

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

Presently before the Court are multiple pleadings filed by both Petitioners Stanley Stedman and Tammy Soper and Respondent Claire Donohue in accordance with this Court's Order(s) following a status conference held on January 10, 2017. See Order on 1/10/17 Status Conference (Index #113).<sup>1</sup> Specifically, the pleadings ripe for address are: (1) the Respondent's *Request for Evidentiary Hearing on Attorney's Fees Issues and Memorandum in Support Thereof*, see Index #114, and the Petitioners' *Objection*, see Index #117; (2) 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; and (3) the Petitioners' *Motion for Taxation of Costs*. See Index #116.<sup>2</sup>

A. Request for Evidentiary Hearing on Attorney's Fees Issues (Index #114).

On October 27, 2015, following a seven day trial, this Court granted the

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<sup>1</sup> The Court incorporates by reference that order.

<sup>2</sup> The Respondent has not seasonably objected to this *Motion*. See Order on 1/10/17 Status Conference at 4 (Index #113).

Petitioners' *Petition for Declaratory Judgment and to Impose Constructive Trust and Request for Injunctive Relief* (the "October 27<sup>th</sup> Order"). See id. (Index #40). That Order was affirmed on appeal. See In re Alice Stedman 1989 Trust 2013 Restatement, No. 2015-0717 (N.H. Nov. 10, 2016). Consequently, the Petitioners have requested an award against the Respondent for, inter alia, the attorney's fees they incurred in prosecuting their *Petition for Declaratory Judgment and to Impose Constructive Trust and Request for Injunctive Relief* (the "*Petition*"). See id. at 12 (Index #1); Scheduling Order dated December 1, 2015 at 2 (Index #44). They also request surcharge and return of any attorney's fees paid by the Trust to or on behalf of the Respondent, in her former role as Trustee of the 2013 Restatement, in her endeavor to defend validation of the 2013 Restatement. See Order on 1/10/17 Status Conference at 4 (Index #113); see generally Petition at 12 (Index #1). Given that the Court's October 27<sup>th</sup> Order on the merits has reached final judgment, it is now appropriate for the Court to consider both requests concerning the attorney's fees.

The Respondent, in her *Request for Evidentiary Hearing on Attorney's Fees Issues and Memorandum in Support Thereof*, see Index #114, requests that this Court hold an evidentiary hearing, possibly to include expert testimony, to allow her to demonstrate: (1) that, as trustee of the now-invalidated February 22, 2013 Restatement of the Alice Stedman 1989 Trust, she conducted her defense of it in a manner, or for reasons, that would justify payment of her expenses; and (2) whether or not her defense of the 2013 Restatement was frivolous, thus rendering her accountable to the Petitioners' for their attorneys' fees. See Cir. Ct.-Prob. Div. R. 59.

The Court begins with a brief discussion of the law concerning fee awards in trust disputes. It will then, based upon those principles, determine whether an evidentiary

hearing is necessary. 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 has 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>3</sup> that in trust matters,

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<sup>3</sup> The New Hampshire 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.

In their submissions, the parties contest 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).

the allowance of attorneys' fees is not a matter of right but rests in the cautiously exercised discretion of the court. Attorneys' fees should be allowed only in those cases where the litigation is conducted in good faith for the primary benefit of the trust as a whole in relation to substantial and material issues essential to the proper administration of the trust.

Concord Nat. Bank v. Town of Haverhill, 101 N.H. 416, 419 (1958).<sup>4</sup>

The Court thus has broad discretion to determine fee awards to either the Petitioners as the prevailing party and/or the Respondent as fiduciary. The fact that it "must provide a reason, grounded in equity" Tamposi, 160 N.H. at 502, for its decision does not mandate that the Court need hold an evidentiary hearing. That does not signify, however, that it would not be prudent to hold a *non-evidentiary hearing*. Given that this Court presided over the seven-day trial, and indeed almost all substantive proceedings since the matter was filed in 2014, it holds that an evidentiary hearing is not required for it to properly award, or order refund of, the subject fees. See, e.g., In the Matter of the Estate of King, 920 N.E.2d at 828 ("A 'hearing' on an award that shifts fees under [the statute] is necessary, but an evidentiary hearing may not be required, particularly where the award of fees is being considered by the judge who presided over

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Although the Court agrees with the Petitioners that this question is beside the point of whether it must hold an evidentiary hearing, the Court discerns 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 attorneys' fees may be funded reimbursed by a trust. Tamposi, 164 N.H. at 502. While Tamposi allows that generally such fees will not be awarded where a trustee is "acting in the proper exercise of her official duties," id., the Court observes 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 (Ohio 1989). Similarly, the Massachusetts Supreme Judicial Court has recognized, 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).

