

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<sup>1</sup>

312-2014-EQ-00108

ORDER ON THE PETITIONERS' NOTICE OF ATTORNEY'S FEES AND COSTS  
PURSUANT TO APRIL [24], 2017 ORDER

This is the fourth of four rulings on attorney fee related issues, see Orders dated April 24, 2017 ("April 24, 2017 Orders")(Index #126); Order on Petitioner's Request for Surcharge Against Respondent For Fees and Costs of Special Trustee Previously Paid by Trust dated June 1, 2017 ("June 1, 2017 Order")(Index #136); Order on the Special Trustee's Verified Motion for Approval of Attorney's Fees, see Index #143, arising from litigation concerning Petitioner Stanley Stedman's ("Stanley") and Petitioner Tammy Soper's ("Tammy")(collectively, the "Petitioners") challenge to the validity of the 2013 Restatement of the Alice Stedman 1989 Trust, see October 27<sup>th</sup> Order (Index #40), and continuing disputes between the Petitioners and the Respondent, former co-trustee of

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<sup>1</sup> The Court observes that since its Order granting the Petitioners' *Petition for Declaratory Judgment and to Impose Constructive Trust and Request for Injunctive Relief* (the "October 27<sup>th</sup> Order")(Index #40) was affirmed on appeal, see In re Alice Stedman 1989 Trust 2013 Restatement, No. 2015-0717 (N.H. Nov. 10, 2016), the operative trust document is the Alice Stedman 1989 Trust, as later amended (the "Alice Trust") and split into two trusts, the Paragraph 1 Alice Trust and Paragraph 3 Alice Trust. See Index ##69 & 75. The Court has not modified the caption for purposes of consistency of the record only, and does not mean to imply that it views the 2013 Restatement as having continuing validity.

the Alice Trust,<sup>2</sup> Claire Donahue ("Respondent"), after the 2013 Restatement was invalidated. See id.

This, hopefully final, order on these matters,<sup>3</sup> concerns the Court's earlier determination that the Respondent "repay [the Petitioners'] for attorney's fees and costs reasonably incurred by them in the litigation to invalidate the 2013 Restatement." See April 24, 2017 Orders at 2. At the direction of the Court, id., the Petitioners have submitted a *Notice of Attorney's Fees and Costs Pursuant to April [24], 2017 Order*, see Index #128 (the "Notice"), seeking an order directing the Respondent to reimburse them \$215,846.35 in fees and costs incurred by them between May 28, 2013 and March 24, 2017. Id.<sup>4</sup> The Respondent has objected, contending that only \$128,932.26 of those fees pertain to invalidation of the 2013 Restatement, while the remainder are attributable to post-invalidation litigation, are duplicative, or the entries are so general as to not warrant reimbursement. See Respondent's Objection (Index #132).<sup>5</sup> The Court

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<sup>2</sup> She was also the named sole trustee under the 2013 Restatement.

<sup>3</sup> The Court concurs wholeheartedly with the Respondent's observation that "[a]t some point, litigation has to come to an end. . . ." Respondent's Objection ¶57 (Index #132).

<sup>4</sup> The invoices presented appropriately should not include expenses and fees already ordered reimbursed by the Respondent, see Notice at 2 (Index #128), and those associated with her unsuccessful Supreme Court appeal as the question of their reimbursement are appropriately a matter to be considered by that court. See Sup. Ct. R. 23.

<sup>5</sup> The Respondent also contends that none of the fees should be awarded as the *Petitioners' Notice* was filed one day late. See Respondents' Objection at 2-3. The Court declines to deny the Petitioners' fee requests on this basis as it deduces that there was no resulting prejudice and it is deems it fairest to allow the late-filed *Notice*. This Court established a ten-day period for the Petitioners to submit their *Notice* and afforded the Respondent ten days "from the Court's receipt" to respond. April 24, 2017 Orders at 4 (Index #126). Although the Petitioners submitted their *Notice* one day late, the Court, in the exercise of its discretion, will not impose such a draconian sanction for a violation of its April 24, 2017 Order. See Am. Exp. Travel v. Moskoff, 144 N.H. 190, 193 (1999)(Courts have broad discretion to sanction for violation of court rules, and "[i]t is important that cases be decided on their merits, that a party have his day in court and that rules of practice and procedure shall be tools in aid of the promotion of justice rather than barriers and traps for its denial." (quotations omitted)); cf. DeButts v. LaRoche, 142 N.H. 845, 846-47 (1998)(court abused its discretion when it failed to consider other sanctions than dismissal for violation of structuring conference order).

