

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2016-0130

David Hodges, Jr. et al.

v.

Alan Johnson, et al.

RULE 7 MANDATORY APPEAL FROM A JUDGMENT OF THE 7TH CIRCUIT COURT-
PROBATE DIVISION

**BRIEF *AMICUS CURIAE* OF THE NEW HAMPSHIRE TRUST COUNCIL
IN SUPPORT OF THE APPELLANTS**

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INTERESTS OF AMICUS CURIAE

Amicus curiae New Hampshire Trust Council (“Trust Council”) seeks to present its view concerning the proper standard for reviewing a trustee’s exercise of a discretionary power to distribute trust property to another trust.¹

The Trust Council is a New Hampshire nonprofit corporation based in Hampton, New Hampshire. The Trust Council’s members include trust companies, law firms, and other persons who believe in the Trust Council’s mission of promoting the trust services sector in New Hampshire. Since its formation in 2010, the Trust Council has been actively involved in proposing and supporting legislation to modernize and enhance New Hampshire’s laws governing trusts, trust companies, and family trust companies.

The Trust Council is committed to ensuring the proper application of the New Hampshire Trust Code (RSA 564-B). A key tenet of the New Hampshire Trust Code is the promotion of certainty, which trustees and beneficiaries rely upon as trustees administer trusts and which trust practitioners rely upon when advising their clients and drafting trust instruments. The Trust Council believes that it is critical that the New Hampshire Trust Code’s provisions are interpreted and applied by the courts accurately and consistent with well-established precedent and the intent of the legislature.

¹ Appellant Joseph MacDonald is a director and equity owner of a company that is a member of the Trust Council. That company is not a party in this matter. Appellant MacDonald was acting individually when he served as a trustee in this matter, and he was not acting in his capacity as a director or owner of the company. Neither Appellant MacDonald nor his legal counsel participated in the Trust Council's decision to file this brief or the preparation of this brief. Trust Council attorney Todd D. Mayo briefly represented David Hodges Sr. and his spouse, but that representation terminated before the events at issue in this matter.

STATEMENT OF THE CASE

Amicus adopts and incorporates by reference the Statement of the Case and Statement of Facts submitted by the Appellants in their Brief.

SUMMARY OF THE ARGUMENT

At issue is whether the Trustees abused their discretion in making a distribution. The probate court failed to apply the proper standard in reviewing the Trustees' exercise of their discretionary power, and it failed to make the requisite findings under that standard.

Accordingly, this Court should reverse.

ARGUMENT

A trustee must exercise a discretionary distribution power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Under RSA 564-B:8-801, "the trustee shall ... distribute the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with [the New Hampshire Trust Code]." Under RSA 564-B:1-105(b)(2), those duties are not modifiable or waivable. A trustee also generally has a duty of impartiality when making distributions. Under RSA 564-B:8-802, "[i]f a trust has 2 or more beneficiaries, the trustee shall act impartially in ... distributing the trust property, giving due regard to the beneficiaries' respective interests." Under RSA 564-B:1-105(a), however, the duty of impartiality can be modified or waived.

The applicable standard for reviewing whether a trustee properly exercised its discretion in making a distribution thus can be distilled into four questions:

1. Did the trustee act in good faith?
2. Did the trustee act in accordance with the terms and purposes of the trust?
3. Did the trustee act in accordance with the interests of the beneficiaries?
4. Did the trustee act impartially in making the distribution, or did the terms of the trust relieve the trustee of the duty of impartiality?

A trustee's exercise of a discretionary distribution power was proper if each of those questions can be answered in the affirmative. The probate court may review a trustee's exercise

of a discretionary distribution power, but it cannot substitute its judgment for that of the trustee. In Wentworth, this Court stated that “[i]t is well settled law that ‘[w]here discretion is conferred upon the trustee with respect of the exercise of a power, its exercise is not subject to control by the court, except to prevent abuse by the trustee of his discretion.’” Wentworth v. Waldron, 86 N.H. 559, 562 (1934) (citation omitted); see also Katz v. Katz, 104 N.H. 478, 482 (1963).

The application of the decanting statute is not at issue. RSA 564-B:4-418 grants to a trustee the power to decant a trust (i.e., distribute trust property to another trust). In this case, the Trustees did not need to invoke the statutory decanting power, because they had a decanting power under the express terms of the 2004 Trusts. Despite its attention to the decanting statute, the probate court did not make any finding that suggests that, in lieu of exercising their decanting power under the terms of the 2004 Trusts, the Trustees exercised the statutory decanting power. Accordingly, it is unnecessary to consider what, if any, limitations the decanting statute may have imposed on the Trustees when they decanted the 2004 Trusts.

