

State of New Hampshire Supreme Court

NO. 2021-0138

2021 TERM JUNE SESSION

In RE: The Omega Trust

RULE 7 APPEAL OF FINAL DECISION OF THE
10TH CIRCUIT – PROBATE DIVISION – BRENTWOOD

BRIEF OF DAVID J. APOSTOLOFF

Lisa J. Bellanti, Esq.
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NEW HAMPSHIRE STATUTES

RSA 564-B:4-4015

RSA 564-B:6-6025, 6

QUESTIONS PRESENTED

1. Did the court err when it dismissed the Petition to Validate the Third Amendment and Restatement of the Omega Trust by finding that there was not clear and convincing evidence that the Grantor intended to amend his trust?
2. Did the court err when it dismissed the Petition to Validate the Third Amendment and Restatement of the Omega Trust by finding that the Grantor did not substantially comply with a method provided in the terms of the trust?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Mark Frank Douglas established the Omega Trust (hereinafter “the Trust”) on December 30, 2005. Pursuant to the terms of the Trust, Mr. Douglas modified the Trust by First Amendment, dated June 4, 2015 and by Second Amendment and Restatement dated September 29, 2015. *Appx.* at 51.

The Second Amendment and Restatement of the Omega Trust provides that upon the death of the Grantor, The Omnos Trust, which is a nominee trust to the Omega Trust be dissolved and that 20% of the remaining trust estate be distributed to the trustee of The Tammy N. Rowan Irrevocable Trust (hereinafter “the Tammy Trust”) and 80% of the remaining trust assets be distributed to the trustee of The Rainbow Trust.

On August 11, 2016, Mark Frank Douglas contacted his attorney, Steven Burke, via email regarding his desire to amend the Trust, with specific instructions on what he wished to do. *Appx.* at 17. In said email, Mr. Douglas informed Attorney Burke of significant health issues. At this time, Kenneth M. Verolla served as Trustee of The Omega Trust, The Omnos Trust, The Tammy Trust and The Rainbow Trust. Mr. Douglas informed Attorney Burke that he wished to add successor trustees and successor trust protectors. Further, Mr. Douglas informed Attorney Burke that he wished to include the following additional beneficiaries, Pamela J. Silver, Grace Lin, Dawn M. Corrente and Laura L. Apostoloff.

On August 12, 2016, Attorney Burke responded to Mr. Douglas’ email. Attorney Burke sent an email to Mr. Douglas with some questions about the changes requested by Mr. Douglas. On August 16, 2016, Mr. Douglas sent an email to Attorney Burke approving the Third Amendment to the Trust with some minor changes. *Appx.* at 23.

On August 16, 2016 at 9:14 PM, Attorney Burke responded to Mr. Douglas that he would prepare the revised documents. *Appx.* at 23. Mr. Douglas passed away on August 18, 2016 without having signed the Third Amendment.

Under Paragraph 19 of the Second Amendment and Restatement, Mr. Douglas reserved the right to modify the Trust by filing notice of such modifications with the

Trustee. The relevant clause from Paragraph 19 of the Second Amendment and Restatement is as follows:

The Grantor reserves the right at any time or from time to time without the consent of any person and without notice to any person other than the Trustee to revoke or modify the trust hereby created, in whole or in part, to change the beneficiaries hereof, or to withdraw the whole or any part of the trust estate by filing notice of such revocation, modification, change or withdrawal with the Trustee; provided, however, that the terms of this agreement may not be modified by the Grantor in such manner as to increase the obligations or alter the rates of the commissions of the Trustee without its written consent.

SECOND AMENDMENT AND RESTATEMENT OF THE OMEGA TRUST. *Appx.* at 67.

On August 5, 2019, David J. Apostoloff filed a Petition to Validate the Third Amendment and Restatement of The Omega Trust. *Appx.* at 9. On February 7, 2020, the NH 10th Circuit – Probate Division – Brentwood appointed Attorney Benjamin Siracusa Hillman Special Trustee (hereinafter “the Special Trustee) for the limited purpose of representing the beneficial interests of The Tammy Trust and The Rainbow Trust. *Appx.* at 28.

The Special Trustee filed a Motion to Dismiss Petition to Validate the Third Amendment and Restatement of the Omega Trust (hereinafter “Motion to Dismiss”). *Appx.* at 31.

