

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2019-0319

In re: David A. Hodges, Jr., et al v. Alan Johnson, et al

RULE 7 MANDATORY APPEAL FROM THE
7th CIRCUIT - PROBATE DIVISION – DOVER
COMPLEX TRUST DOCKET

BRIEF FOR PETITIONERS
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QUESTIONS PRESENTED FOR REVIEW

- I. Whether it was an unsustainable abuse of discretion for the trial court to hold the Former Co-Trustees of the David A. Hodges, Sr. Irrevocable Trusts *personally* responsible for the attorneys' fees and expenses they incurred in the litigation over the validity of the Trusts' decantings.
- II. Whether the record below lacks sufficient findings of fact to support the trial court's order that the Former Co-Trustees of the David A Hodges, Sr. Irrevocable Trusts should be *personally* responsible for the attorneys' fees and expenses they incurred in the defense of litigation brought over the validity of the trust' decantings.

STATEMENT OF THE CASE

This matter arises from litigation over the validity of the decantings of two irrevocable trusts that were established by David A. Hodges, Sr. (the "Settlor"). This appeal is the second matter arising from the decantings to come before this Court. The decision after trial of the action to void the decantings previously came before this court in *Hodges v. Johnson*, 170 N.H. 470, 177 A.3d 86 (2017).¹ This appeal arises from the Circuit Court, Probate Division, Complex Trust Docket's (the "lower court" or "trial court") decision subsequent to *Hodges v. Johnson*, *supra*, regarding the attorneys' fees and expenses incurred by the former Co-Trustees of the Irrevocable Trusts,² Alan Johnson and Attorney William S. Saturley (the "Former Co-Trustees"), in the decanting litigation.

One of the irrevocable trusts contains assets exempt from generation skipping transfer taxes (the "GST-Exempt Irrevocable Trust") and the other irrevocable trust contains assets that

¹ To minimize the size of the appendix, when possible the Former Co-Trustees will cite to *Hodges v. Johnson*.

² See definition of the Irrevocable Trusts below on page 2.

are not exempt from generation skipping transfer taxes (the “GST Non-Exempt Irrevocable Trust”). *Hodges v. Johnson*, 170 N.H. at 474, 177 A.3d at 88-89. Both of the GST-Exempt Irrevocable Trust and the GST Non-Exempt Irrevocable Trust (collectively the “Irrevocable Trusts”) were established on August 24, 2004 by decanting from previously established irrevocable trusts. *Id.* Both of the Irrevocable Trusts have the same beneficiaries and general terms. *See* Appendix at pages 51-202. The Irrevocable Trusts are funded with non-voting stock of Hodges Development Corporation (“HDC”), which constitutes ninety-eight percent (98%) of all of the stock of HDC. *Hodges v. Johnson*, 170 N.H. at 475, 177 A.3d at 89.

When the Irrevocable Trusts were established, David A. Hodges, Sr. retained no power to amend or modify the Irrevocable Trusts, with one very limited exception. *Hodges v. Johnson*, 170 N.H. at 89-90, 177 A.3d at 475-477. The Settlor retained the authority during his lifetime to amend the provisions related to the “appointment, resignation, removal and number” of members of a board established under the trust to serve as a trust advisor (the “Committee of Business Advisors or CBA”). *Id.*

Under the August 24, 2004 instruments, the beneficiaries of the Irrevocable Trusts were the Settlor’s then wife, Joanne Hodges, the Settlor’s children, David A. Hodges, Jr., Nancy Friese and Janice Coville, the Settlor’s step-children (Joanne’s children from a prior marriage), Barry Sanborn and Patricia Sanborn, and all issue of the foregoing beneficiaries. *Hodges v. Johnson*, 170 N.H. at 475, 177 A.3d at 89. During the Settlor’s lifetime,³ the beneficiaries’ right to receive distributions were very limited.

The Irrevocable Trusts were decanted several times after August of 2004.⁴ The Former Co-Trustees were serving immediately prior to and immediately after each of the decantings.

³ David A. Hodges, Sr. died in August of 2015. *See Hodges v. Johnson*, 170 N.H. at 473, 177 A.3d at 88.

⁴ The decantings occurred in 2010, 2012 and 2013. *See Hodges v. Johnson*, 170 N.H. at 478, 177 A.3d at 91-92.

Hodges v. Johnson, 170 N.H. at 478, 177 A.3d at 91-92. The decantings were orchestrated by Attorney Joseph McDonald, a preeminent New Hampshire estate planning attorney, who accomplished the decantings while serving as Co-Trustee. *Id.* Attorney McDonald advised the Former Co-Trustees that the decantings would be valid. *Id.* In reliance on Attorney McDonald's advice, the Former Co-Trustees allowed Attorney McDonald to temporarily serve as Co-Trustee in order to accomplish the decantings. *Id.* Had the decantings accomplished by Attorney McDonald been upheld, they would have eliminated the beneficial interests of Joanne Hodges, David A. Hodges, Jr., Barry Sanborn and Patricia Sanborn (the "Decanted Beneficiaries"). *Id.* Given the observed enmity between the Decanted Beneficiaries, particularly David A. Hodges, Jr. and Barry Sanborn, and David A. Hodges, Sr., who ran HDC, the Irrevocable Trusts' significant asset, the Former Co-Trustees felt the decantings would protect the terms, purposes and beneficiaries of the Irrevocable Trusts, and that they were appropriately exercising their discretion.⁵ See generally, *Hodges v. Johnson*, *supra*; Transcript, *Hodges v. Johnson*, September 24, 2015, Volume II, Page 329, lines 4-21.

While David A. Hodges, Sr. was still alive, some of the Decanted Beneficiaries initiated an action to invalidate the decantings.

Decantings are authorized under New Hampshire law, which includes decanting to remove a beneficial interest. See RSA 564-B:4-418⁶. The decanting validity action turned on the question of whether the Former Co-Trustees properly exercised their duty of impartiality to the Decanted Beneficiaries when the decantings were accomplished. *Hodges v. Johnson*, 170

⁵ Indeed, the hostility between the beneficiaries of the Irrevocable Trusts which hold the non-voting stock of Hodges Development Corporation, was acknowledged by the Court and the parties in the original action, and at one point resulted in armed guards being hired to protect the Settlor and Alan Johnson while they worked at Hodges Development Corporation.

