STATE OF NEW HAMPSHIRE

9th CIRCUIT – PROBATE DIVISION – NASHUA

Case Number: 316-2018-EQ-02064

**TRUSTEE’S OBJECTION TO PETITIONER’S MOTION FOR ORDER**

**THAT BENEFICIARY PERSONALLY PAY ATTORNEY’S FEES**

NOW COMES Respondent Trustee states as follows:

1. The motion must be denied because it is contrary to settled law. Without citation, the motion falsely states, “The Trustee does not have an obligation to defend the validity of the Trust.” In fact, the law requires the Trustee to defend the Petitioner’s claim. *See e.g.*, *Loring & Rounds:* A Trustee’s Handbook § 6.2.6 (2012) (“The trustee has a duty to defend the trust. The trust may be attacked by those who have an economic interest in bringing about its cancelation or termination. It may be attacked by those who oppose its purposes. To fail to mount a vigorous defense is to thwart the intentions of the settlor and may be grounds for the trustee’s removal.”) (citing *Bogert*, Trusts and Trustees § 581, and 2A Scott on Trusts § 178); RSA 564-B:8-811 (“[a] trustee shall take reasonable steps to… defend claims against the trust”); *see also* RSA 564-B:8-816(a)(24) (trustee has the power to “… defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee’s duties”). Giving effect to the settlor’s intent is “paramount” under RSA 564-B:1-112 and the Trustee’s failure to defend the Trust would be a breach of the trustee’s duty effectuate such intentions. In fact, when an action is a “vehicle for attacking the trust itself, *e.g.*, if there are allegations that the trust was the product of fraud, duress or undue influence, then the trustee is duty bound to advocate for the trust’s validity [ ].” *Loring & Rounds:* A Trustee’s Handbook § 6.2.6 (2012) (citing 3 Scott & Ascher, § 17.10). There is simply no support for the idea that a trustee does *not* have a duty to defend an attack to the validity of a trust, nor is any cited by Petitioner.
2. Complementary to the duty to defend the trust is the trustee’s ability to use trust assets to pay counsel fees to defend the trust. Although the Trust in this case is silent on this point, the New Hampshire Trust Code (“NHTC”) contains default rules that apply in the absence of express terms in the Trust to the contrary. *See* RSA 564-B:1-105(a). Here, the following NHTC provisions require denial of Petitioner’s Motion:
   1. The Trustee may receive reimbursement for expenses incurred during trust administration, either properly incurred, or not properly incurred but necessary to prevent unjust enrichment of the trust (RSA 564-B:7-709(a)); and
   2. The Trustee has the authority to retain legal counsel to “advise or assist the trustee in the performance of the trustee’s administrative duties and to act without independent investigation upon their recommendations.” (RSA 564-B:8-816(a)(27)).
3. It would be patently unreasonable to require a trustee to defend a trust in order to give effect to the settlor’s intent, but not permit the trustee to use trust assets to do so. The NHTC recognizes this by allowing for retention of counsel and their associated expenses pursuant to Sections 7-709 and 8-816 referenced above. This is implicitly acknowledged by Petitioner in the Motion where he contends the applicable standard for determining “the propriety of payment of attorney’s fees is set forth at RSA 564-B:8-805,” which requires trust expenses to be “reasonable.” *See Petition to Invalidate Trust Pursuant to RSA 564-B:406* (“Petition”), ¶ 4. Although Petitioner contends that costs associated with defending an attack on the validity of the Trust are not reasonable, this ignores the Trustee’s duty to do so.
4. Not only may reasonable counsel fees be paid by the trust as an element of trust administration, but counsel fees may also be awarded to a trustee at the conclusion of the litigation. RSA 564-B:10-1004 allows the Court to award “as justice and equity may require,” costs, expenses, and “reasonable attorney’s fees …to be paid by another party or from the trust that is the subject of the controversy.” RSA 564-B:10-1004. Petitioner here is seeking to require the Trustee to personallypay for his litigation costs to defend the Trust and give effect to the settlor (“Settlor”) wishes. *See* Motion, ¶ 7 (emphasis added). However, that does not generally occur under applicable law. “When acting in the proper exercise of [his] official duties, a trustee should not generally be held personally liable under the Uniform Trust Code for attorney’s fees incurred by any party.” *Shelton v. Tamposi*, 164 N.H. 490, 502 (2013).
