

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

TRUST DOCKET
6TH CIRCUIT COURT
PROBATE DIVISION

GARY VOLPE, ON BEHALF OF THE DECEASED CLARA VOLPE

v.

DENNIS VOLPE, LINDA VOLPE AND JEFFREY VOLPE

317-2020-EQ-00474

ORDERS ON MOTIONS TO DISMISS

On October 29, 2020, the Court held a telephonic hearing¹ on the motions to dismiss based upon the limitations/repose period in RSA 564-B:4-406² submitted by Petitioner Gary Volpe's *Amended Petition for Determination of Undue Influence* (the "Amended Petition"), see Index #16, submitted by Dennis Volpe and Cambridge Trust Company (Cambridge Trust) in the above-captioned matter. See Index ##20-21 (motions); 26-27 (objections); 29 (response). Attending the hearing were: Attorney Keith A. Mathews and his client, Petitioner Gary Volpe; Attorney Karyn P. Forbes, Esq. and her client, Respondent Dennis Volpe; Respondent Jeffrey Volpe, pro se;

¹ The Court also considered, at a separate hearing immediately preceding, a motion for injunctive relief submitted by Gary Volpe, in an associated matter, In re: Frank C. Volpe Revocable Trust of September 8, 1999, No. 317-2020-EQ-00925 (the "Frank Trust Matter").

² In its *Motion to Dismiss*, Cambridge Trust Company contends, and it is not challenged, whether RSA 564-B:4-406 is a statute of repose or limitation is "immaterial" to whether the *Petition* should be dismissed. *Id.* at 1, n.1 (Index #21). See generally, In re: Beatrice C. Skillen 1995 Trust Agreement, No. 320-2018-EQ-0074, *Order on Motion to Dismiss* at 2, n.3 (Trust Docket August 22, 2018), affirmed No. 2018-0612, 2019 WL 4165179 (N.H. Sup. Ct. Aug. 15, 2019).

Respondent Linda Volpe, pro se³; and Attorneys Ralph F. Holmes and Andrea Jo Schweitzer on behalf of Intervenor Cambridge Trust, Trustee of the Clara E. Volpe Revocable Trust (the "Clara Trust"). After consideration of the offers and arguments presented at the hearing, the *Motion to Dismiss* filed by Dennis Volpe, see Index #20, and the *Motion to Dismiss* submitted by Cambridge Trust, see Index #21, are GRANTED. Gary Volpe's *Amended Petition for Determination of Undue Influence*, see Index #16, is respectfully DISMISSED.⁴

In ruling on a motion to dismiss, this Court must determine "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Harrington v. Brooks Drugs, Inc., 148 N.H. 101, 104 (2002) (quotation omitted). In doing so, it must "assume the truth of the facts alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to [them]." Id. (quotation omitted). "Although the trial court's decision on a motion to dismiss is normally based solely on the allegations in the pleadings, if additional evidence is submitted, without objection, the trial court should consider it when making its ruling." Delaney v. State, 146 N.H. 173, 175 (2001)(quotations omitted). Because a motion premised on the statute of limitations/statute of repose constitutes an affirmative defense, the movant

³ Attorney Anthony H. Santoro earlier filed a limited appearance on behalf of Linda Volpe, although he did not attend the hearing. See Index #13. He has since submitted a withdrawal. See Index #32.

⁴ The matter will remain open, however, for consideration of the *Counterclaim* submitted by Cambridge Trust. See Index #22. Its counsel indicated at the hearing that if the *Motion(s) to Dismiss* were granted, it would proceed on its *Counterclaim* by way of submission of a *Motion for Summary Judgment*. Cambridge Trust and/or any other party desiring to submit further pleadings are DIRECTED that any dispositive motions must be submitted **on or before December 1, 2020, with substantive responses due by January 1, 2020**, in accordance with the provisions of RSA 491:8-a. See Cir. Ct. – Probate Div. R. 58-A. After consideration of the motion and/or objection(s), the Court will proceed to further schedule the *Counterclaim* for resolution as appropriate.

bears the burden of proving that it applies. Donnelly v. Eastman, 149 N.H. 631, 633-34 (2003); Glines v. Bruk, 140 N.H. 180, 181 (1995).

The Court notes the following relevant facts as gleaned from the Petitioner's *Amended Petition* for purposes of these orders. See, e.g., Suprenant v. Mulcrone, 163 N.H. 529, 530 (2012). The Court also relies on the trust documents submitted without objection for this Court's review. See Delaney, 146 N.H. at 175.

Clara Volpe created the Clara E. Volpe Revocable Trust (the "Clara Trust") in 1999. See Defendant Dennis Volpe's Memorandum of Law in Support of His Motion to Dismiss Exhibit 1 (Index #20). It was amended nine times before Clara's death in August 2019. Id. Intervenor Cambridge Trust is, as was earlier indicated, Trustee of the Clara Trust. Id.

