a trustee committing a breach may be chargeable with the cost of restoring the assets of the trust. RESTATEMENT (THIRD) OF TRUSTS Liability of Trustee for Breach of Trust §100 (2012). Although "not a routine part of trustee liability for breach of trust", *id.*; cf. Concord Nat. Bank v. Hill, 113 N.H. 490, 496 (1973), factors courts can consider, in the exercise of their discretion "are the nature and extent of trustee misconduct in committing the breach, the conduct of the trustee in presenting the accounting or defending the surcharge action, and the significance of imposing costs on the trustee as a deterrent to misconduct." RESTATEMENT (THIRD) OF TRUSTS Liability of Trustee for Breach of Trust §100, *Comment on Liability Under Clause (a) - cmt. b(2)* (2012).

Consequently, the Court must determine whether, in this matter, the Trust properly funded Claire's defense of the 2013 Restatement. The Court notes that even those courts that allow for fees where a trustee has acted in good faith generally do not award them where a fiduciary has acted primarily for his or her own benefit. See In re Estate of Zonas, 536 N.E.2d 642, 645 (Ohio 1989)(observing that "[i]f an executor's actions do not benefit the entire estate but instead are merely done to benefit himself personally, then his fees and his attorney's fees generally are disallowed"). Similarly, the Massachusetts Supreme Judicial Court observed, pursuant to a statute incorporating similar language to RSA 564-B:10-1004, that "the party whose conduct triggered the need for litigation has been ordered to pay the expenses arising from that litigation." In the Matter of the Estate of King, 920 N.E.2d 820, 826-27 (Mass. 2010). It has been

recognized at common law that a fiduciary should not be allowed to recoup attorney's fees where he or she "advanced [his or her] own interest" as an heir or beneficiary. See, e.g., In re Estate of Zonas, 636 N.E.2d at 645 (collecting cases).

The Court deems it most just, based upon the facts of this case, to **ORDER** Claire to reimburse the Trust for the \$190,828.87 paid to Attorney Pike, Attorney Hanson, and the McLane Law Firm in securing advice about, and in defense of; the 2013 Restatement. The Court invalidated the 2013 Restatement. Order dated October 27, 2015 at 3 (Index #40). If the 2013 Restatement had been upheld, Claire would have enjoyed a large financial windfall to the detriment of her brother. Id. at 37. In addition, the Court found that "Alice's relative isolation, extremely weakened physical state, uncertain mentation, and broken spirit rendered her susceptible to Claire's influence during at least the last month of her life, if not earlier." Id. at 36-37. It found multiple indicia of undue influence, id. at 37, that "cast a shadow on the purity of Claire's intentions." Id. at 38. In addition, it concluded that in an attempt to support the 2013 Restatement during the March 2015 trial, "Claire testified in a manner that gave the Court significant pause regarding her credibility", id. at 40, and her testimony "stretch[ed] credulity." Id.<sup>16</sup> The Court thus finds that it would not be just and equitable to allow Claire's defense of the 2013 Restatement to be borne by the Alice Trust.<sup>17</sup>

<sup>16</sup> As noted supra, even during the current proceeding, her testimony was contradictory and at times unbelievable.

<sup>17</sup> The Court also observes that the result would be the same were it to apply RSA 564-A:3, IV as posited by the Petitioners. See Petitioners' Memorandum of Law Re: March 21-22, 2017 Hearing at 2-3 (Index #122). That provision recognizes the inherent conflict of interest when a trustee is also a beneficiary. RSA 564-A:3, IV(a) (1). Unless the trust in question otherwise allows and references the statute, id., which the 2013 Restatement and the Alice Trust did not, a trustee may only distribute funds to "provide for that trustee's health, education, maintenance, or support" according to the 2013 Restatement, see Pet.'s Trial Exh. 2(2) and "medical care, education, support and maintenance in reasonable comfort" in the Alice Trust.

Finally, the Court seeks to clarify an observation made in its pretrial order concerning counsel's argument that its references to this matter being a "close case" justified an evidentiary hearing. See Order dated February 16, 2017 at 5-6 (Index #119). Although it stands by its observations that cases of undue influence are difficult generally "because settlors . . . are often isolated by the influencer and there is often inconsistent documentary and testimonial evidence, it can, and did, still confidently determine that a settlor had been unlawfully influenced, and it is that determination, not the difficulty of making it, that drives its later considerations of whether a trust must pay for the trustee's attorney's fees in defense of acts later found unlawful." Id. at 6 (citations omitted). It also reaffirms a notation that

use of the term 'close' specifically, as is apparent from its discussions preceding it, was merely intended as acknowledgment that because undue influence may result from more subtle conduct designed to create irresistible ascendency by imperceptible means, and the often self-serving and contradictory state of evidence in these types of cases, this case was like many others in which undue influence is at issue tasked the presiding judge with making findings based on events and occurrences largely shrouded in nuance and/or contradiction.