I. Did the Trustees Act in Good Faith?

The probate court stated that it “need not make findings concerning the good faith of the [Trustees] in effectuation the decanting.” Order at 36. To the extent this literally meant that the Trustees were not required to act in good faith, this was an error, because, as discussed above, RSA 564-B:8-801 specifically requires that a trustee “shall ... distribute the property in good faith....” However, since the probate court cited the good faith requirement of RSA 564-B:8-801 in its analysis (Order at 34) and repeatedly discussed the Trustees’ behavior and motivations, it is reasonable to conclude that the probate court found that the Trustees did not fail to act in good faith.

The probate court did express dismay or at least discomfort with some of the Trustees' actions. For example, it noted "the astonishing lack of any even modestly selective or self-serving documentation revealing the thought processes, reasoning and content of discussions [other than with the Settlor] relating to and predating each decant." Order at 35. It also found "no evidence that Respondents Saturley and Johnson, in their capacity as trustees, ever consulted independent counsel specializing in trusts and estates." Order at 28. (The probate court, however, did note that "Attorney Saturley testified that he conducted his own independent investigation and consideration of the propriety of the decantings." *Id.*) Although the Trustees might have maintained better records of their decision-making process in making the distributions or might have taken other actions that would have further demonstrated how they came to decide that the decantings were the appropriate course of action, the proper analysis is limited to whether the Trustees acted in good faith and otherwise in accordance with their duties when making the discretionary distribution.

II. Did the Trustees Act in Accordance with the Terms and Purposes of the Trust?

The Trustees acted in accordance with the terms and purposes of the 2004 Trusts. The probate court found that the 2004 Trusts, "like most irrevocable trusts, were created in order to take advantage of certain tax related benefits" and that "[t]he structure of the 2004 Trusts, namely creation of the Committee of Business Advisors and the directives included in Articles XII(G)-(H), further indicates that they were formed *to hold family business* [Hodges Development Company ("HDC")] *assets and provide for continuation of the family business after the death of its founder.*" Order at 26-27 (emphasis added). The probate court found that "[b]ecause of Respondent Johnson's long-time employment and executive status at HDC... and Attorney Saturley's position as legal counsel to HDC, consideration was given to the business

purposes and effect of the decanting on HDC....” Order at 29. The probate court further found that the Trustees gave “consideration to the terms and business purposes of the 2004 Trusts....” Order at 35. Thus, the Trustees acted in accordance with the terms and purposes of the trusts.

The Trustees’ distribution of trust property to a trust that excluded the Appellees as beneficiaries was in accordance with the terms of the 2004 Trusts. The terms of the trusts expressly empowered the Trustees to distribute trust property to “distributee trusts.” A “distributee trust” was defined as:

any trust being administered under this trust instrument for the benefit of any one or more, but not necessarily all, of the group consisting of my [ex-wife] and my descendants, or any trust established by me under another trust instrument for one or more, but not necessarily all, of the members of such group...

Order at 20. Thus, in making a distribution to a distributee trust, the Trustees could properly exclude the Appellees as beneficiaries.

The Trustees could have been deemed to have failed to act in accordance with the terms of the trusts if they had decanted pursuant to the Settlor’s directions. Under the terms of the 2004 Trusts, the Settlor did not have the power to direct the Trustees to decant trust property. Although the probate court noted concerns about the Trustees’ deliberative process and, in particular, the weight that they gave to the Settlor’s wishes, it did not find that the Trustees acted at the Settlor’s direction when they decanted the trusts. The probate court stated:

The deeply personal and harsh nature of the decantings, along with the testimony of Attorney McDonald, suggests that they were undertaken and completed at the request, with the blessing, and at the direction of [the Settlor]. Whether they were effectuated after independent consideration by [Trustees] Saturley and Johnson, however, is less clear. Although both claimed to have made an independent decision, it is apparent that each deeply considered [the Settlor’s] wishes.

Order at 29. Although the probate court stated that certain facts “suggest[] that [the decantings] were undertaken and completed . . . at the direction” of the Settlor, it did not find this was the case.

III. Did the Trustees Act in Accordance with the Interests of the Beneficiaries?

The probate court determined that “the Trustees failed to satisfy the requisite duty to consider the ‘interests of the beneficiaries’ when decanting.” Order at 3. This finding was in error because it did not properly account for the limited scope and nature of the Appellees’ interests in the 2004 Trusts.

In exercising their discretion to make a distribution, the Trustees had a duty to consider the interests of the beneficiaries as those interests were defined by the terms of the 2004 Trusts. Under RSA 564-B:1-103(7), “interests of the beneficiaries” means “the beneficial interests provided in the terms of the trust.” Under RSA 564-B:1-103(19), the “terms of the trust” means “the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.” The settlor’s intent thus shapes the scope and nature of a beneficiary’s interest in the trust. As discussed above, the express terms of the 2004 Trusts vested in the Trustees the discretion to make distributions to distributee trusts that did not include one or more of the Appellees as beneficiaries. This, along with the Settlor’s own subsequent expressions to the Trustees, as discussed below, clearly demonstrates the Settlor’s intent, recognized by the probate court, that the Appellees’ beneficial interests were no more than “conditional.” See Order at 15.