On February 5, 2021, the NH 10th Circuit granted the Motion to Dismiss. *Appx.* at 76. Mr. Apostoloff appealed the NH 10th Circuit Court’s decision.

SUMMARY OF ARGUMENT

Mr. Apostoloff argues that his Petition was an action to carry out the intention of Mark Frank Douglas by validating the unsigned Third Amendment. Prior to his passing, Mr. Douglas clearly and unequivocally sought to amend the Trust and instructed his attorney, Steven Burke of McLane Middleton, Professional Association, to prepare a Third Amendment and Restatement reflecting his intent. Unfortunately, Mr. Douglas passed away before the Third Amendment could be executed by him.

ARGUMENT

I. Trusts Need Not Be in Writing to be Valid

Unlike a will, a Trust need not be signed or be in writing to be valid, RSA 564-B:4-401.

In New Hampshire, a grantor can validly amend a revocable trust pursuant to RSA 564-B:6-602;

- (1) by substantial compliance with a method provided in the terms of the trust; or
- (2) by any other method manifesting clear and convincing evidence of the settlor's intent if the terms of the trust do not provide a method or do not expressly prohibit methods other than methods provided in the terms of the trust.

Given this language, the statute contemplates that a trust may be amended in several different ways, so long as those methods are not expressly prohibited by the trust and there is clear and convincing evidence that the Grantor intended to amend the trust.

Unless the terms of the trust require a signed writing, there is no statutory or common law support that a trust amendment must be signed by the grantor to be valid. In re Estate of Field, 953 A.2d 1281 (Pa. Super Ct. 2008).

In the case of In re Wendland-Reiner Trust, 677 N.W.2d 117 (Neb 2004), the Court noted that the modern trend in trust cases is to allow an amendment to a trust by any method so long as the amendment is established by clear and convincing evidence as to the intent of the settlor, unless the trust provides an exclusive method for amendment.

II. The Grantor Gave Sufficient Notice to the Trustee of his Intent to Modify the Trust

Paragraph 19 of the Second Amendment and Restatement of the Trust specifically grants Mr. Douglas the power to revoke or modify the Trust and prescribes a method of doing so. Mr. Douglas, as Grantor, had the right to modify the Trust by filing notice of the modification with the Trustee. The Trust does not require that the notice be in writing nor does it require an executed document.

Based on the standards set forth in RSA 564-B:6-602, the Trustee was given adequate and sufficient notice of the Third Amendment to satisfy the “filing of notice” requirement of Paragraph 19 because Mr. Douglas notified Mr. Verolla that he intended to modify the trust and that Mr. Douglas was communicating with his attorney to make such modifications.

Mr. Douglas had made all prior modifications to the trust and that this was his normal practice and procedure to do so in the same manner that he made the changes for the Third Amendment.

Moreover, because the terms of the Trust do not expressly prohibit methods to amend the Trust other than the method prescribed in the Trust, Mr. Douglas validly amended the Trust by manifesting clear and convincing evidence of his intent.

CONCLUSION

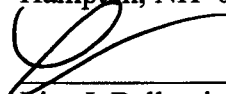
For the foregoing reasons, this Court should reverse the ruling of the NH 10th Circuit Court-Probate Division.

Respectfully submitted,
For David J. Apostoloff,

By his attorney:

Lisa J. Bellanti, Esq.
Casassa Law Office
459 Lafayette Road
Hampton, NH 03842

Dated: June 28, 2021




Lisa J. Bellanti, Esq.
NH Bar No. 13792

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for David J. Apostoloff requests that Attorney Lisa J. Bellanti be allowed 15 minutes for oral argument.

I, Lisa J. Bellanti, Esq., attorney for David J. Apostoloff hereby certify that I sent a copy of the Motion as required by the rules of the Supreme Court.

Dated: June 28, 2021



Lisa J. Bellanti, Esq.