⁶ A trustee's right to decant is derived in RSA 564-B:4-418. This statute has been amended since the decantings were made in 2010, 2012 and 2014, but the right to decant and eliminate a beneficial interest existed under RSA 564-B:4-418 (eff. September 9, 2008 to June 30, 2014). See Appendix pages 43-50.

N.H. at 479, 177 A.3d at 92. For the purpose of this appeal, it is important to note what this Court found regarding the Former Co-Trustees:

The trial court did not invalidate the decantings on the ground that the defendants failed to act in accordance with the terms of the 2004 trusts because they decanted pursuant to the settlor's direction. Indeed, although the trial court came close to finding that the decantings were accomplished at the settlor's direction, it failed to so find Nor did the court find that the defendants acted in bad faith when the decantings occurred.

Hodges v. Johnson, 170 N.H. at 479, 177 A.3d at 92.

The trial court's invalidation of the decantings was upheld on appeal. This Court ruled that on the record before it, the Trustees did not properly exercise their fiduciary duty of impartiality to the Irrevocable Trusts' beneficiaries. *Hodges v. Johnson*, 170 N.H. at 487, 177 A.3d at 98.

It is noteworthy, however, that when the decantings were accomplished, and when the equity case was brought to void the decantings, there was no clearly established law or other settled authority concerning the exercise of a trustee's duty of impartiality regarding decanting to eliminate the interest of a beneficiary. Although the Former Co-Trustees' role in the decantings was considered a "serious" breach of trust, it is significant to the matter presently before the Court that when the Former Co-Trustees participated in the decantings accomplished by Attorney McDonald as Co-Trustee, there was no case law to advise the Former Co-Trustees how to properly exercise their duty. There is no finding that the Former Co-Trustees engaged in or participated in a forbidden activity regarding the Irrevocable Trusts. Nor did they fail to follow specific directives previously established by statute or this Court.

This appeal concerns the attorneys' fees and expenses incurred by the Former Co-Trustees in the decanting litigation. The Former Co-Trustees paid their attorneys' fees and expenses through trial out of the Irrevocable Trusts. After the trial court's decision in the

decanting validity action, and while the appeal process proceeded, the Former Co-Trustees paid their attorneys' fees and expenses personally. The Former Co-Trustees, thereafter, applied to have this Court require the Irrevocable Trusts to reimburse them for the attorneys' fees and expenses they paid out of pocket. Successor Co-Trustees of the Irrevocable Trusts, who were appointed by the Probate Court sometime in or around the summer of 2018, filed pleadings seeking to require the Former Co-Trustees to reimburse the Irrevocable Trusts for the Former Co-Trustees' attorneys' fees and expenses paid by the Irrevocable Trusts. The Successor Co-Trustees were not parties in the original trial on the validity of the decantings.

On April 1, 2019, the lower court held a hearing on the pending claims regarding the Former Co-Trustees' attorneys' fees. No evidence was submitted other than the invoices supporting the fees and expenses that were put before the court. The Former Co-Trustees' attorneys' fees and expenses that were paid by the Irrevocable Trusts were \$89,586.91. The Former Co-Trustees' attorneys' fees and expenses that they paid out of pocket after the decanting validity trial were \$58,841.00, most of which were incurred before to the appointment of the Successor Co-Trustees. However, they were reimbursed for \$22,666.00 of those fees through a settlement reached with Attorney McDonald, and thus the amount of reimbursement they requested from the Irrevocable Trusts was \$39,573.42.

The lower court ordered the Former Co-Trustees to reimburse the Irrevocable Trusts for *all* of their attorneys' fees and expenses paid by the Irrevocable Trusts, \$89,586.91, allowed the Former Co-Trustees reimbursement of \$5,306.43 (relating to the appointment of the Successor Co-Trustees), and denied the Former Co-Trustees reimbursement of the remaining \$34,266.99 which they had paid out of pocket.

Therefore, ultimately, this case concerns the Former Co-Trustees' request that they not have to reimburse the Irrevocable Trusts for \$89,586.91 paid by the Trusts for their attorneys' fees and expenses, and the Former Co-Trustees' request for reimbursement of \$34,266.99 they personally paid for attorneys' fees and expenses.

STATEMENT OF THE FACTS

The Former Co-Trustees served as Co-Trustees of the Irrevocable Trusts until they were removed by the trial court after the conclusion of the appeal of the trial court's decision on the validity of the decantings. In the decanting litigation, the Former Co-Trustees incurred attorneys' fees of \$79,348.39 and expenses of \$10,238.61 through trial, all of which were paid by the Irrevocable Trusts. Appendix at page 203. They also incurred \$62,239.42 in attorneys' fees and expenses after trial, which were reduced by \$39,573.42 after the contribution of a third party in the amount of \$22,666.00. Appendix at page 204.

SUMMARY OF ARGUMENT

Trustees are authorized by RSA 564-B:8-805 and 7-709 to have the expenses they incur on behalf of a trust to be paid by a trust provided the expenses are reasonable and incurred in good faith. The lower court committed an unsustainable abuse of discretion by conflating RSA 564-B:7-709, 8-805, 10-1001, 10-1002 and 10-1004 and common law to treat the Former Co-Trustees' attorneys' fees and expenses as damages. The lower court erred by accepting the Successor Co-Trustees' invitation to focus exclusively on the *result* of the Decanting Litigation, in which the Former Co-Trustees were found to have breached one of their fiduciary duties. The lower court gave no regard to the propriety of the decision made by the Former Co-Trustees to incur the fees and expenses. If the trial court had conducted a proper analysis of the Former Co-Trustees' attorneys' fees and expenses, it would have concluded that the fees and expenses were

reasonably incurred in good faith, and, therefore, should be properly paid by the Irrevocable Trusts. The trial court's decision was an unsustainable abuse of discretion and should be reversed without remand with an order of reimbursement to the Former Co-Trustees.

