

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

ORDER ON MOTION FOR SUMMARY JUDGMENT

Presently before the Court is a *Motion for Summary Judgment*, see Index ##39-40, submitted by Intervenor Cambridge Trust Company, Trustee of the Clara E. Volpe Revocable Trust (the "Clara Trust"). It is seeking judgment on its *Counterclaim*, see Index #22, requesting a declaration that Gary Volpe, by filing and pursuing Count I of his *Amended Petition for Determination of Undue Influence* (the "Amended Petition"), see Index #16, has violated the *in terrorem* clause of the Clara Trust. See generally RSA 564-B:10-1014; Ninth Amendment to the Clara Trust ¶3.2.5 (Index #22). Petitioner, Gary Volpe, has filed an *Objection*. See Index #45. Respondents Linda Volpe, Dennis Volpe and Jeffery Volpe did not file any responsive pleadings. For the reasons that follow, the *Motion for Summary Judgment*, see Index ##39-40, is GRANTED.

I. Applicable Law

"Summary judgment shall be rendered forthwith if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits filed, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” RSA 491:8-a, III; Cir. Ct.- Prob. Div. R. 58-A; Brown v. Concord Group Ins. Co., 163 N.H. 522, 525 (2012)(courts “consider all the evidence presented in the record, and all inferences properly drawn therefrom”). “In acting upon a motion for summary judgment, the trial court is required to construe the pleadings, discovery and affidavits in the light most favorable to the non-moving party to determine whether the proponent has established the absence of a dispute over any material fact and the right to judgment as a matter of law.” Panciocco v. Lawyers Title Ins. Corp., 147 N.H. 610, 613 (2002); see Estate of Donovan, 162 N.H. 1, 4 (2011). A motion for summary judgment will be defeated by reference to “contradictory evidence under oath sufficient to indicate that a genuine issue of material fact exists.” Brown, 163 N.H. at 527; see also Omiya v. Castor, 130 N.H. 234, 239 (1987) (summary judgment defeated by a product of discovery that “sets forth specific facts showing the existence of a genuine issue for trial.”). “[A] disputed fact is ‘material’ for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law.” Palmer v. Nan King Restaurant, Inc., 147 N.H. 681, 683 (2002); Brown, 163 N.H. at 525.

These matters also concern the application of the New Hampshire Trust Code’s “no-contest” or “*in terrorem*” statute. See generally, RSA 564-B:10-1014. Under New Hampshire law, the terms of any *in terrorem* provisions in a trust are to be honored “to the greatest extent possible,” RSA 564-B:10-1014(d), and are to be enforced “according to the express terms of the [*in terrorem*] provision without regard to the

presence or absence of probable cause or the beneficiary's good or bad faith in, taking the action that would justify the complete or partial forfeiture of the beneficiary's interest in the trust under the terms of the no-contest provision." RSA 564-B:10-1014(b).

The Legislature, however, has also enacted significant "safe harbor" provisions that form exceptions to enforceability of an *in terrorem* clause in a trust. See generally RSA 564-B:1-105(b)(14)(terms of trust do not prevail over New Hampshire Trust Code safe harbors). *In terrorem* clauses are unenforceable, inter alia:

- When the document is found "invalid because of fraud, duress, undue influence, lack of testamentary capacity, or any other reason;" RSA 564-B:10-1014(b);
- Where acts of a trustee are challenged, the fiduciary "has committed a breach of fiduciary duties or breach of trust"; RSA 564-B:10-1014(b); and
- To an action brought by a beneficiary/distributee "for a construction or interpretation of the terms" of the trust, see RSA 564-B:10-1014(c)(4).

These safe harbor provisions lie at the heart of the instant controversy. Although Gary Volpe did not petition this Court for a determination whether his action constituted a "contest" under the statute, the Court,¹ in determining whether the *in terrorem* clause of the Clara Trust was a contest, must itself make a preliminary finding of whether that provision in the Clara Trust should be applied to disqualify him.

Any court's analysis of whether a proposed action constitutes a "contest" is fact specific, based on the proposed action and the terms of the *in terrorem* clause in the

¹RSA 564-B:10-1014(c)(3) allows a beneficiary/distributee to petition the courts for interpretation of the limits of the particular *in terrorem* clause at bar as applied to a proposed action that may be seen as challenging a fiduciary's acts or the validity of the instrument. Although the Legislature has specifically allowed for actions to determine if a proposed petition or motion may violate an *in terrorem* clause, see RSA 564-B:10-1014(c)(3), Gary Volpe did not seek such an instruction in this case, despite apparently being warned of its potential application.