Id. at 6, n. 6 (quotations and citations omitted). It pauses, however, to clarify that this rendition was intended only to make clear the Court's use of certain terminology and was by no means a negative commentary on the arguments made or claims advanced by Claire's very able counsel. Indeed, during the post-trial pendency of this knotty matter, it has been impressed by the professionalism and skill of all counsel representing the parties.

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R's. Hearing Exh. A. The \$190,828.87 in payments for attorney's fees does not qualify as health/medical care, education, maintenance, or support, and should not be funded by the Alice Trust.

### C. Interpretation of the Third Amendment to the Trust

Although the parties disagreed about the proper interpretation of Section 3(C) of the 2009 Third Amendment to the Trust, after the first day of the hearing, they entered into a *Stipulation* resolving the disputes among them. See Stipulation Regarding Interpretation of Sections (3)B and 3(C) of the Alice Stedman 1989 Trust, As Amended (dated March 22, 2017) (Index #124). The Court reviewed and orally approved the *Stipulation*, subject to a point of clarification that it sets forth, for the record, below.

Specifically, Paragraph 1 of the *Stipulation* provides in pertinent part:

[u]pon the occurrence of any one of the aforementioned triggering events, Robie's, including all real estate upon which Robie's operates and all tangible business assets associated therewith is to be sold, subject to the right of the Respondent and Petitioner or the issue of a decedent by right of representation to choose items of such business property according to their mutual agreement, and the net proceeds made a part of the Trust principal.

Id. Although initially unclear to the Court, with concurrence of the other parties the Special Trustee explained that, if and when Robie's is sold, this paragraph allows the Petitioners, Respondent, and should either or both of them predecease, their issue by right of representation, to keep certain business assets, like maintenance tools for example, without paying the Trust. The term "net proceeds" refers only to the proceeds from a sale of Robie's.

### D. The Petitioners' Attorneys' Fees



The Petitioners also seek a surcharge against Claire for attorney's fees incurred by them in challenging the validity of the 2013 Restatement. See *Petition* at 12 (Index #1); Scheduling Order dated December 1, 2015 at 2 (Index #44).

As set forth supra, RSA 564-B:10-1004 provides that a Court, "as justice and equity may require," can award reasonable attorney's fees "to be paid by another party or from the trust that is the subject of the controversy[.]" and also that the New Hampshire Supreme Court has made clear that this provision of the New Hampshire Trust Code sets forth a broad exception to the "American Rule" concerning fee awards, Tamposi, 164 N.H. at 502, so long as in the exercise of its discretion, the courts "provide a reason, grounded in equity, as to why such an award should be made." Id. In particular, trustees generally should not be found personally liable, however, a court is empowered to impose personal liability if, under the facts and circumstances of the case, it determines that such an award is fair. Id. In interpreting this provision of the Uniform Trust Code, the Restatement notes that: "[s]ome cases have required trusts to pay reasonable litigation costs of successful beneficiary-plaintiffs. Other cases have held wrongdoing trustees directly liable for the litigation costs of plaintiff-beneficiaries. . . . [F]actors relevant to [fee-shifting include the] degree of culpability, bad faith in conduct of litigation, the ability of the offending party to satisfy an award of attorney fees, and whether the award would deter similar misconduct by others." RESTATEMENT (THIRD) OF TRUSTS Liability of Trustee for Breach of Trust §100, *Reporter's Notes* - cmt. b(2) (2012); see, e.g., Dardovitch v. Haltzman, 190 F.3d 125, 145-46 (3<sup>rd</sup> Cir. 1999). Of importance here is the tenet that it is appropriate to charge a trustee personally "when the trustee has acted wrongfully, especially where the litigation itself is made necessary by the