ARGUMENT

Even if a decanting eliminates a beneficiary, it is indisputable that trustees have the legal authority to decant a trust to a new trust, unless the trust settlor specifically includes a provision restricting or prohibiting a trustee from decanting. The trustee's power to decant implicates a host of the trustee's fiduciary duties. The Decanting Litigation presented a legal issue of first impression in New Hampshire. When a trustee exercises his or her power to decant and to remove a beneficial interest, how does the trustee thereby fulfill his or her fiduciary duties?

The trial in the Decanting Litigation turned specifically on the trustee's duty of impartiality because the decantings eliminated some beneficial interests. However, removing a beneficial interest from a trust is always partial. It will always favor the remaining beneficiaries and it will always disadvantage the beneficiary whose interest is eliminated. How does a trustee exercise his or her power to decant to remove a beneficial interest while still fulfilling his or her duty of impartiality? In the Decanting Litigation, the trial court attempted bridge the gap by defining the duty of impartiality as implicated in a decanting to remove a beneficiary. Yet on appeal, this Court found the trial court's definition of the duty of impartiality erroneous, and articulated a different standard. There no established New Hampshire law to provide guidance to the Court in deciding the validity of the decantings during the trial in 2015 (and there had been no established New Hampshire law to provide guidance to the Former Co-Trustees when the decantings were done in 2010, 2012 and 2013). Thus, even the skilled and experienced trial court erred in its construction of the applicable law. Further, this Court's holdings regarding the

duty of impartiality in *Hodges v. Johnson*, 170 N.H. 470, 177 A.3d 86, required clarification of its prior explanation of the duty of impartiality as set forth in *Shelton v. Tamposi*, 164 N.H. 490, 62 A.3d 741 (2013).

After rejecting the trial court's iteration of a trustee's duty of impartiality regarding the trustee's exercise of the legitimate power to remove a beneficial interest via decanting, this Court defined that duty and upheld the trial court's conclusion that the Former Co-Trustees had failed to consider or take into account the beneficial interests of the beneficiaries whose interests were eliminated, thereby breaching their fiduciary duty of impartiality. Neither this Court, nor the trial court, ever ruled, suggested or implied that the beneficial interests of the Decanted Beneficiaries could not be eliminated via decanting.

The matter was remanded back to the Probate Court for further proceedings concerning attorneys' fees. On remand, the trial court entertained the Former Co-Trustees' request that the attorneys' fees and expenses they personally paid for their defense in the Decanting Litigation be reimbursed to them out of the Irrevocable Trusts, and the Successor Co-Trustees' request that the Former Co-Trustees' attorneys' fees and expenses paid by the Irrevocable Trusts be reimbursed to the Irrevocable Trusts by the Former Co-Trustees personally. Other than invoices, no evidence was submitted to the trial court at the hearing on fees. The trial court denied the Former Co-Trustees' requests that their unpaid attorneys' fees and expenses be paid by the Irrevocable Trusts, and ordered that they reimburse the Irrevocable Trusts for attorneys' fees and expenses paid by the Trusts.

This appeal contends that it was an abuse of discretion to hold the Former Co-Trustees responsible for the attorneys' fees and expenses that they incurred in the Decanting Litigation. The trial court further erred because there was no finding or ruling on the circumstances by

which a trustee may decant to eliminate the interest of a beneficiary without violating the duty of impartiality. Thus, there remains no measure as to the claimed gravity of the Former Co-Trustees' breach of the duty of impartiality. The Order also failed to account for the Catch-22 facing the Former Co-Trustees when the action was brought to void the decantings, and instead focused only on the result of the decantings. Conceding to the claims of the Decanted Beneficiaries would have been detrimental to the interests of the beneficiaries who remained after the decantings. The ruling fails to consider the dearth of legal guidance to navigate the decision to eliminate the interests of beneficiaries via decanting when the decantings were accomplished. Finally, the trial court erred by conflating the New Hampshire Trust Code provisions governing: 1) a trustee's ability to have his or her fees paid out of the trust he is administering; 2) the provisions allowing an award of attorneys' fees to a party in litigation and the damages; and 3) the provisions governing damages.

I. THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S ORDER THAT THE FORMER CO-TRUSTEES ARE PERSONALLY RESPONSIBLE FOR THE ATTORNEYS' FEES AND EXPENSES THEY INCURRED IN THE DECANTING LITIGATION.

It now appears that Justice Basset's dissenting opinion in *Hodges v. Johnson*, 170 N.H. at 488, 177 A.3d at 100, was prescient. He foresaw that by affirming the result reached in the Probate Court on alternate legal grounds not considered by the trial court or briefed by the parties, the opinion has "far-reaching, unintended consequences" for the Former Co-Trustees as well as generally for "trust and fiduciary law in New Hampshire." *Id.* These far reaching consequences include, *inter alia*, the trial court's denial of the Former Co-Trustees' request that the fees and expenses they incurred in the decanting litigation be paid by the Irrevocable Trusts.

The denial of the Former Co-Trustees' ability to have their attorneys' fees and expenses paid by the Irrevocable Trusts was made without consideration of the very things Justice Bassett said were necessary to avoid those unintended consequences:

(1) the circumstances under which a trustee violates the duty of impartiality when the trustee unequally distributes trust assets and/or eliminates a beneficiary's future interest in an irrevocable trust by decanting; and (2) whether the defendants, Alan Johnson, Joseph McDonald, and William Saturley, violated that duty when they eliminated the future beneficial interests of the plaintiffs, David A. Hodges, Jr., Barry R. Sanborn, and Patricia Sanborn Hodges, through decanting, while retaining two of the settlor's children as beneficiaries.

The record below does not contain specific findings of fact or law by the trial court specifically applying the breach of the duty of impartiality as defined by this Court on appeal.⁷ Nor does the record contain any findings of bad faith conduct by the Former Co-Trustees. *See Hodges v. Johnson*, 170 N.H. at 479, 177 A.3d at 92 ("Nor did the [trial] court find that the defendants acted in bad faith when the decantings occurred").