<sup>4</sup> The Court also notes that although the Respondent seeks an evidentiary hearing to demonstrate benefit to the Alice Stedman 1989 Trust, Request for Evidentiary Hearing on Attorney's Fees Issues and Memorandum in Support Thereof ¶5 (Index #114), this Court already determined in its January 14, 2016 Order, that her appeal to reinstate the invalidated amendment was, "to a point that almost approaches exclusively," for her benefit, and not those of others and the Trust as a whole. Id. at 3 (Index #54). Also to the extent she again argues that she had a "duty to defend", the Court has already observed that the 2013 Restatement "on balance, overwhelmingly benefitted [her] only." Id. at 2, n.1.

the trial" (citations omitted)(collecting cases); In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 301–02 (1st Cir. 1995)(a "court is not obliged to convene an evidentiary hearing as a means of resolving every attorneys' fee dispute"). "Rather, flexibility is the watchword. Because a [trial court] has available to it a wide range of procedures through which it can bring a sense of fundamental fairness to the fee-determination hearing while at the same time husbanding the court's resources," it is not required to hold an evidentiary hearing. In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d at 301. Instead, "[t]he key determinant is whether, given the nature and circumstances of the case the parties had a fair opportunity to present relevant facts and arguments to the court, and to counter the opponents' submissions." Id. (quotations, ellipses and brackets omitted). In this matter, the Court has not only observed both the Petitioners' and Respondent's testimony concerning the circumstances giving rise to the 2013 Restatement, but it carefully reviewed the voluminous documentary record. It also held a hearing on the use of trust assets to fund appellate attorney's fees, see Order dated January 14, 2016 (Index #54), and an award of fees associated with litigation over the Respondent's accountings. See Order dated July 18, 2016 (Index #101). It considered countless pleadings and held numerous hearings in the many months it has presided over this case. It does not discern that a further evidentiary hearing will be necessary to fairly assess the attorneys' fees issues before it or be a productive use of judicial resources.<sup>5</sup>

Finally, the Court turns to the Respondent's repeated references, as justification for an evidentiary hearing, to its comment the October 27<sup>th</sup> Order that "after review of

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<sup>5</sup> The Court has not hesitated to entertain evidentiary hearings where it deemed them necessary to fairly determine an issue before it. In fact, in this matter, it has already ordered an evidentiary hearing, despite both parties request that it decide an issue on the record. See Order dated July 18, 2016 at 4 (Index #101).

the voluminous evidence submitted by the parties, [it] has determined that the call on Alice's capacity and whether the 2013 Restatement was a product of undue influence is a close one." See id. at 3.<sup>6</sup> She also repeats as justification its later observation, when denying her request to rely on the trust to fund appellate litigation, that "the Court is not unsympathetic to [her] argument that this was a difficult case to litigate (and for the Court to render a decision)." See Order On Request of Claire Donohue to Utilize Trust Assets to Fund Appeal at 4 (emphasis added)(Index #54).<sup>7</sup> In the October 27<sup>th</sup> Order, the Court also commented, multiple times, on the difficulty of making factual determinations in cases concerning undue influence owing their nature generally, see id. at 2-3, and this one specifically, because settlors in these matters are often isolated by the influencer and there is often inconsistent documentary and testimonial evidence. Id. However, the Court can, and did, still confidently determine that the 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. See id. at 39-40.

Consequently, the Respondent's Request for an Evidentiary Hearing on Attorney's Fees Issues, see Index #114, is **DENIED**.

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<sup>6</sup> The Court clarifies that this sentence generally, and the use of the term "close" specifically, as is apparent from its discussions preceding it, id. at 2-3, was merely intended as acknowledgement that because undue influence "may result from more subtle conduct designed to create irresistible ascendancy by imperceptible means", Neill v. Brackett, 126 N.E. 93, 94 (Mass. 1920), 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 shroud in nuance and/or contradiction.

<sup>7</sup> In that Order, the Court noted the unique posture of her request, namely that the Respondent was both trustee and beneficiary and the inherent conflicts of interest that often arise as a result. Id. at 3. The Court also firmly observed that "the appeal is primarily, to a point that almost approaches exclusively, in furtherance of her personal beneficial interest and not those of others and the Trust as a whole. Thus even under the common law she would not be entitled to secure advance payment of the attorneys' fees and costs related to her appeal." Id. at 3-4.

B. *Motion for Instructions, Reformation and/or Modification* (Index #115).

On January 10, 2017, the Court held a status conference to determine the proper manner in which to proceed towards resolution of this matter following the New Hampshire Supreme Court's order. See Order dated January 17, 2017 (the "January 17<sup>th</sup> Order"). During that conference, counsel for the Petitioners raised a concern over the proper interpretation of the newly revived 2009 Third Amendment to the Trust. See id. at 2. As this concern had yet to be raised before the Court, it ordered the parties to file pleadings that would allow it to properly address the Petitioners' concerns. Id. It also directed that "as necessary, argument or evidentiary presentations concerning Paragraph 3(C) will be entertained at the hearing scheduled on March 21-22, 2017." Id. at 3 (emphasis omitted). The Petitioners, in response, have filed a *Motion for Instructions, Reformation and/or Modification*, see Index #115, to which the Respondent has filed a partial objection. See Index #118. Although both parties agree that Section 3(C) of the 2009 Third Amendment is ambiguous, see *Motion* at ¶8 (Index #115); *Objection* at ¶1 (Index #118), the Respondent objects to reform, modification, or consideration of Section 3(B) when it determines the meaning of Section 3(C) because "interpretation of Section 3(B) is beyond the scope of the Court's direction." *Partial Objection* at ¶2 (Index #118).