This litigation has been ongoing for over three years and it has long been apparent that reimbursement of fees and expenses was an issue to be considered. The Court had already determined that at least some of the Petitioners' fees must be paid by the Respondent, see April 24, 2017 Orders (Index #126).

**GRANTS the Notice IN PART.** It rules that the Respondent must only reimburse the Petitioners' fees and costs incurred through November 17, 2015, the date of its denial of her *Motion for Reconsideration*. See Index #43. The parties agree that fees charged to that date total \$128,932.26. See *Respondent's Objection* at 5, 7 (Index #132); *Petitioners' Response* at 2 (Index #135). In addition, she is not, as agreed to by the Petitioners, see *Response* at 2, responsible for a \$222.50 duplicative charge invoiced on April 29, 2015.<sup>6</sup> Finally, the Court, for the reasons set forth within, determines that the Respondent should reimburse the Petitioners for all attorneys' fees and costs associated with the "Cota Litigation." See June 1, 2017 Order at 5-6 (Index #136); Order dated April 18, 2016 (Index #77). It cannot, however, determine with any confidence the amount of those fees, and directs the parties to confer, **within seven (7) days of the date of the Clerk's Notice of Decision in remittance of this Order**, in a good faith endeavor to agree on the proper amount fees and costs associated with that matter. If they cannot concur on the amount due, they are to file appropriate motions for consideration by the Court by **July 31, 2017**.

As this is its final order concerning allocation of fees, the Court fully incorporates by reference all findings and rulings in its April 24<sup>th</sup> Order, see Index # 126, and its June

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The *Notice* is a vehicle through which the Court determines how much should be justly imposed on her and how much the Petitioners should rightly bear on their own account. The Respondent submitted an organized and well-presented *Objection* (Index #132), in addition to a later-filed *Replication* (Index #137), that have been carefully considered by the Court, and indeed adopted in part by the *Petitioners*. See *Petitioners' Reply* at 2 (Index #135). To the extent she argues that the late filing resulted in her counsel having to rush their response, see *Replication* at 3, given the extensive nature of the attached billing records, the Court likely would have granted a generous extension of the period by which to reply had she requested it.

<sup>6</sup> The Petitioners have also agreed that the Respondent should not be held responsible for certain charges totaling \$3,506.30 that she alleges are also duplicative or are so vaguely presented as to preclude analysis of their nature. See *Objection* at 10. These charges, however, were incurred after November 17, 2015, see *id.*, and as such, have been excluded from potential reimbursement in any event.

1<sup>st</sup> Order, see Index #136, and its Order on the Special Trustee's Verified Motion for Approval of Attorney's Fees Dated May 8, 2017. See Index #143. It also incorporates by reference, so far as otherwise supportive, its recitations of the applicable law and factual findings and conclusions derived therefrom, in all prior orders, including, but not limited to, its Order dated February 16, 2017, see Index #119; its October 27<sup>th</sup> Order, see Index #40, and its Order dated April 8, 2016 (Index #77) (concerning the Cota Litigation).

In particular, the Court has previously carefully considered the question of whether the Petitioners' fees and costs should be reimbursed by the Respondent personally. See April 24, 2017 Orders at 21-24 (Index #126). Although trustees generally should not be found personally liable pursuant to RSA 564-B:10-1004,<sup>7</sup> see Shelton v. Tamposi, 164 N.H. 490, 502 (2013), courts may so order where the facts and circumstances of the case render an award appropriate. See id. This Court previously observed that:

[i]n interpreting this provision of the Uniform Trust Code, the Restatement notes that: 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 (3rd Cir. 1999). Of note here is the observation 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.

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<sup>7</sup> This statute provides that a Court may, "as justice and equity may require," award reasonable attorney's fees "to be paid by another party or from the trust that is the subject of the controversy."



April 24, 2017 Orders at 21 (Index #126). It then concluded that in light of its prior findings that: (1) the Respondent isolated and unduly influenced an ailing Alice; (2) through this act significantly redistributed asset grants away from Stanley to her own favor; (3) hid the severity of Alice's illness from Stanley; and (4) failed to promptly inform him of her passing, justice and equity required that she reimburse the Petitioners for fees and costs incurred in invalidating the 2013 Restatement. Id. at 23. It also found that fairness dictated reimbursement as:

not only were the Petitioners forced by Claire's actions to engage in lengthy and costly litigation, but Claire's conduct during it was not commendable. Indeed, the Court specifically found that at trial her "testimony lacked certain indicia of consistent truthfulness." She gave "inconsistent and evasive" testimony that greatly hindered the Court's ability to discern the events that occurred in this matter. Id. at 32-33. It found some testimony "incredible."

Id. at 23-24 (citations omitted).