Thus, in the absence of any consideration of the Former Co-Trustees' conduct under the legal standard defined by this Court in *Hodges v. Johnson, supra*, the trial court committed an unsustainable abuse of discretion by ruling that the Former Co-Trustees are personally responsible for the attorneys' fees and expenses they incurred in the Decanting Litigation. The lack of a record to support the claim that the Former Co-Trustees' should be personally responsible for their attorneys' fees and expenses, and the trial court's ruling, requires reversal without remand of the trial court's order that the Former Co-Trustees should be personally responsible for the attorneys' fees and expenses they incurred in the Decanting Litigation.

⁷ Although this Court stated that "the trial court could reasonably have concluded that Johnson and Saturley committed a 'serious breach of trust' when they . . . violated their duty of impartiality", warranting their removal, this reference to a serious breach was in the context of the Former Co-Trustees' removal. *See Hodges v. Johnson*, 170 N.H. 488, 177 A.3d at 99.

II. THE TRIAL COURT COMMITTED AN UNSUSTAINABLE ABUSE OF DISCRETION BY FAILING TO CONSIDER THE FORMER CO-TRUSTEES' DEFENSE OF THE DECANTING LITIGATION UNDER THE LEGAL STANDARDS APPLICABLE TO THAT DECISION TO DEFEND WHEN IT WAS MADE

It is a general principle of New Hampshire law that an award of attorneys' fees may be made when expressly authorized by statute, an agreement or an established judicial exception. *Halifax-American Energy Company, LLC v. Provider Power, LLC*, 170 N.H. 569, 584, 180 3d 268, 282 (2018). There are several statutes regarding the issue of responsibility for the Former Co-Trustees' attorneys' fees and expenses. Two of these statutes, RSA 564-B:7-709 and 8-805, apply to all situations in which a *trustee incurs* attorneys' fees. Another statute, RSA 564-B:10-1004, *applies to all parties* to litigation, not just the trustee.

Rather than deciding whether the Former Co-Trustees' attorneys' fees and expenses were properly incurred under the standards established by RSA 564-B:7-709 and 8-805, the trial court conflated all statutes it contemplated as potentially authorizing an award of fees to create a web in which to support a particular result. In its order arising from the trial in the Decanting Litigation, the trial court also conflated the duty of good faith set forth at RSA 564-B:8-801 with the duty of impartiality set forth at RSA 564-B:8-803, which this Court found to be in error. *See Hodges v. Johnson*, 170 N.H., at 482 177 A.3d at 95.

Matters of statutory construction are questions of law, reviewed by this Court *de novo*. *Ford v. New Hampshire Department of Transportation*, 163 N.H. 284, 291, 37 A.3d 436, 443 (2012). Here RSA 564-B:709, 564-B:8-805 and 564-B:10-1004 by their terms apply to the

payment of attorneys' fees and expenses incurred by a trustee in litigation. However, to the extent these statutes conflict, the more specific statute should apply.⁸

As discussed below, there are several additional statutes that the trial court erroneously also considered as supporting its award of damages. Despite all of the distractions raised by the Successor Co-Trustees and entertained by the trial court, there was really only one issue to be decided, to wit, were the Former Co-Trustees' attorneys' fees and expenses incurred in the Decanting Litigation to be paid by the Irrevocable Trusts, or were they the personal responsibility of the Former Co-Trustees?

A. The Trial Court Failed to Determine Whether the Former Co-Trustees' Attorneys' Fees and Expenses Were Properly Incurred Under RSA 564-B:8-805 and RSA 564-B:7-709.

The construction of RSA 564-B:8-805 and 7-709, which establish the standards by which the costs incurred by a trustee are the responsibility of a trust, has not previously been addressed by this Court.⁹ Nor has the interplay between those specific statutes, and RSA 564-B:10-1004.

When two statutes conflict, the more specific statute controls. *Ford v. New Hampshire Department of Transportation*, 163 N.H. at 294, 37 A.3d at 445. Here, in order to avoid a conflict, the adjudication of the claims regarding the Former Co-Trustees' attorneys' fees and expenses must turn on a step-by-step application of the applicable statutes, starting with the specific statutes that address the costs of administration. RSA 564-B:8-805 and 7-709 provide guidance to a trustee when he or she decides whether to incur attorneys' fees:

⁸ Although a trust instrument may establish a legal standard governing the trust's payment of the trustee's attorneys' fees and expenses, the Irrevocable Trusts contain no such provision. See RSA 564-B:1-105 (which does not identify the New Hampshire Trust Code provisions governing the trustee's attorneys' fees and expenses as mandatory rules).

⁹ *Shelton v. Tamposi*, 164 N.H. 490, 62 A.3d 741 (2013) touched upon the Probate Court's authority to allocate fees between parties pursuant to RSA 564-B:10-1004, but did not speak to the issue of whether the trustee in that case properly incurred her own attorney's fees.

RSA 564-B:8-805 provides that administration expenses incurred by a trustee must be “reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.”

RSA 564-B:7-709 provides that trustees may be reimbursed out of the trust property for “expenses properly incurred in the administration of the trust.”

The Court below ignored the dictates of RSA 564-B:7-709 and 8-805, which provide trustees and beneficiaries with an independent basis for determining whether the attorneys’ fees and expenses incurred by a trustee should be paid out of the trust.

Although RSA 564-B:10-1004 generally grants a court significant discretion to allocate responsibility for fees among the various parties in a litigation matter, a court considering the issue of whether a trust should bear the expense of litigation under the general authority of RSA 564-B:10-1004 must first consider whether the expenses were properly incurred under RSA 564-B:8-805 and 7-709. *See In re: Trust No. T-1 of Trimble*, 826 N.W.2d, 474, 491-492 (Iowa 2013) (“We conclude that a court considering whether to require a trust to pay the fees and costs of the trustee under section 633A.4507¹⁰ **should first consider whether the expenditures were properly incurred in the administration of the trust or otherwise benefitted the trust.**”) (emphasis added).