On May 26, 2020, Gary Volpe, submitted a *Petition for Determination of Undue Influence* against his siblings, Linda Volpe, Dennis Volpe, and Jeffrey Volpe. See Index #1. That *Petition* was later amended. See Index #16. In the *Amended Petition*, Gary Volpe asserts that beginning in May 2012, his siblings "purposefully alienated" him from his mother's affection and presence, and unduly influenced her to reduce his share of inheritance from her trust and/or estate. As a consequence, he argues that any amendments to the Clara Trust after 2012 are void pursuant to RSA 564-B:4-406. Id. ¶¶ 11; 17; 22-23; 28-30. The *Petition* also alleges that the siblings failed to collect debts owed Clara from various members of the family and made large expenditures from her bank accounts to benefit themselves, which reduced the size of the Estate of Clara Volpe. Id. ¶¶ 18.

Both Respondent Dennis Volpe and Intervenor Cambridge Trust filed similar *Motion(s) to Dismiss*. See Index ## 20, 21. Each alleges that the *Petition* was not timely filed under RSA 564-B:4-406(b). Id.⁵

The *Amended Petition* alleges that the post-2012 amendments to the Clara Trust are invalid pursuant to RSA 564-B:4-406(a), which provides that a “trust is void to the extent that it was not validly created in accordance with this chapter or its creation was induced by fraud, duress, or undue influence.” Dennis Volpe and Cambridge Trust seek dismissal on the basis of the limitations/repose periods set forth in RSA 564-B:4-406(b)-(c). The provisions of that statute provide:

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

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

(2) in the case of an irrevocable trust, including a formerly revocable trust that has become irrevocable, 3 years after the trustee sent to the beneficiary a notice described in RSA 564-B:8-813(c)(3); or

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

(c) A trustee may send the notice described in subsection (b)(3) for purposes of commencing the 180-day limitation period, but the trustee does not have a duty to do so. A trustee shall not be liable

⁵ Additionally, Dennis Volpe alleges that Gary Volpe is not authorized to act on behalf of Clara Volpe's estate. *Dennis Volpe's Motion to Dismiss* at 1 (Index #20). Because the Court dismisses the *Amended Petition* on the basis of the RSA 564-B:4-406, it need not address this argument. It observes that although it discerns that this argument is meritorious if he brought the matter only on behalf of Clara, in his *Objection(s) to Motion to Dismiss*, see Index ##26-27, Gary clarifies that he is bringing the *Petition* individually, as well as on behalf of Clara. Id. at 1.

to any person for not sending the notice described in subsection (b)(3).

Id. Dennis Volpe and Cambridge Trust assert that dismissal is appropriate under RSA 564-B:4-406(b)(3) because, following Clara's death in August 2019, the Trustee sent a notice (the "Notice") pursuant to RSA 564-B:8-813 to Gary Volpe providing him with a copy of the Clara Trust and Ninth Amendment as well as the Trustee's contact information. See *Trustee's Motion to Dismiss with Incorporated Memorandum of Law* Exh. A (Index #21). The Notice also stated, inter alia, that "[p]ursuant to RSA 564-B:4-406, you have 180 days from the date of this Notice to commence a judicial proceeding to contest the validity of the Trust." Id. ¶8. Dennis Volpe and Cambridge Trust allege that accordingly, under RSA 564-B:4-406, Gary Volpe was required to submit his *Petition* on or before March 4, 2020, but failed to do so until May 26, 2020, and therefore, the *Petition* should be dismissed.

In his *Objection(s)*, Gary asserts that during the period following receipt of the Notice, he "took substantial steps to avoid bringing suit" and "delayed . . . filing in order to avoid unnecessarily bringing suit against his family, to conserve court resources, and to ensure that any assumption made regarding the Trust and its planned distributions are correct." Id. at 1. He maintains that Respondent Cambridge Trust has "unclean hands" as it did not respond to inquiries requesting documents he sent on October 4, 2019 until March 27, 2020, after the limitations period/repose had run, and therefore the statute should not pose a time-bar to his legal action. Id. at 2-3. Respondent Dennis Volpe replies that the unclean hands doctrine is inapplicable because in the October correspondence, Gary Volpe did not ask for documentation, but only "referred generally to 'questions and concerns' regarding the Trust accounting . . . [and] did not specify

what these 'questions and concerns' even were or provide any notice to the Trustee that Gary was considering a challenge to the validity of the Trust." *Dennis Volpe's Response to Objection to the Motion to Dismiss* at 4-5 (Index #29). At the hearing, counsel for Gary Volpe asserted that he attempted to follow-up in February 2020 and arrange a meeting, but his outreach was not responded to until after the limitations period ran.