applicable trust or estate documents. As such, courts must also apply the rules of construction for a will/trust.² When courts construe those instruments, "the intention of a settlor is paramount, and [they] determine that intent, whenever possible, from the express terms of the trust itself. . . . [Courts should] reject any construction of trust language that would defeat the clear and expressed intention of the settlor." Shelton v. Tamposi, 164 N.H. 490, 495-96 (2013). "Similarly, it is the settlor's intent, as ascertained from the language of the entire instrument, which governs the distribution of assets under a trust." King v. Onthank, 152 N.H. 16, 18 (2005). 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 will, the words within the will are to be given their common meaning . . . clauses in a will are not read in isolation; rather, their meaning is determined from the language of the will as a whole." In re Clayton J. Richardson Trust, 138 N.H. 1, 3 (1993). Finally, testators/settlors 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, have been found to understand how to include limiting language in a will. See Cowan v. Cowan, 90 N.H. 198, 201 (1939). As noted supra this Court is, by statute, directed to interpret *in terrorem* clauses "to enforce the settlor's intent as reflected in [it] to the greatest extent possible," RSA 564-B:10-1014(d), as limited by the safe harbor provisions instituted by the Legislature.

² "The rules of construction that apply 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 trust property." Shelton v. Tamposi, 164 N.H. 490, 495 (2013).

To the extent that the *Motion for Summary Judgment* or *Objection* require the Court to interpret RSA 564-B:10-1014, it recites the well-established rules of statutory construction as its guideposts. 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 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).

II. Facts and Procedural Background

The Court makes note of the following undisputed facts for background purposes only. Additional facts, referenced in light of the applicable summary

judgment burden, will be adduced as necessary when discussing the specific issues raised by the parties.

Clara Volpe created the Clara E. Volpe Revocable Trust (the "Clara Trust") in 1999. It was amended nine times before Clara's death in August 2019. Intervenor Cambridge Trust Company is the trustee of the Clara Trust. The Clara Trust, as initially drawn and executed in 1999, did not include an *in terrorem* clause, see *Trustee's Answer and Counterclaim to Amended Petition*, Exh. B (Index #22), however, such clauses were included in later amendments to the Clara Trust. Id. Exhs. G (Fifth Amendment); J (Eighth Amendment); K (Ninth Amendment). The *in terrorem* clause in the Ninth Amendment³ provides, in pertinent part:

The Grantor hereby expressly states her desire to limit the amount of any future litigation by and among her children and to do so, incorporates this section hereunder and intends it to be a material purpose of this Trust. In the event any beneficiary under this Trust agreement shall, individually or in conjunction with any other person or persons, including a parent or other legal guardian, undertake the following actions, then any bequest, devise, or residual share created for said beneficiary under the terms of this trust agreement shall be null and void *ab initio* as if the beneficiary had predeceased the Grantor without surviving issue:

1. Directly or indirectly contest in any court the validity of this Trust Agreement and/or the Grantor's last Will;
2. Seek to obtain adjudication in any proceeding in any court that this Trust Agreement or any of its provisions and/or that such Will or any of its provisions are void;
3. Seek to otherwise set aside this Trust Agreement or any of its dispositive provisions;
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6. Take any other action with an objectively measure purpose or intent to hinder, delay, or frustrate the administration of this trust, or to subvert the Grantor's express intent to limit any

³ As noted *infra*, the Court granted the *Motion(s) to Dismiss the Amended Petition* as it was filed outside the applicable statute of limitations/statute of repose. See RSA 564-B:4-406(b). Accordingly, the Ninth Amendment remains valid and the Court will review the *Motion for Summary Judgment* in light of the provisions contained in it.

bequest to said beneficiary to the amount or interest specified [in the Clara Trust].

Id. ¶3.2.5.

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 and therefore 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 *Amended Petition* also alleges that the siblings failed to collect debts owed to Clara from various members of the family and were making large expenditures from her bank accounts to benefit themselves and this reduced the size of the Estate of Clara Volpe. Id. ¶¶18.

In response, both Respondent Dennis Volpe and Intervenor Cambridge Trust Company filed similar *Motion(s) to Dismiss*. See Index ## 20-21. Each alleged that the *Amended Petition* was not timely filed under RSA 564-B:4-406(b), and sought dismissal of the *Amended Petition*. Id. After a hearing, see Order dated 11/3/2020 (Index #34), this Court granted the *Motion(s) to Dismiss*. Id. After consideration of the language of RSA 564-B, it observed that:

the comments to the Uniform Trust Code make clear that Section 4-406(b)(3) may be applied to this matter and it 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. Although application of the plain terms of the New Hampshire Trust Code results in a harsh outcome

against Gary Volpe, 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. . . . Here, Gary Volpe waited, at his own peril, until May 2020 to file this matter and cannot now, in light of the notice sent, avoid dismissal.