trustee's defalcation." Dardovitch, 190 F.3d at 146. As noted supra, trustees may be charged with costs in an effort to restore the assets of the trust. RESTATEMENT (THIRD) OF TRUSTS, Liability of Trustee for Breach of Trust §100 (2012). The "make whole objective . . . of recovery from a trustee . . . may include, in an appropriate case, the attorney fees and other litigation costs of a successful plaintiff — that is, a co-trustee or successor trustee, or a beneficiary . . . ." id., Comment on Liability Under Clause (a) - cmt. b(2). Ultimately, the Court's decision is grounded in equity, and thus it is reminded in rendering it that: "[e]quity is primarily responsible for the protection of rights arising under trusts, and will provide the beneficiary with whatever remedy is necessary to protect him and recompense him for loss, in so far as this can be done without injustice to the trustee or third parties." BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, ch. 41, §861 Remedies of the Beneficiary against the Trustee (rev. 2d and 3d ed. Supp. 2016).

The Court finds additional guidance in the common law. In New Hampshire, "[a]ttorneys' fees should be allowed only in those cases where the litigation is conducted in good faith for the primary benefit of the trust as a whole in relation to substantial and material issues essential to the proper administration of the trust." In re Dumaine, 135 N.H. at 110 (quotations omitted). In addition, whether a beneficiary may be awarded attorney's fees and expenses includes the question of whether the litigant(s)' "primary motive was the benefit of the trusts as a whole or [their] own benefit." Id.

Turning to the question of whether Claire is responsible for attorney's fees and expenses incurred by the Petitioners<sup>18</sup> in securing invalidation of the 2013

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<sup>18</sup> The Court observes the unusual posture of this inquiry in that under the 2013 Restatement, Stanley was a distributee, as purportedly was Tammy also; however, with respect to the Alice Trust, he was a co-

Restatement, the Court concludes that justice and equity requires that not only are the Petitioners entitled to recover them, but that they shall be personally reimbursed by Claire. As discussed in summarized form supra and at length in its October 27<sup>th</sup> Order, the 2013 Restatement was invalidated as a product of undue influence exerted upon a failing and isolated Alice by Claire. It was executed within days of Alice's death – a time that her physician noted was a period of rapid physical decline. Id. The 2013 Restatement significantly redistributed shares of Alice's assets from Stanley to Claire. Compare 2013 Restatement, Pet.'s Trial Exh. 2(2) with the Alice Trust. See R's Hearing Exh. A. She was found to have hid the severity of their mother's decline from Stanley, the fact of her hallucinations, and indeed even failed to inform him of her death in a timely manner. October 27<sup>th</sup> Order at 37-38 (Index #40).

In addition, not only were the Petitioners forced by Claire's actions to engage in lengthy and costly litigation, but her conduct during it was far less than commendable. Indeed, the Court specifically found that at trial her "testimony lacked certain indicia of consistent truthfulness." October 27<sup>th</sup> Order at 32. She gave "inconsistent and evasive" testimony that greatly hindered the Court's ability to discern the relevant events that occurred. Id. at 32-33. It found some testimony "incredible." Id. at 35, n. 35. Consequently, it concludes that fairness dictates that she reimburse the Petitioners for their attorney's fees incurred in association with the litigation that resulted in invalidation

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trustee along with Claire. See generally, Order dated October 27, 2015 at 28, 31-32. Under the facts of this case, in particular that with respect to the 2013 Restatement having been drafted and executed without his knowledge, he is not responsible for the acts of his co-trustee Claire. See generally, Dardovitch, 190 F.3d at 140-150 (discussing co-trustee liability).

of the 2013 Restatement.<sup>19</sup> Although such an award should only be imposed in unusual situations, in this case, not only was an estate document invalidated as a result of Claire's acts, but her conduct in defense of that document was lacking in certain good faith and truthfulness.

The Court notes that counsel for Claire requested that it fashion an Order relieving/minimizing Claire's short-term out-of-pocket payments to the Petitioners. See Respondent's Memorandum of law and Requests for Findings and Rulings for March 21-22 Hearing at 21 (Index #121). Although it does not question the sincerity of counsel's representation that Claire is not able to financially repay the attorney's fees with which she is charged, it cannot, based solely on that representation, and without concrete financial documentation to support it, adopt his suggestion. Again, the Court is hopeful that should there be documented difficulty in making repayment; the parties will reach a satisfactory solution without recourse to the Court.