The Court disagrees. In deciding this issue, it will be required to take into account and determine the meaning of certain other provisions of the 2009 Third Amendment. RSA 564-B:1-112 governs construction of a trust. It provides that:

[t]he rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property. In interpreting or construing the terms of a trust, the settlor's intent shall be

sovereign to the extent that the settlor's intent is lawful, not contrary to public policy, and possible to achieve. For the purposes of determining the benefit of the beneficiaries, the settlor's intent as expressed in the terms of the trust shall be paramount.

This statute reinforces the common law rule that the intent of the settlor is the veritable North Star guiding a court when it is interpreting a trust. Shelton, 164 N.H. at 495 (intent of settlor is "paramount"); see, e.g., King v. Onthank, 152 N.H. 16, 18 (2005)(intent of testator is the "sovereign guide"). As such, "it is the settlor's intent, as ascertained from the language of the entire instrument, that governs the distribution of assets under a trust." King, 152 N.H. at 18. Courts "determine that intent, whenever possible, from the express terms of the [instrument] itself." Shelton, 164 N.H. at 495. "[I]f no contrary intent appears in the [trust], the words within the [trust] are to be given their common meaning . . . clauses in a [trust] are not read in isolation; rather, their meaning is determined from the language of the [instrument] as a whole." In re Clayton J. Richardson Trust, 138 N.H. 1, 3 (1993). Finally, settlors/testators 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, settlors/testators have been found to understand how to include limiting language in a trust/will. See Cowan v. Cowan, 90 N.H. 198, 201 (1939).

That said, where the terms of the instrument are ambiguous, technical rules of will interpretation are to be employed only so far as they assist the Court in interpreting a settlor's intent. See 96 C.J.S. Wills § 907. "[S]uch rules have no binding force, and are mere guides to aid in the discovery of the testator's intention." Id.; see In re Frolich's Estate, 112 N.H. 320, 326 (1972)("canons of construction always give way in this jurisdiction to a single broad rule of construction favoring the maximum validity of



the testator's dispositive plan" (quotations omitted)). Consequently, the Supreme Court has directed that in this Court's effort to discern intent, "the probate court is always permitted to consider the 'surrounding circumstances' of the [settlor], and where the terms of the [trust] are ambiguous, . . . extrinsic evidence may be admitted to the extent that it does not contradict the express terms of the [trust]." Simpson v. Calivas, 139 N.H. 1, 8 (1994) (citations omitted). "External facts may be received to explain or resolve doubts, but not to create them." 7 C. DeGrandpre *New Hampshire Practice, Wills, Trusts, and Gifts*, § 13.07, at 144 (4<sup>th</sup> ed. 2003) (quotations omitted). Therefore, a settlor's comments before or after execution of a trust is not permitted to contradict the express language in the instrument, but where appropriate may serve as a helpful tool in discerning intent. See, e.g., Merrow v. Merrow, 105 N.H. 103, 106 (1963); accord Simpson, 139 N.H. at 8.

Consequently, where the Court is faced with an ambiguous term, it looks to not only the *entire instrument* to discern intent, but it may entertain extrinsic evidence as well. Consequently, it disagrees with the Respondent that it may not consider Section 3(B). To the extent that its previous orders indicate otherwise, the Court now clarifies the record.

C. Motion for Taxation of Costs (Index #116)

The Petitioners also filed a *Motion for Taxation of Costs*, see Index #116, seeking an award of \$6,437.30 for costs arising from the successful prosecution of their *Petition*. See Index #1. "As a general rule, costs are allowable only when authorized by statute or court rule." Grenier v. Barclay Square Commercial Condo. Owners' Ass'n, 150 N.H. 111, 118 (2003)(quotations omitted)(applying similar Superior Court rule). Circuit Court-Probate Division Rule 87 governs allowance of costs to a party. It directs that certain

trial, finding it was reasonably necessary in order for plaintiff's counsel to properly prepare for trial). As such, the *Motion for Taxation of Costs* is **GRANTED**. The Respondent is **DIRECTED** to submit reimbursement to the Petitioners within **thirty (30) days** of the date of this Order.

RECOMMENDED:

Dated: 2.16.17



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Gary R. Cassavechia, Retired Judge  
and current Judicial Referee

SO ORDERED.

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

Dated: 2/16/17



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Susan W. Ashley, Judge