Notably, however, the Court has thus far rejected the Petitioners' claims that the Respondent be held responsible for Special Trustee fees and costs incurred after invalidation of the 2013 Restatement on the theory that they would not have been incurred in the absence of execution of the 2013 Restatement which precipitated the sibling discord that followed. See June 1, 2017 Order at 7 (Index #136); Order on the Special Trustee's Verified Motion for Approval of Attorney's Fees Dated May 8, 2017. See Index #143. It instead concluded that justice and equity required a surcharge imposed on the Respondent only where costs "arise exclusively from [her] wrong-doing" and that she should not be held responsible for "additional ensuing disputes between the irretrievably estranged siblings" after resolution of the question of validity of the 2013 Restatement was attained. See June 1, 2017 Order at 7 (Index #136).

In this instance, the Court has reviewed the invoices that followed the denial of the Respondent's *Motion for Reconsideration*, see Notice (Index #128), and cannot reasonably discern whether the resultant litigation arose from intractable sibling discord and distrust, or bad faith acts of the Respondent alone.<sup>8</sup> Although the Petitioners assert that the siblings would have continued to have a close relationship if the 2013 Restatement had never been executed and, thus, the Respondent should be responsible for all fees incurred in this continuing litigation, see Petitioners' Reply at 3, while the Respondent asserts that discord was inevitable after Alice's death in any event, see Respondent's Objection at 6, the Court will not ground its decision on such speculation by either party. Therefore, as previously observed in the context of Special Trustee fees and costs, "[t]he Respondent should not be held responsible for fees and costs . . . in a blanket fashion that is out of the ordinary for the norm. To impose fees on all litigation flowing from the initial petition to invalidate the 2013 Restatement would, in effect, result in the Court invoking a per se rule that it has previously declined to do." Order dated June 1, 2017 at 7 (Index #136).<sup>9</sup> As such, the Court **ORDERS** the Respondent to reimburse the Petitioners all invoiced fees and expenses incurred by them before November 17, 2015, but it **DENIES** requests for reimbursement of those incurred after that date subject to one exception — the Cota Litigation fees and costs.

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<sup>8</sup> Notably, the Court has already charged her with fees associated with her lack of cooperation in producing amended accountings. See Order dated July 18, 2016 at 3 (Index #101); Order dated June 7, 2016 (Index #95). In addition, it observes that many objections to the accountings produced by the Respondent, and a petition for instruction as to the meaning of certain terms of the Alice Trust, were subsequently withdrawn by the Petitioners. See generally Orders dated April 24, 2017 at 2, 4, 13-14, 20 (Index #126).

<sup>9</sup> Although the Petitioners assert that the Respondent should be held responsible for attorney's fees and costs associated with unraveling co-mingling of accounts, the Court notes, as previously recognized, that the Special Trustee opined that it is not unusual in instances where the settlor has a family business that he/she regularly co-mingles personal and business funds, and an independent fiduciary must be called to straighten out the accounts.

For background purposes, the Cota Litigation involved the Respondent's attempted ouster of certain long-tenured campers, not as trustee but as park manager, following this Court's October 27<sup>th</sup> Order that invalidated the 2013 Restatement. See Order dated April 18, 2016 (Index #77). The campers, the Cotas, were good and close friends of Stanley. In conjunction with the related litigation, it has previously been stated that:

[i]n enjoining the Respondent from denying the Cota's renewal of their seasonal lease and directing them to remove their camper and associated improvements, the Court stated that it is convinced that it is more probable than not that the non-renewal was motivated by a bad faith intent to retaliate against Mr. Stedman for seeking to invalidate the 2013 Restatement. Given the finding of bad faith, the Court finds that under both the provisions of RSA 564-B:10-1004 and New Hampshire common law, see Harkeem v. Adams, 117 N.H. 687, 690-91(1977)(under common law, bad faith conduct justifies award of counsel fees where one party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons"(quotations omitted)), the Cota related fees of the Special Trustee are rightfully chargeable to the Respondent.

Order dated June 1, 2017 at 5-6 (Index #136). Similarly, the Petitioners should not be responsible for fees and costs incurred in securing injunctive relief and thus the Court has determined that in addition to reimbursing the Petitioners for fees incurred in invalidating the 2013 Restatement, the Respondent is obligated to reimburse the Petitioners for the fees and expenses they incurred in conjunction with the Cota Litigation once their amount has been determined .

RECOMMENDED:

Dated: 7/7/17

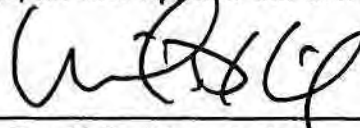


Gary R. Cassavechia, Retired Judge  
and current Judicial Referee

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.

Dated: 7/7/2017



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David D. King, Judge