This construction of the relationship between RSA 564-B:10-1004 and RSA 564-B:7-709 and 8-805 is necessary and consistent with the legislature’s apparent intention that the New Hampshire Trust Code provide clear guidance to trustees, thereby creating a favorable environment to attract trust business to New Hampshire. Otherwise, a trustee who decides to incur attorneys’ fees and expenses will always have to worry that regardless of his or her good faith and reasonable decision to incur those costs under the standards set forth at RSA 564-B:7-

¹⁰ This is Iowa’s statute that corresponds to RSA 564-B:10-1004.

709 and 8-805, he or she may be personally accountable for those costs if a court in retrospect determines otherwise, and does so without any consideration of whether the trustee properly incurred those costs under the specific standard applicable to that decision.

Because RSA 564-B:10-1004 does not contain any standard or guide for the trustee incurring attorneys' fees and expenses, its application in the first instance could lead, as it did here, to arbitrary and unpredictable results. RSA 564-B:10-1004 is a general grant of authority to the Court to make an equitable award of fees to any party:

In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, **to any party**, to be paid by another party or from the trust that is the subject of the controversy.

This statute does not address the discretion of trustees.

Some cases in other jurisdictions have held that their statutes which correspond to RSA 564-B:10-1004 are the more "specific" statutes. Those courts still consider the decision made by the trustee to incur those expenses. *See Atwood v. Atwood*, 25 P.3d 936 (OK Civ App 2001) (itemizing a non-exhaustive list of factors to be considered when making an award of fees pursuant to the statute corresponding to RSA 564-B:10-1004 that would require consideration of the decision to incur fees); *Garwood v. Garwood*, 233 P.3d 977 (WY 2010) (adopting the considerations set forth in *Atwood*). The *Trimble* analysis, however, which requires the court to first directly consider whether the fees were properly incurred under RSA 564-B:8-805 and 7-709, offers trustees a clear guide for making a decision to incur attorneys' fees. The application of a specific set of standards to a trustee's decision-making diminishes the likelihood of an arbitrary result derived from the exercise of the broad discretion granted under RSA 564-B:10-1004 unmoored to the fiduciary standards set forth at RSA 564-B:8-805 and 7-709.

B. The Attorneys' Fees and Expenses Incurred by the Former Co-Trustees in the Decanting Litigation Were Reasonable and Necessary.

The action to challenge the decantings was clearly a claim against the Irrevocable Trusts. It sought to invalidate the actions of Joseph McDonald as Co-Trustee when he orchestrated the decantings. When making the decision to defend against that challenge, the metrics set forth in RSA 564-B:8-805 and 7-709 guided the Former Co-Trustees' decision.

The comments to the Uniform Trust Code provide guidance to the construction of these statutes as well. *Hodges v. Johnson*, 170 N.H. at 480, 177 A.3d at 93. The official comments to Section 8-805 of the Uniform Trust Code refer to Section 7 of the Uniform Prudent Investor Act and the corresponding Restatement (Third) of Trusts, §88. *See* Uniform Trust Code (2010), comment to Section 805.

The Restatement (Third) of Trusts, §88 (2005) authorizes a trustee to “incur and pay expenses that are reasonable in amount and appropriate to the purposes and circumstances of the trust, and to the . . . responsibilities . . . of the trustee.” The comments to the Restatement (Third) of Trusts, §88 are clear that “the exercise of the power [to incur expenses] is subject to the trustee’s fiduciary duties.” Restatement (Third) of Trusts §88 (2005) (comment d) speaks to the costs incurred by a trustee in judicial proceedings:

The trustee can properly incur expenses for reasonable counsel fees and other costs in bringing, *defending*, or settling litigation as appropriate to proper administration or performance of the trustee’s duties . . . The right of indemnification applies **even though the trustee is unsuccessful in the action**, as long as the trustee’s conduct is *not imprudent or otherwise in violation of a fiduciary duty*.

(emphasis added). The Restatement (Third) of Trusts §88 is clear that even if a trustee is not successful on the merits of a attorneys’ action, it may be still indemnified for its attorneys’ fees and expenses if its participation in the judicial proceeding was not imprudent or otherwise in

violation of a fiduciary duty. The decision to defend against the action to invalidate the decantings was not a breach of the Former Co-Trustees' fiduciary duties even if the ultimate decision to decant was found to be a breach.

The trial court failed entirely to determine whether the Former Co-Trustees properly incurred attorneys' fees and expenses in the decanting litigation under the standards set forth at RSA 564-B:8-805 and 7-709 and/or the other authority as cited above. Instead, the Court was invited by the Successor Co-Trustees to reach for a legal ground to substantiate an assessment of damages against the Former Co-Trustees for those fees. The trial court's acceptance of this invitation is dangerous, disregards of the law, and sets forth a dilemma for all trustees going forward. All fiduciaries, including trustees, hold a position of trust and are required to make countless decisions that require an exercise of discretion. With some decisions, there is a bright line to guide the trustee in making that decision. With most decisions, the trustee has to assess the situation in the context of the instrument, its terms and purposes, the interests of the beneficiaries and all factors relevant to the particular matter being decided. For most decisions, the trustee has tremendous discretion and is required to weigh a multitude of factors in exercising that discretion. Recognizing this reality, trust law does not punish trustees who properly exercise their discretion, even if the decision made does not ultimately yield the most favorable result when examined in hindsight.

By failing to determine the Former Co-Trustees' right to have the Irrevocable Trusts pay their attorneys' fees and expenses under RSA 564-B:8-805 and 7-709, the trial court gave itself the latitude it did not possess to simply consider the issue as a matter of damages. This was an unsustainable abuse of discretion. *In re: Trust No. T-1 of Trimble*, 826 N.W.2d, 474, 491-492 (Iowa 2013).