APPENDIX

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STATE OF NEW HAMPSHIRE

CIRCUIT COURT 10TH CIRCUIT – PROBATE DIVISION – BRENTWOOD

CASE NO. 318-2019-EQ-

In Re: The Omega Trust

Petition to Validate the Third Amendment and Restatement of the Omega Trust

NOW COMES, David J. Apostoloff (Petitioner) in the above-entitled matter, and by and through his attorney, Lisa J. Bellanti, and respectfully requests that this Honorable Court declare the unsigned Third Amendment and Restatement (Third Amendment) of the Omega Trust (the Trust) valid pursuant to RSA 564-B:6-602. In support thereof, the Petitioner states as follows:

Introduction

This is an action to carry out the intention of Mark Frank Douglas, late of Salem, New Hampshire, by validating the unsigned Third Amendment. Prior to his passing, Mr. Douglas clearly and unequivocally sought to amend the Trust and instructed his attorney, Steven Burke of McLane Middleton, Professional Association, to prepare a Third Amendment and Restatement reflecting his intent. Unfortunately, Mr. Douglas passed away before the Third Amendment could be executed by him.

Jurisdiction and Venue

1. The Trust is a “trust” as described in RSA 564-A:1, and pursuant to the terms of the Trust, shall be construed under and regulated by the laws of the State of New Hampshire.
2. The principal place of administration of the Trust is New Hampshire.

3. RSA 564-B:2-203 grants the Probate Division exclusive jurisdiction in the interpretation, construction, modification, termination and administration of trust described in RSA 564-A:1, I.
4. Pursuant to RSA 564-B:2-204, venue for a judicial proceeding involving a trust is in the county of this state in which the trust's principal place of administration is located. At the time of his death, Mr. Douglas was residing in Salem, County of Rockingham, State of New Hampshire.

Parties to the Petition

5. Petitioner, David J. Apostoloff, with a mailing address of 107 North Shore Road, Derry NH 03083, is a beneficiary of the Third Amendment and Restatement.
6. Respondent, Kenneth M. Verolla, with a mailing address of 12 Essex Street #7, Andover, MA 01810, is the trustee of the Omega Trust.

Facts

7. The Trust was established by the Grantor, Mark Frank Douglas by agreement dated December 30, 2005.
8. Pursuant to Paragraph 19 of the Trust, Mr. Douglas previously modified the Trust by First Amendment, dated June 4, 2015 and by Second Amendment and Restatement dated September 29, 2015.
9. The Second Amendment and Restatement of the Omega Trust provides that at the death of the Grantor, The Omnos Trust, which is a nominee trust to the Omega Trust be dissolved and that 20% of the remaining trust estate be distributed to the trustee of The Tammy N. Rowan Irrevocable Trust (the Tammy Trust) and 80% of the remaining trust assets be distributed to the trustee of The Rainbow Trust.
10. At the time of the preparation of the Third Amendment, the Respondent served as Trustee of The Omega Trust, The Omnos Trust, The Tammy Trust and The Rainbow Trust.

11. On or about July 2016, Mr. Douglas informed his Trust Protector Dawn Corrente that he in poor health. He asked Ms. Corrente to assist him in preparing the Third Amendment to the trust. Mr. Douglas informed Ms. Corrente of the changes that he planned to make and she assisted him in drafting an email to his attorney, Steven Burke to make the changes to the trust.
12. On August 11, 2016, Mark Frank Douglas contacted his attorney, Steven Burke, via email regarding his desire to amend the Trust, with specific instructions on what he wished to do. In said email, Mr. Douglas informed Attorney Burke of significant health issues. *See* email dated August 11, 2016, attached as Exhibit 1.
13. Mr. Douglas informed Attorney Burke that he wished to add successor trustees and successor trust protectors. Further, Mr. Douglas informed Attorney Burke that he wished to include the following additional beneficiaries, Pamela J. Silver, Grace Lin, Dawn M. Corrente and Laura L. Apostoloff.
14. Mr. Douglas informed the Respondent that he was making changes to his Trust and he was contacting his attorney to amend the Trust.
15. On August 12, 2016, Attorney Burke responded to Mr. Douglas' email. Attorney Burke sent an email to Mr. Douglas with some questions about the changes requested by Mr. Douglas.
16. On August 16, 2016, Mr. Douglas sent an email to Attorney Burke approving the Third Amendment to the Trust with some minor changes. *See* email dated August 16, 2016, attached as Exhibit 2.
17. On August 16, 2016 at 9:14 PM, Attorney Burke responded to Mr. Douglas that he would prepare the revised documents. *See* email dated August 16, 2016, attached as Exhibit 2.
18. Mr. Douglas passed away on August 18, 2016 without having signed the Third Amendment.
19. Under Paragraph 19 of the Second Amendment and Restatement, Mr. Douglas reserved the right to modify the Trust by filing notice of such modifications with the Trustee. The relevant clause from Paragraph 19 of the Second Amendment and Restatement is as follows:

The Grantor reserves the right at any time or from time to time without the consent of any person and without notice to any person other than the Trustee to revoke or modify the trust hereby created, in whole or in part, to change the beneficiaries hereof, or to withdraw the whole or any part of the trust estate by filing notice of such revocation, modification, change or withdrawal with the Trustee; provided, however, that the terms of this agreement may not be modified by the Grantor in such manner as to increase the obligations or alter the rates of the commissions of the Trustee without its written consent.

Analysis

20. Unlike a will, a Trust need not be signed or be in writing to be valid, RSA 564-B:4-401.
21. In New Hampshire, a grantor can validly amend a revocable trust pursuant to RSA 564-B:6-602;
 - (1) by substantial compliance with a method provided in the terms of the trust; or
 - (2) by any other method manifesting clear and convincing evidence of the settlor's intent if the terms of the trust do not provide a method or do not expressly prohibit methods other than methods provided in the terms of the trust.
22. Unless the terms of the trust require a signed writing, there is no statutory or common law support that a trust amendment must be signed by the grantor to be valid. In re Estate of Field, 953 A.2d 1281 (Pa. Super Ct. 2008).
23. In the case of In re Wendland-Reiner Trust, 677 N.W.2d 117 (Neb 2004), the Court noted that the modern trend in trust cases is to allow an amendment to a trust by any method so long as the amendment is established by clear and convincing evidence as to the intent of the settlor, unless the trust provides an exclusive method for amendment.

24. Paragraph 19 of the Second Amendment and Restatement of the Trust specifically grants Mr. Douglas the power to revoke or modify the Trust and prescribes a method of doing so. Mr. Douglas, as Grantor, had the right to modify the Trust by filing notice of the modification with the Trustee. The Trust does not require that the notice be in writing nor does it require an executed document.
25. Based on the standards set forth in RSA 564-B:6-602, the Trustee was given adequate and sufficient notice of the Third Amendment to satisfy the “filing of notice” requirement of Paragraph 19 because Mr. Douglas notified Mr. Verolla that he intended to modify the trust and that Mr. Douglas was communicating with his attorney to make such modifications.
26. Mr. Douglas had made all prior modifications to the trust and that this was his normal practice and procedure to do so in the same manner that he made the changes for the Third Amendment.
27. Moreover, because the terms of the Trust do not expressly prohibit methods to amend the Trust other than the method prescribed in the Trust, Mr. Douglas validly amended the Trust by manifesting clear and convincing evidence of his intent.
28. The Petitioner had previously filed with this Court an Petition for Instructions regarding the no contest language contained within the Trust. *See* IN RE: The Omega Trust, 318-2018-EQ-00262.

Conclusion

29. By instructing his attorney to draft the Third Amendment and by notifying his trustee of his intent to amend the trust, Mr. Douglas substantially, if not explicitly, complied with the prescribed method for amendment of the Trust as provided in the Trust instrument.
30. Moreover, Mr. Douglas’ method manifested clear and convincing evidence of his intent and the trust does not expressly prohibit changes by methods other than the methods provided in the terms of the trust.

31. Consequently, the unsigned Third Amendment of the Trust was a valid exercise of Mr. Douglas' power and thus, is the controlling Trust instrument.

NOW THEREFORE, for the reasons set forth above, the petitioner respectfully requests that this Honorable Court:


1. Declare the unsigned Third Amendment and Restatement of the Trust valid and operative.
2. Grant such other and further relief as this Court determines to be just and equitable.

Respectfully submitted.

David J. Apostoloff

By his Attorney

August 5, 2019



Lisa J. Bellanti, Esq., NH Bar #13792
Casassa Law Office
459 Lafayette Road
Hampton NH 03842
(603) 926-6336
lbellanti@casassalegal.com

VERIFICATION

I, David J. Apostoloff, verify that the factual allegations contained in this petition are true and accurate to the best of my knowledge, information and belief.