5. At the outset, Petitioner’s allegations in the Petition do not amount to a *finding* of undue influence or incapacity (nor breach of a fiduciary duty or bad faith). Instead, there is compelling evidence, attached to the Petition itself, that the drafting attorney for the Trust evaluated the Settlor’s presentation and concluded she was “still fully competent” (she was “well-organized in her thoughts and presentation; she was completely oriented to person, place and time;” capable of recounting familial history and persons; and articulate and expressive of her reasons for changing her estate plans). *See* Petition, Exhibit A. The Settlor further expressed to her counsel that she wanted to disinherit Petitioner entirely. *See id*. The thrust of Petitioner’s allegations in the Petition is that he had a better relationship with Settlor than she described to her counsel, however Petitioner’s disagreement with Settlor’s characterizations about their relationship, his behavior, or reasons therefore, do not provide the kind of circumstances that justify requiring the Trustee to personally pay to defend the Trust against Petitioner’s action, particularly where the Court has nothing but unproven allegations to consider in making such a determination.
6. In addition, the Court has historically allowed an award of counsel fees in favor of a trustee 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 administration of the trust . . . [w]here the parties seeking fees take positions to defeat a trust (or will) they are not entitled to an allowance of fees out of the trust property . . . the inquiry is whether the [ ] primary motive was to benefit the estate [or trust] as a whole or themselves.” *In re Estate of King*, 151 N.H. 425, 434 (2004); citing *In re Dumaine*, 135 N.H. 103, 110 (1991); *see also* *Silva v. Botsch*, 121 N.H. 1041, 1044 (1981) (expanding rule that fee award in favor of trustee for litigation for the benefit of the trust may apply to elected public officials, who serve as a “public trustee,” and successfully defend themselves against removal from office); *Concord Nat. Bank v. Haverhill*, 101 N.H. 416, 419 (1958) (respondents’ allowed counsel fees where they participated in litigation to give effect to terms of charitable testamentary trust, which was a ‘service to the trust and an aid to the Court’).
7. In other words, the Trustee could be awarded counsel fees at the conclusion of the litigation, if they were sought and the Court determined the Trustee acted in good faith for the benefit of the Trust as a whole. If the Trust is upheld as valid, then the Settlor’s wishes will be given effect and trust property will be distributed according to the terms of the Trust, which benefits the Trust as a whole. Where this case is at an early stage of the litigation, it would not be appropriate to order the Trustee to pay his own litigation costs now.
8. Finally, Petitioner erroneously contends the Trustee is participating in the litigation for his own personal benefit, which is at odds with his duty of impartiality, and in conflict with his fiduciary duties. *See* Motion, ¶¶ 6, 7. However, such allegations are without merit, or supported by any relevant authority. They ignore the Trustee’s duty to defend the Trust against attacks such as those mounted in the Petition, in which the Petitioner is seeking to invalidate the Trust for his personal benefit. *See* Petition, ¶ 16. The Trustee hired litigation counsel to defend the Trust from the challenge to its validity as permitted by the NHTC and applicable law. Petitioner is attempting to conflate the role of counsel between defense of the Trustee and defense of the beneficiary. However, the *Appearances* on file with the Court make clear that undersigned counsel represent only the Trustee in his fiduciary capacity. There is no merit to Petitioner’s allegations to the contrary, nor evidence, nor authority, to support the propositions raised in the Motion. As such, the Motion must be denied.

WHEREFORE, the Trustee respectfully requests this Honorable Court:

1. Deny the Motion for Order Requiring Beneficiary to Personally Pay the Trust’s Attorney’s Fees; and
2. Enter such other and further orders as justice and equity so require.

Respectfully submitted,

Trustee,

By His Attorneys,

McLANE MIDDLETON,  
PROFESSIONAL ASSOCIATION

Date: \_\_\_\_\_\_\_\_\_\_\_\_ By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Ralph F. Holmes, NH Bar No. 1185

ralph.holmes@mclane.com

Andrea J. Schweitzer, NH Bar No. 268933

andrea.schweitzer@mclane.com

900 Elm Street, P.O. Box 326

Manchester, New Hampshire 03105-0326

Telephone: 603.625.6464