C. The Former Co-Trustees Had An Affirmative Duty to Defend Against the Decanting Action

If the decantings had been upheld, the beneficiaries of the Irrevocable Trusts would have been Nancy Friese and Janice Coville, and their respective issue. Thus the petition to void the decantings implicated the Former Co-Trustees' duties of good faith, loyalty and prudence to the Friese and Coville beneficiaries. *See* RSA 564-B:8-801, 8-802 and 8-804. If the Former Co-Trustees had failed to defend the decantings, the resulting beneficial interests of the Friese and Coville beneficiaries would have each been reduced from fifty percent (50%) to twenty percent (20%). Further, if the Former Co-Trustees had failed to defend the decantings, the beneficiaries whose interests would be revived would be given the opportunity to engage in the very acts that gave rise to the decantings in the first instance.¹¹

D. It Was Reasonable for the Former Co-Trustees to Defend Against the Petition

Trust laws are by necessity broad and require the exercise of discretion. New Hampshire's legislative landscape is designed to give trustees the freedom to exercise their judgment, but always requiring that decisions be made in good faith. There are many areas of trust law for which there is uncertainty. This uncertainty arises in part because the laws are codified with little case law construing them, and in part because each trust is a discrete instrument, individualized to the settlor's wishes and intentions. Two trusts with similar provisions but different classes of assets (real estate vs. securities) would likely be construed differently. Two trusts holding the same assets but with different termination provisions, one to be distributed upon death, the other to be perpetuated indefinitely, would be construed differently. The combination of circumstances and provisions is infinite, each one requiring a

¹¹ See footnote 5.

trustee to administer to that particular trust's terms, purposes and defined interests, within the defined standards and discretion provided by the trust instrument and the law. It is expected that a trustee will have a good faith foundation for his or her decisions. The Former Co-Trustees had a well-founded basis in law to believe that the decantings were valid, and in good faith believed the decantings were valid. They could not have failed to defend or "thrown in the towel" and walked away from the decantings without violating their duties to Nancy Friese and Janice Coville, and their respective issue. The Former Co-Trustees did not act in bad faith. Instead, they relied upon the expertise of Attorney McDonald who had advised them that the decantings were proper.¹²

The Former Co-Trustees were at risk if they failed to defend against the decantings. Namely, the two beneficiaries who were not removed by the decantings could claim that the Former Co-Trustees breached their fiduciary duties to them, resulting in dilution of their interests in the Trusts.

Decanting to a trust that eliminates a beneficiary was and is still the law. Trustees today have some more guidance in making the decision to decant an irrevocable trust than they did prior to December of 2017 and the *Hodges v. Johnson* decision. The Former Co-Trustees did not have such guidance and did not breach any fiduciary duty by defending against the Petition, which should be the focus of the Court's inquiry. Instead, the trial court only looked at the question of whether the Former Co-Trustees had breached their duty of impartiality when they participated in the decantings. It never addressed the question of whether the Former Co-

¹² The Former Co-Trustees were criticized for relying on Attorney McDonald's advice because he represented the Settlor. However, the advice provided by Attorney McDonald was confirmed by the Former Co-Trustees' expert in the Decanting Litigation, Attorney Robert Wells. If consulted when the decantings were proposed, the Wells opinion would underscored and affirmed Attorney McDonald's approach. See Transcript, *Hodges v. Johnson*, October 15, 2015, Volume III, Page 448, Lines 3 – 15.

Trustees breached any duties when they made the decision to defend the action to invalidate the decantings.

For the foregoing reasons, the Former Co-Trustees' attorneys' fees and expenses in the Decanting Litigation were reasonably incurred pursuant to RSA 564-B:8-805. Therefore, the Former Co-Trustees attorneys' fees and expenses paid out of pocket should be properly reimbursed to them pursuant to RSA 564-B:7-709.

III. JUSTICE AND EQUITY REQUIRE THAT THE FORMER CO-TRUSTEES' ATTORNEYS' FEES AND EXPENSES BE PAID BY THE TRUST

Had the trial court established that the Former Co-Trustees' attorneys' fees and expenses were indeed properly incurred pursuant to RSA 564-B:8-805, an analysis of whether those fees should be allocated pursuant to RSA 564-B:10-1004 might have been undertaken. The RSA 564-B:10-1004 analysis requires consideration of the following factors: the reasonableness of the parties' claims, contentions or defenses; whether the litigation was unnecessarily prolonged; the parties' relative ability to bear the financial burden; and whether the trustee "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in the bringing or conduct of the litigation. *In re: Trust No. T-1 of Trimble*, 826 N.W. 2d 474, 492-493. These factors require an analysis of the trustee's conduct in the litigation, not the conduct that gives rise to the litigation.

The Former Co-Trustees' position in the litigation was reasonable. They did not violate an established principal of law and they believed the decantings were valid. There was no established law in New Hampshire to inform the Former Co-Trustees that they would not be successful in defending against the action to void the decantings. It is erroneous to measure the reasonableness of the Former Co-Trustees' decision to defend with hindsight. Considering the

state of the law at the time the Decanting Litigation was commenced, the only conclusion that may be made is that the Former Co-Trustees' position in the litigation was reasonable.

The Former Co-Trustees did not unreasonably prolong the litigation. There is no indication in the record that they caused delays or impediments. The Irrevocable Trusts, rather than the Former Co-Trustees individually, are certainly able to bear the financial burden of the Former Co-Trustees' attorneys' fees and expenses. Considering the novelty and importance of the issues presented in the litigation, the financial burden of the Former Co-Trustees' attorneys' fees and costs to the Irrevocable Trusts is more than reasonable.

Finally, the Former Co-Trustees did not act in bad faith in the Decanting Litigation. Assessing a trustee with litigation expenses and costs when he or she has in good faith sought to properly administer a trust creates uncertainty for the trustees potentially hinders their proper administration of a trust for fear of reprisal. That outcome is directly contrary to the general intentions of the New Hampshire legislature in its adoption of the New Hampshire Trust Code, and the continuing additions and amendments to those laws, all designed to create certainty and a forum in which trustees will be protected by their good faith efforts to administer a trust in accordance with the intentions of the trust settlor.