In exercising their discretion to make a distribution, the Trustees also had a duty to consider the interests of all of the beneficiaries and could not properly consider solely the interests of the Appellees. A trustee must consider the interests of *all* beneficiaries in managing

and distributing trust property.² See In re Goodlander, 161 N.H. 490, 498 (2011) (observing that a trustee has a fiduciary duty to all of the beneficiaries). The probate court noted that the Trustees believed the decantings as undertaken were necessary to preserve trust property, which would of course inure to the benefit of the remaining beneficiaries:

At trial, the [Trustees] asserted that the decantings were effectuated in deference to the business purpose of the 2004 Trusts, namely continuation of HDC after the death of David, Sr. There was testimony that due to: intra-family discord, ... and a long-time estrangement of unclear origin between [the Settlor] and [Appellee Patricia S. Hodges], complete disenfranchisement of [Appellees]...was necessary to avoid a “Tamposi-situation” ... where a family member, in bad faith disrupts management of a closely held business in an attempt to extract liquidity from the company.

Order at 30-31. The probate court found that “although giving consideration to the terms and business purposes of the 2004 Trusts, [the Trustees] did not undertake and complete the other task required by law, namely, to give due consideration to the [Appellees’] interests.” Order at 35. The probate court, however, erred in making that finding, because it was based on a false premise. The probate court stated that it made that finding because “[a] contrary holding, under the facts found by this Court, would effectively nullify the limits on decanting set forth in RSA 564-B:4-418(e) as it would be condoning complete removal of beneficial interests through decanting based solely on the business purposes set forth in a trust and, in this case, the personal interests of a grantor.” Id.³

² As discussed below, the terms of the 2004 Trusts waived the Trustees’ duty of impartiality. The Trustees nonetheless had a fiduciary duty to all of the beneficiaries, even though the waiver of the duty of impartiality allowed inequity in distributions.

³ The probate court’s reliance on RSA 564-B:4-418(e) was misplaced, because the Trustees exercised their decanting power under the terms of the trust, not the decanting power under RSA 564-B:4-418. That reliance is harmless error. As in effect when the Trustees decanted the trusts, RSA 564-B:4-418(e) provided that the decanting statute did not abrogate a trustee’s duties under RSA 564-B:801, which imposes the same duties that apply when a trustee makes a distribution.

The terms of the 2004 Trusts define the Appellees' interests in those trusts. The probate court noted, consistent with RSA 564-B:8-814(b) that the Appellees' interests in the trusts were "mere expectancies." Order at 15. The Appellees' interests in the trusts were subject to the Trustees' discretion, including the Trustees' discretion to exclude them from any distributions or to make a distribution to a distributee trust that excluded them as beneficiaries. The Appellees' interests also were defined by the purposes for which the Settlor created the trusts, which included the purpose of continuing the operation of HDC. By concluding that allowing the decantings to stand would be wrongfully "condoning complete removal of beneficial interests through decanting based solely on the business purposes set forth in a trust," the probate court failed to consider the limited scope and nature of the Appellees' beneficial interests as provided in the terms of the 2004 Trusts, which expressly permitted the elimination of those interests and were designed to achieve the purpose of continuing the operation of HDC.

The probate court observed that the Settlor "having put [the Appellees] *irrevocably* in the 2004 Trusts, the co-trustees had a duty to take their interests into account and not dismissively ignore them." Order at 35, fn. 31 (emphasis added). The Appellees, however, did not have "irrevocable" interest in the trusts. The terms of the trusts expressly empowered the Trustees to distribute the trust property to a distributee trust that excluded the Appellees as beneficiaries. Although each of the trusts was irrevocable—i.e., the Settlor did not reserve the power to revoke the trust and direct the distribution of the trust property (see RSA 564-B:1-103(14) and 564-B:6-602(d))—such irrevocability does not mean that the Trustees did not have the power to make distributions to the exclusion of the Appellees. To the contrary, the terms of the 2004 Trusts expressly allowed the Trustees to make distributions to the exclusion of the Appellees.

In evaluating whether the Trustees' considered the interests of the beneficiaries when they decanted the trusts, the probate court impermissibly substituted its judgment for that of the Trustees. The court found that "[the Trustees] did not make any adjustments to the structure of the decanting or choice of the method with which the beneficial interests might be permissibly modified in light of consideration given to those interests." Order at 30. The court also found that "there is no documentary evidence, and *little or no* testimonial evidence, that the [Trustees] ever considered less draconian measures—or to put it another way—options that would have mitigated or neutralized the risk to the company, but resulted in something less than complete removal of the [Appellees'] beneficial interests established under the 2004 Trusts." Order at 36 (emphasis added). In so doing, the court went beyond its mandate to review the Trustees' discretionary decisions for abuse, and instead substituted its judgment for that of the Trustees. See Wentworth.