#### E. The Special Trustee's Fees

Finally, the Petitioners seek a surcharge against Claire for fees incurred by the Special Trustee in the performance of her duties since appointment by this Court in January 2016. See Petitioners' Requests for Findings of fact and Rulings of law for March 21-22, 2017 Hearing ¶84 (Index #123). They assert that appointment of the Special Trustee would not have been necessary but for the execution of the 2013 Restatement. Claire contends that the Petitioners waived their right to object to payment

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<sup>19</sup> It makes clear, however, that in so doing it will not hold Claire responsible for the Petitioners' attorney's fees associated with the appeal of its October 27, 2015 Order. That inquiry is left to the discretion of the New Hampshire Supreme Court. See N.H. Sup. Ct. R. 23.



of the Special Trustee's fees by the Trust when she was appointed, and the claim that she and Stanley would have been able to effectively manage the Alice Trust as co-trustees without assistance is speculative. See Respondent's Memorandum of law and Requests for Findings and Rulings for March 21-22 Hearing at 23-26 (Index #121).

The Court adopts its discussion of the contours of RSA 564-B:10-1004 set forth supra. It further observes that "[t]he goal of making the trust and beneficiaries whole is not always taken literally, however, either as a floor or as a ceiling. For example, an award of attorney fees and other costs incurred by the trust or the beneficiaries in remedying the breach is not automatic but a matter of judicial discretion." RESTATEMENT (THIRD) OF TRUSTS Liability of Trustee for Breach of Trust §100 (2012).

The Court notes that the presentation by the Special Trustee was particularly helpful in informing the most equitable resolution to this dispute between the Petitioners and Respondent. In particular, the Special Trustee, who is an attorney, although not under oath but making representations as an officer of the Court, stated that her tasks are segregable into those she considered to have been conducted in the "normal course" and those that were "extraordinary." She noted that in her experience, where there is a closely held family business and a family member becomes trustee, it typically requires a professional successor fiduciary to spend significant time sorting out accounts and assets. Here, the Court observes no one disputes that Alice, despite her acuity with basic financial software, co-mingled Robie's funds and personal funds. It is also undisputed that at times she maintained large amounts of cash, collected from campers, at her home. Consequently, it strikes the Court as reasonable that the Special Trustee spent a lot of time collecting financial information and bank statements in order to gain a

working understanding of the nature of, as well as to undo, restructure and segregate, as needed, the Trust assets into proper categories for management and accounting purposes.

The Court also credits the Successor Trustee's testimony that the records she received from prior counsel were not helpful in marshalling the assets. In addition, she had to spend time dissecting expenses paid from business accounts that may not have been valid trust expenses and create a spreadsheet to track camper deposits and payments. See generally Stipulation Regarding Scope of Duties of the Special Trustee (Index #51). She observed that calculating and reporting an opening inventory was difficult as Claire did not maintain complete records during the period between her mother's death and the appointment of the Special Trustee. She observed, however, that in family situations like this, such disarray is not atypical and that she has developed a good working relationship with Claire, who, in accordance with the amendments to the Alice Trust, currently manages Robie's Campground.

The Special Trustee did note, however, there were a number of extraordinary expenses incurred due to litigation concerning the attempted eviction of long-term campers, the Codas, see Order dated April 8, 2016 (Index #77), and the *Petition for Surcharge* related to the \$35,000 loan to Michael Donahue. She further indicated that she was willing to submit to the Court her invoices segregated for charges she views as incurred in the ordinary course and those that were extraordinary. She has done so. See Supplemental Fee Statement of Special Trustee As Requested by Judicial Referee on March 22, 2017 (Index #125). According to her submission, the fees and expense of concern total \$64,825.42. She attributes \$37,374.00 of that total to what she considers

extraordinary, with the remaining \$25,564.00 falling into the category of what she views as normal or typical trust administration. There have been no responses filed to the submission. Absent submitted written response by the Respondent and/or the Petitioners taking issue with the total or the allocation of fees and costs filed with the Court by May 3, 2017, it will then proceed to enter a ruling without further notice or hearing.

RECOMMENDED:

Dated: 4.24.17

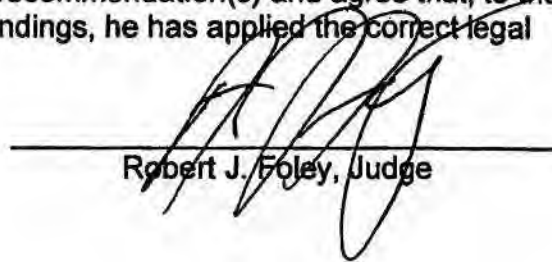


Gary R. Cassavechia, Retired Judge  
and current Judicial Referee

SO ORDERED.

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

4/24/17

  
Robert J. Foley, Judge