For the foregoing reasons, it was an unsustainable abuse of discretion to order the Former Co-Trustees personally responsible for the attorneys' fees and expenses they incurred in the Decanting Litigation. The record does not support an order that the Former Co-Trustees should be personally responsible for those fees pursuant to RSA 564-B:10-1004. The lower court's Order suggested throughout that it lacked authority to allow reimbursement of the Former Co-Trustees' attorneys' fees and expenses incurred in the appeal of the order in the Decanting Litigation. To the extent its Order denying reimbursement is founded on this belief, the lower

court is in error. Considering the Former Co-Trustees' request for reimbursement of their attorneys' fees and expenses incurred after trial under the umbrella of the Court's authority to award fees in litigation matters pursuant to RSA 564-B:10-1004, ignores the Former Co-Trustees' right to be reimbursed for those fees and expenses under RSA 564-B:7-709. RSA 564-B:7-709 authorizes a trustee to be reimbursed for attorneys' fees and expenses incurred in administering a trust, including fees and expenses incurred in litigation concerning the trust. RSA 564-B:7-709 contains no restriction limiting that right to reimbursement for attorneys' fees and expenses incurred at trial and/or prohibiting the right of reimbursement for attorneys' fees and expenses incurred on appeal. It would be illogical and unnecessary to making such a distinction in RSA 564-B:7-709.

IV. THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION WHEN IT RELIED ON ITS DETERMINATION THAT THE FORMER CO-TRUSTEES SHOULD HAVE SOUGHT INSTRUCTION FROM THE PROBATE COURT.

One of the considerations raised by the Successor Co-Trustees and inappropriately relied upon by the trial court in its order requiring the Former Co-Trustees to pay their attorneys' fees and expenses incurred in the Decanting Litigation is its assertion that they did not file a petition for instruction with the Probate Court regarding their decisions in the decantings. The trial court cites that failure to determine that the Former Co-Trustees did not make a good faith effort to consider the interests of the beneficiaries whose interests were removed by the decantings. This is an abuse of discretion for the following reasons.

A. A Trustee Is Not, Nor Should He Be, Required to File a Petition for Instruction for Every Exercise of Discretion.

The exercise of discretion one of the foundations of fiduciary law.

Trustees have significant discretion, to be exercised within the parameters defined by the trust instrument, and the applicable statutory and common law. There is no bright line to tell a trustee that a particular exercise of discretion warrants the filing of a petition for instruction.¹³ Ironically, the actual decision to file a petition for instruction is an exercise of discretion that may give rise to a claim by a beneficiary that it was not necessary or warranted. Thus the trustee must pay the legal fees and expenses associated with the filing, if it is retrospectively determined that the decision to seek instruction was an abuse of discretion. There are circumstances in which it is appropriate for a trustee to seek instruction regarding an exercise of discretion. The trial court failed to establish a valid foundation or set out any criteria to support its assertion that the Former Co-Trustees should have filed a petition for instruction when exercising the statutorily conferred discretion to decant the Irrevocable Trusts to eliminate the beneficial interests of the Removed Beneficiaries.

1. There was no established law to suggest to the Former Co-Trustees that their decision-making when exercising their discretion to decant was subject to doubt or conflicting claims, and thus that they should file a petition for instruction.

While it seems that the trial court has disdain for a trustee's statutorily granted power to decant to eliminate the interest of a beneficiary, it is beyond question that the legislature granted trustees that power. It is also clear from the record in the trial in the Decanting Litigation that the Former Co-Trustees acquiesced in the decantings because they were concerned that the contemporaneous conduct of the Decanted Beneficiaries threatened their ability to fulfill the

¹³ General guidance from this Court regarding the filing of a petition for instruction is found in *In re: Lykes' Estate*, 113 N.H. 282, 286, 305 A.2d 684, 686-687 (1973), *quoting*, *Amoskeag Trust Co. v. Wentworth*, 99 N.H. 346, 348, 111 A.2d 198, 200 (1955), "if specific questions of doubt or of conflicting claims should arise later where advice of the court is necessary for the protection of the trustee application may then be made therefore and further instruction will be given."

primary material purpose of the Irrevocable Trusts, the preservation and continuation of the Business Interests, including the non-voting stock of Hodges Development Corporation.¹⁴ See *Hodges v. Johnson*, 170 N.H. at 475, 177 A.3d at 89 (“The paramount purpose of the 2004 trusts was to provide for the continuation of HDC after the settlor’s death by eliminating the need to liquidate HDC assets in order to pay estate taxes.”) And, although the matter of *Hodges v. Johnson*, *supra*, turned on the duty of impartiality, the decanting statute in effect at the time the decantings were made only referenced the trustee’s general duties under RSA 564-B:8-801. See RSA 564B:4-418(e) (eff. September 9, 2008 to June 30, 2014). There was no reference to RSA 564-B:8-803, which establishes the duty of impartiality.

2. The decanting decision concerned contingencies that are not appropriate for a petition for instruction.

Retrosopes are not available to any of us. We do not have any other tool with which to make precise, accurate predictions. The Former Co-Trustees established the concerns about the Decanted Beneficiaries on which they relied in acquiescing in the decantings. There were issues, especially with David Hodges, Jr. and Barry Sanborn, resulting in HDC having to hire armed guards to protect David Hodges, Sr., who worked at HDC, and Alan Johnson. *Hodges v. Johnson*, 170 N.H. at 474, 177 A.3d at 88. Decisions are made in the present, in real world time,

¹⁴ Articles XII, paragraphs G and H of each of the Irrevocable Trusts reflect this intention:

G. Distribution of Business Interests. It is my desire, but not direction, that Business Interests not be distributed to any beneficiary, but rather remain in trust, so that they may be managed by the Committee of Business Advisors, if appropriate. Therefore, the Trustee shall not distribute any Business Interest to or for the benefit of any beneficiary without the written consent of a majority of the Members of the Committee, if the Committee is then in existence.