The probate court chided the Trustees for, in its view, placing too much emphasis on the Settlor's expressed views as to what was in the best interest of the trusts, considering their purpose as a vehicle for the successful operation of HDC. The court did so despite acknowledging that a bedrock principle of New Hampshire trust law is the preeminence of settlor intent. See, e.g., Order at 5 ("It is well-established that the intent of the settlor is the veritable North Star guiding a court when it is interpreting a trust." (Citation omitted)). It further recognized that "a settlor's comments before *or after* the execution of a trust is [sic] not permitted to contradict the express language in the instrument, *but where appropriate may serve as a helpful tool in discerning his or her intent.*" Order at 7 (citing Merrow v. Merrow, 105 N.H. 103, 106 (1963) (emphasis added)).

The probate court found “[a]lthough both [Trustees Saturley and Johnson] claimed to have made an independent decision, it is apparent that each *deeply* considered [the Settlor’s] wishes.” Order at 29 (emphasis added). This language, which suggests the probate court was concerned the Trustees placed too much weight on the Settlor’s wishes, versus the weight of the interests of the Appellees, seems inconsistent with its more definitive subsequent finding that the Trustees “did not give *any* consideration to the [Appellees’] beneficial interests.” Order at 35 (emphasis added).

There is apparently no dispute that the Settlor felt that HDC would suffer if the Appellees continued to play a role and that they should not retain beneficial interests in the trusts, that he stated this on multiple occasions to the Trustees, and that the Trustees agreed. Contrary to the court’s concern, it would seem axiomatic—and consistent with Merrow—that, as the Trustees engaged in their assessment as to the propriety of the decantings, the Settlor’s statements to them were among the best available evidence of his intent as the settlor, serving to augment the express terms of the trusts and the Trustees’ personal knowledge of how circumstances had evolved since the trusts were formed.

IV. Did the Trustees Act Impartially in Making the Distribution, or Did the Terms of the Trust Relieve the Trustees of the Duty of Impartiality?

In exercising their decanting power under the terms of the trusts, the Trustees did not have a duty to act impartially, and they could exclude the Appellees as beneficiaries of the distributee trust. A trustee generally has a duty of impartiality when making distributions. RSA 564-B:8-802 (“[i]f a trust has 2 or more beneficiaries, the trustee shall act impartially in ... distributing the trust property, giving due regard to the beneficiaries’ respective interests”). A settlor, however, can modify or waive the duty of impartiality. RSA 564-B:1-105(a). In the 2004 Trusts, the Settlor waived the Trustees’ duty of impartiality with respect to the decanting power

granted to the Trustees under the terms of those trusts. Under the definition of “distributee trust,” the Trustees had the power to decant to a trust for the benefit of “any one or more, but not necessarily all, of the members of” a class that included the Appellees. Thus, the Trustees had the power to exclude the Appellees as beneficiaries of the distributee trust.

Even if the Settlor had not waived the Trustees’ duty of impartiality, the Trustees did not have a duty to treat the Appellees the same as the other trusts’ other beneficiaries.

The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably *in light of the purposes and terms of the trust*. A settlor who prefers that the trustee, when making decisions, generally favor the interests of one beneficiary over those of others should provide appropriate guidance in the terms of the trust. See Restatement (Second) of Trusts § 183 cmt. a (1959).

Unif. Trust Code § 802, Comment (2010) (emphasis added). In light of the trusts’ purposes in promoting HDC’s continued viability and the trusts’ express terms granting the Trustees the discretionary power to make distributions to the exclusion of one or more beneficiaries, the Trustees, consistent with their duty of impartiality, could decant into trusts of which the Appellees were not beneficiaries.

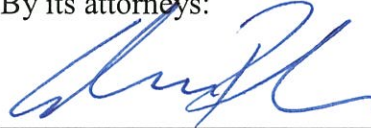
CONCLUSION

For the reasons stated above, *amicus* respectfully requests that this Court reverse the probate court's order voiding the decantings.

Respectfully submitted,

NEW HAMPSHIRE TRUST COUNCIL

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November 1, 2016

Certificate of Service

I hereby certify that two copies of the foregoing *Brief Amicus Curiae of the New Hampshire Trust Council In Support of the Appellants* were served this 1st day of November, 2016 by first class mail, postage prepaid, and electronic mail on counsel for the Appellants Jeffrey H. Karlin, Esq. and Russell F. Hilliard, Esq., and on counsel for the Appellees Roy W. Tilsley, Jr., Esq. and Edward J. Sackman, Esq.



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