August 5, 2019

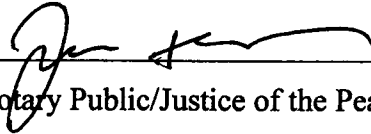


David J. Apostoloff

State of New Hampshire

Rockingham SS

On this 5 day of August, 2019, personally appeared before me the above-named David J. Apostoloff and swore that the foregoing statements are true to the best of his knowledge and belief.



Notary Public/Justice of the Peace

My Commission Expires:

JOSEPH J. TROPIANO
Commissioner of Deeds - New Hampshire
My Commission Expires September 13, 2022

EXHIBIT 1

M. F. Douglas

From: M. F. Douglas [d.management3@myfairpoint.net]
Sent: Thursday, August 11, 2016 7:29 PM
To: 'Burke, Steve'
Subject: FW: Steve Burke from M F Douglas re: update of Estate Plan docs 8-11-2016 letter
Attachments: Steve Burke MF Douglas update of Estate Plan docs 8-112016 letter.doc

Steve,

On July 15, 2013, I was diagnosed as being anemic and having leukemia.

They have been treating my leukemia with medication over the past 3 years. Unfortunately, none of the medications were able to sustain my red blood cell count and I am now receiving occasional blood transfusions. I go to the doctors every week to have my blood count checked and to see if I need a transfusion. The problem is that my anemia is as a result of my bone marrow being tired and is not making enough red blood cells.

On June 23, 2016, I had a bout of congestive heart failure and spent 5 days in Parkland hospital.

I am also having trouble with my breathing when I talk, so I am not really able to sustain a conversation.

I also have lost my appetite and have very little energy.

I was in Parkland Hospital, Derry, NH on August 4, 2016 overnight in ICU for a blood transfusion, echo cardiogram, and a chest x-ray.

I am telling you this so that you realize why I am not talking to you and that time is of the essence.

I have reviewed some of the estate plan documents and you told me back in September 23, 2005 in a letter that was sent to Henry Grillo about if we were to fund a Revocable Trust during my lifetime, that it would avoid probate. However, we have not managed to sell any of the 5 houses currently under construction in Eden Estates. As a consequence, there is no money to fund Rainbow Trust and Tammy Trust. I want to advise you that I have had to borrow a considerable amount of money in order to continue with the construction process. I think that a radical change in my estate plans is necessary. I would like to simplify it as much as possible.

My big question is that the Eden Estates property is owned by Crest Realty Trust. The bank account that has the construction money is also in Crest Realty Trust. Ken Verolla is the Trustee of both. What I would like to know is when I die can the Crest Realty Trust continue to operate as a separate entity and continue with the construction process and the sale of the houses with the excess money being paid into Omnos without having to go through probate?

In that regard, will it be necessary to have appraisals of Crest and some of the other Trusts that have property or can they continue to operate independently? Then when the property is sold, the money will be paid to Omnos Trust and Omnos will then be able to establish a real estate tax escrow fund, and to pay off any outstanding construction costs or loans.

I certainly hope that this is doable as it would greatly simplify things.

Another question I have is that I would like to leave the entire contents of the house at 1 Tammy Street, Salem, NH, which is owned by Spruce Trusts, to David J. Apostoloff. As you may realize, in my estate plans there is a Bill of Sale from me to Omega Trust regarding the personal property which I would like to leave to David J. Apostoloff. (Ken Verolla is now the Successor Trustee of Spruce Trust.) Can Omega give this property to Dave now or does it need to go through probate?

Another question I have is if I wanted to give some money off a current Crimson Trust mortgage that Kenny is the Trustee of, up to an allowable yearly amount that you can gift without having to fill out any papers, can Ken do that any time without having it go through probate?

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M. Frank Douglas
P.O. Box 467
Salem, NH 03079

8-11-2016

Steve,

I have been reviewing my estate planning documents as well as my various Trusts and feel that some changes need to be made.

I noticed that page 19 of the Second Amendment and Restatement of The Omega Trust is missing from my copy. Can you please send me a copy of that missing page?

My good friend, Dawn M. Corrente, who I consider as a daughter, recently purchased a new home and no longer lives in Concord, North Carolina. Her new address is 8000 Tottenham Drive, Harrisburg, NC 28075. Her cell number is 704-998-8762 and her personal email is Justjjs@aim.com. I hope that you can draft something simple for the various documents stating these changes.