H. Distributions from Businesses. It has been my experience that retaining cash and other liquid assets in the Corporation and my other businesses is necessary and desirable for the long-term success and viability of each such business. Accordingly, it is my strong desire and intent that each such business retain, and not distribute to its shareholders and owners, cash and other liquid assets, so as not to endanger the viability of such business.

not in the rarefied atmosphere of a legal proceeding that takes months or years to come to a conclusion.

There is no way now, and there was no way when the decantings were done, to predict whether the Former Co-Trustees' concerns about the Decanted Beneficiaries would come to fruition if they remained beneficiaries. There was, however, real certainty in the moment regarding the actions of the Decanted Beneficiaries as being detrimental to HDC and therefore, to the Irrevocable Trusts. There is no question that the Former Co-Trustees had those concerns, and that if those concerns came to fruition, they would have imperiled the continuation of the Business Interests as intended by the Settlor.

It is also not certain that any petition for instruction would have been expeditiously entertained, as the courts generally refrain from ruling on contingencies. *See In re: Lykes' Estate*, 113 N.H. 382, 286, 305 A.2d 684, 686 (1973) ("This court will not give advice establishing maximum and minimum limits within which the trustee's discretion shall be exercised in the future.")

3. It may be reasonably inferred that any petition for instruction regarding the decanting would have been hotly contested, expensive and harmful to the Irrevocable Trusts.

Given the hostility that the Decanted Beneficiaries had towards David A. Hodges, Sr. and Alan Johnson, it is more than reasonable to infer that a proposed decanting would have been aggressively contested. The litigation ensuing from a petition for instruction to bless a proposed decanting to remove a beneficiary would be lengthy, costly, and in the instance of a trust that holds significant business assets, such as the Irrevocable Trusts, it would imperil the trust assets. However, the Court should, as the lower court did not, refrain from holding trustees to a standard of conduct and suggest that a petition for instruction could have been filed, when such a petition

may not be appropriate, for which the results are possibly harmful, and which certainly is impossible to predict.

4. Even after *Hodges v. Johnson*, we do not know how the Former Co-Trustees should have exercised their duty of impartiality.

Both the trial court's decision in the Decanting Litigation and this Court's decision in *Hodges v. Johnson, supra*, were about process. The Former Co-Trustees were found to not have properly exercised their duty of impartiality because they failed to consider the interests of the Decanted Beneficiaries. The trial court did not correctly state the law pertaining to the exercise of the duty of impartiality in a decanting. This Court upheld the trial court's *result* because the record supported the trial court's conclusion that the Decanted Beneficiaries' beneficial interests were not given any consideration. This Court did not, however, provide any guidance to the Former Co-Trustees as to how they should have fulfilled their duty of impartiality (nor was any guidance provided to other trustees who decant to remove a beneficiary as to how to weigh those beneficial interests).¹⁵

B. The Trial Court's Suggestion That a Petition for Instruction Should Have Been Brought By the Former Co-Trustees Should Be Disregarded.

The trial court's assertion that the Former Co-Trustees should have filed a petition for instruction and the rulings made in reliance upon that assertion must be disregarded because the assertion is purely speculative and not based upon law or fact. Further, the concept that any exercise of discretion for which there is any possibility of a challenge should be presented in a petition for instruction effectively makes the Probate Court the trustee. It also creates a significant burden on the courts, and creates significant uncertainty in trust law. For every

¹⁵ See the dissenting opinion in *Hodges v. Johnson*, 170 N.H. 470, 488-489, 177 A.3d 86, 99-100, stating that the matter should be vacated and remanded to identify "the circumstances under which a trustee violates the duty of impartiality when the trustee unequally distributes trust assets and/or eliminates a beneficiary's future interest."

matter addressed by a trustee for which there is no clear, established guideline, the trustee will be faced between the choices of petitioning for instruction, with all of the previously discussed negative consequences (time, cost, creating litigation, etc.) or exercising the discretion reasonably with the risk that if the right choice is not made in hindsight, the trustee may be subject to litigation and charged with paying his or her own legal fees and expenses, despite acting reasonably.

CONCLUSION

The trial court committed an unsustainable abuse of discretion when it ordered the Former Co-Trustees to reimburse the Irrevocable Trusts for the attorneys' fees and expenses they incurred in the Decanting Litigation, and denied their requests to be reimbursed by the Irrevocable Trusts for the attorneys' fees and expenses that they paid out of pocket. The trial court's decision should be reversed, so that the Former Co-Trustees' are reimbursed for all of the attorneys' fees and expenses they paid out of pocket and they are not required to reimburse the Irrevocable Trusts.

REQUEST FOR ORAL ARGUMENT

The Appellant requests a 15 minute oral argument. The argument will be made by Attorney Pamela J. Newkirk.

Respectfully submitted,

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SATURLEY, FORMER CO-TRUSTEES
OF THE DAVID A. HODGES, SR. GST-
EXEMPT AND NON-EXEMPT
IRREVOCABLE TRUSTS

By their attorneys,

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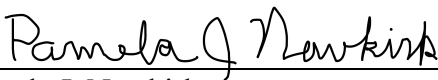
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Statement of Compliance

I hereby certify that on this 15th day of October, 2019, the foregoing pleading was sent via e-mail to counsel of record in this matter, Attorney Roy W. Tilsley, Bernstein Shur, PO Box 1120, Manchester, NH 03105-1120; Attorney Edward J. Sackman, Bernstein Shur, PO Box 1120, Manchester, NH 03105-1120; Attorney Jan P. Myskowski, Myskowski & Matthews, PLLC, 14 Dixon Avenue, Suite 204, Concord, NH 03301; Attorney Russell F. Hilliard, Upton Hatfield, 159 Middle Street, Portsmouth, NH 03801; Attorney Virginia S. Sheehan, Flood Sheehan Tobin, PLLC, Two Delta Drive, Suite 303, Concord, NH 03301; Attorney Ralph F. Holmes, McLane Middleton, PO Box 326, Manchester, NH 03105-0326; Attorney Alexandra S.

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