Id. at 7-8. It accordingly dismissed the *Amended Petition*. Two subsequent *Motion(s) for Reconsideration*, see Index ##35, 42, were denied by this Court.

III. Motion for Summary Judgment

As noted supra, the Intervenor submitted the *Counterclaim*, see Index #21, seeking a determination by this Court that because he filed the *Amended Petition*, Gary Volpe was "in violation of the no contest provision such that he is disinherited under the terms of the [Clara] Trust." Id. ¶6. He answered, see Index #25, that he was challenging the validity of the Ninth Amendment, and as such, contended that "[i]t would be wholly improper to make any determination involving the Ninth Amendment until the Court has full opportunity to make a well-founded determination as to the legitimacy of the prescribed amendments." Id. ¶3. Following dismissal of the *Amended Petition*, the Intervenor submitted the *Motion for Summary Judgment*. In it, the Intervenor contends that it is entitled to judgment as a matter of law because in submitting the *Amended Petition*, Gary Volpe violated the *in terrorem* clause of the Ninth Amendment, and, as a result, he should face the sanctions it specifies, namely treatment as if he had "had predeceased the Grantor without surviving issue." Gary Volpe objects, contending that although his *Amended Petition* had been dismissed as untimely, summary judgment "would be inappropriate at this stage, and more to the point, inequitable," without a full adjudication of the very claims that had been dismissed, namely that the Ninth Amendment was the product of undue influence." See *Objection* (Index #45).

Although the validity of the Ninth Amendment had been previously disputed, that dispute has been resolved, and the Ninth Amendment stands as valid. All that remains to be now determined is whether the *in terrorem* clause may be invoked against Gary Volpe. First, it is undisputed that Gary Volpe filed the *Amended Petition* seeking to “void” “[a]ny amendments to the Trust by Clara Volpe.” *Id.* ¶29. As such, the Court concludes that he initiated a “contest” prohibited by the terms of the *in terrorem* clause by: (1) “[d]irectly . . . contesting in any court the validity of this Trust Agreement;” (2) “[s]eeking to obtain adjudication in any proceeding in any court that this Trust Agreement or any of its provisions . . . are void;” and (3) “[s]eeking to otherwise set aside this Trust Agreement or any of its dispositive provisions.” *See supra*. Having done so, that clause directs that he must be treated as if he had predeceased Clara. *Id.*

The Court observes that in many matters involving application of an *in terrorem* clause, a petitioner, after having been found to have filed a “contest” under the terms of the subject trust, may, by way of RSA 564-B:10-1014(b), reach safe harbor provided that petitioner successfully demonstrates that the subject trust is “invalid because of fraud, duress, undue influence, lack of testamentary capacity or any other reason.” *Id.*; *see generally Hallett v. Hallett*, No. 317-2013-EQ-00865 at 3, 7, 12 (Trust Docket 1/15/15) (First Safe Harbor Order). Often, a petitioner, having proffered a contest under the terms of the subject trust is “left with the following options: (1) give up their legal action and accede to the trust; (2) proceed with the Verified Petition as then cast and risk an evidentiary ruling after trial that the no-contest provision is triggered; or (3) file a Motion to Amend adding, deleting, or modifying claims.” *Id.* at 12. Here however, because Gary Volpe late-filed his contest, and as such it has been dismissed pursuant

to RSA 564-B:4-406 (b)(3),⁴ he foreclosed opportunity to access safe harbor via RSA 564-B:10-1014(b) by proving that the subject trust amendments were invalid.

The Court respectfully disagrees with the Petitioner that in order to apply the *in terrorem* clause in this case, it must allow litigation previously foreclosed concerning the validity of the Clara Trust amendments. As noted supra, RSA 564-B:10-1014 directs that the intent of the Grantor be enforced to the greatest extent possible. Here, Clara Volpe directed that her intent was "to limit the amount of any future litigation by and among her children." Here, Gary Volpe, through his own lack of diligence, is precluded from further substantive challenge to the amendments. Accordingly, they must stand as valid. It therefore would be contrary to the intent of Clara Volpe, as expressed in those amendments, to allow further litigation that would not, in itself, invalidate the amendments, but rather would only forestall application of the now-determined valid *in terrorem* clause. As such, this Court may not allow, see RSA 564-B:10114(d), further challenge to the Clara Trust. The *Motion for Summary Judgment* is accordingly GRANTED.

RECOMMENDED:

Dated: 2/25/2021

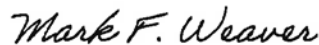


Gary R. Cassavechia (Retired Judge),
Judicial Referee

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: 2/25/21



Mark F. Weaver, Judge

⁴ Cf. Donnelly v. Eastman, 149 N.H. 631, 633-34 (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)).