Resolution of this matter requires the Court to interpret RSA 564-B:4-406(b)(3). Courts determine the meaning of a statute by analyzing its plain terms. Hodges v. Johnson, 177 A.3d 86, 93 (2017); Landry v. Landry, 154 N.H. 785, 787 (2007). In order to discern the plain meaning of the statute, courts may permissibly consult the dictionary for its common definition. See, e.g., State v. Flodin, 159 N.H. 358, 363 (2009); Board of Water Comm'rs, Laconia Water Works v. Mooney, 139 N.H. 621, 626 (1995)(an undefined statutory term is given its "plain and ordinary meaning"). In addition, courts "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." Hodges, 177 A.3d at 93. Finally, as in all instances where it must interpret a statute based upon a uniform law, such as the Uniform Trust Code, courts may properly consult the official comments to that law. Id.; see generally, Rabbia v. Rocha, 162 N.H. 734, 737-38 (2011)(courts look to the comments of the model act for guidance as to its meaning). In fact, the notes to the Uniform Trust Code carry particular weight, as the New Hampshire Supreme Court recently noted that "[w]hen interpreting a uniform law, such as the Uniform Trust Code, the intention of the drafters of a uniform act becomes the legislative intent upon enactment." Hodges v. Johnson, No. 2019-0319, Slip op. at 9 (N.H. Sup. Ct. Sept. 23, 2020)(quotations omitted).

The language in Section 4-406(b)(3) mirrors that included in Section 6-604(a)(2)⁶ of the Uniform Trust Code. The relevant comments to that section explain that “[t]his section provides finality to the question of when a contest of a revocable trust may be brought. The section is designed to allow an adequate time in which to bring a contest while at the same time permitting the expeditious distribution of the trust property following the settlor’s death.” See Uniform Laws Commission, Trust Code – Final Act §604, Comments at 114 (2010). It further stated that the purpose of including notice provisions was to allow “[a] trustee who wishes to shorten the contest period [to] do so by giving notice.” Id. (emphasis added).

Accordingly, the comments to the Uniform Trust Code make clear that Section 4-406(b)(3) may be applied in this matter and the action be dismissed. Here, the trustee invoked the shortened limitations/repose period as allowed by the statute. Gary Volpe simply did not file the present action within that period, and thus the *Petition* was late filed by more than two and a half months.⁷ Although application of the plain terms of the New Hampshire Trust Code results in a harsh outcome for the Petitioner, finality for a trustee, where a notice has been sent, is clearly envisioned by it, and this Court will not ignore the plain meaning of the statute. Cf. Donnelly v. Eastman, 149 N.H. 631, 633-34

⁶ That section suggests a limitation/repose period of 120 day, however, the New Hampshire Legislature chose to extend it to 180 days.

⁷ The Court observes that during a period of time between March and May 2020, “deadlines set forth in court rules, court orders, statutes, ordinances, administrative rules, administrative orders or otherwise that are set to expire” were extended due to the COVID 19 pandemic. See Order Suspending In-Person Court Proceedings ¶11 (N.H.S.C. March 16, 2020) available at: <https://www.courts.state.nh.us/supreme/orders/3-16-20-order.pdf>. Even assuming that order applied to statute of limitations/statute of repose deadlines, it was rescinded effective May 4, 2020, see Second Renewed and Amended Order Suspending In-Person Court Proceedings and Restricting Public access to Courthouses ¶15 (N.H.S.C. April 24, 2020) available at: <https://www.courts.state.nh.us/supreme/orders/4-24-20-Second-Renewed-and-Amended-Order-Suspending-In-Person-Court-Proceedings-Related-to-Circuit-Court.pdf> and, in any event, was effective after the limitations/repose period in this matter had passed at the time the initial moratorium was imposed.

(2003)(admonishing trial courts that statutes of limitations periods — and by extension periods of repose — should be strictly applied and courts are “cautioned against judicial repeal of the statute of limitations and the substitution of ad hoc, judge-made rules that would vary from case to case.” (quotations omitted)). The Court observes that:

[i]n other contexts, [the New Hampshire Supreme Court has] emphasized justice over procedural technicalities. Compliance with statutes of limitations, however, is not a mere procedural technicality. Given the purposes of statutes of limitations, they differ from other procedural rules. Non-compliance with statutes of limitations is an affirmative defense to an action. Statutes of limitations represent the legislature's attempt to achieve a balance among State interests in protecting both forum courts and defendants generally against stale claims and in insuring a reasonable period during which plaintiffs may seek recovery on otherwise sound causes of action. Furthermore, statutes of limitation are designed to expedite the orderly administration of justice. The main purposes of statutes of limitations are to ensure timely notice to an adverse party, and to eliminate stale or fraudulent claims. The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim.

Id. (quotations, citations and brackets omitted).

Here, Gary Volpe waited, at his own peril, until May 2020 to initiate his legal action and cannot now, in light of the notice sent, avoid its dismissal.⁸

RECOMMENDED:

Dated: 11/3/2020



Gary R. Cassavechia (Retired Judge),
Judicial Referee

⁸ The Court is not swayed by the argument that the Respondents and Cambridge Trust is guilty of “unclean hands.” It agrees with Dennis Volpe that the letter correspondence was vague and did not request documents. To the extent that counsel for Gary Volpe tried to reach them by telephone and was unsuccessful, he still could have filed an action based upon the information concerning sibling relationships and Clara's health that he already possessed at that time. Instead, he sat on his claim until it was too late to prosecute it.

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: November 3, 2020


Margaret-Anh Moran, Judge