It appears that some of the Trusts do not list a Successor Trustee or a Trust Protector. I have included a list of the Trusts which I would like to have Trust Protectors, if for some reason Kenneth M. Verolla needs to be replaced with a Successor Trustee:

The Omnos Trust	Trust Protector	Dawn M. Corrente, then Susan J. Hopkins, then Daniel J. Norris
The Crimson Trust	Trust Protector	Dawn M. Corrente, then Susan J. Hopkins, then Daniel J. Norris
Crest Realty Trust	Trust Protector	Dawn M. Corrente, then Susan J. Hopkins, then Daniel J. Norris

In an effort to keep things simple with all of the Trusts, I would like the naming of successive Trust Protectors to stop after Daniel J. Norris for any of the Trusts that have a Trust Protector.

With respect to Spruce Trust, I have a copy of an unsigned Assignment of Beneficial Interest and Revised Schedule of Beneficial Interests naming Kenneth M. Verolla, Trustee, that was prepared in June of 2015. Do you have a signed copy of the Assignment of Beneficial Interest and Revised Schedule of Beneficial Interest? If so, can you email me a copy of these signed documents?

Steve Burke, Esq.
August 11, 2016
Page 2

Regarding distributions to The Rainbow Trust and the Tammy Trust this paragraph is no longer relevant as there is no money to put into the two trusts but I am just including it so you can see that I wanted the money to be paid to the beneficiaries in quarterly installments – rather than \$20,000 yearly "plus additional amounts as needed for support" replace with \$100,000 yearly, payable quarterly, provided the funds are available – do not include "plus additional amounts as needed for support." If all the \$100,000 funds are not available at the usual payout time, then, if they do become available during the ensuing year, then, they are to be paid out cumulatively so that the recipients will receive \$100,000 for each year as long as there is money available. The total of the \$100,000 annually should be paid out in quarterly installments of \$25,000 beginning in January of the relevant year.

I don't recall the ins and outs of how you gift people money, so my question is: Do all the heirs have to be listed in the will or, for the sake of simplicity, can I give Kenny a sheet of paper with my wishes for the heirs with the amount of money that each heir is supposed to get?

I would like the heir situation simplified as much as possible I would like Tammy and the heirs that were listed on the flow chart under the Rainbow Trust - Kevin, Ariel, Brett and Justin to be given 25% of AVAILABLE money quarterly as stated in the "Regarding" paragraph above.

I would like to add some additional heirs as stated below to be given 50% of AVAILABLE funds available from Omnos Trust quarterly. These are the names of additional beneficiaries.

Pamela J. Silver, 1132 Bryson Drive, Greenville, NC 27834-0081
Grace Lin, c/o PC Max, 492 South Broadway, Salem, NH 03079
Dawn M. Corrente, 8000 Tottenham Drive, Harrisburg, NC 28075
Laura L. Apostoloff, 107 N. Shore Road, Derry, NH 03038

After all the lots are sold in the Eden Estates subdivision (hopefully within five years), and the only income is from loans Crimson Trust holds, the remaining money from any Crimson Trust loans will be funneled into Omnos Trust to be distributed in proportional amounts to each beneficiary. If money is being received by Crimson Trust for loans during the sale of lots in Eden Estates, some of the money shall be paid into Omnos Trust for future distribution to all of the Trusts, and some funds will be retained for the payments of taxes, fees, etc, as determined by Kenneth M. Verolla, Trustee or a Successor Trustee.

Delta Management Trust has no relevance to the estate planning package and should be completely removed from the flow charts and other estate planning documents.

Steve Burke, Esq.
August 11, 2016
Page 3

Also, Eden Trust has no relevance to the estate planning package and should be completely removed from the flow charts and other estate planning documents.

After both Delta Management and Eden Trust have been removed from the flow chart, I would like to replace them with Maple Leaf Realty Trust, and Waterfield Trust. I think you or Dan Norris have a copy of these two Trust Declarations. Maple is recorded in Strafford County, B-1209, P-48. Waterfield is not recorded. If you need a copy of either of the Declarations, let me know and I will send it.

I know this is quite a bit of information which I hope clarifies my desire to SIMPLIFY my estate plans.

I will await your reply.

Thanks,

Frank

EXHIBIT 2

M. F. Douglas

From: Burke, Steven [STEVE.BURKE@MCLANE.com]
Sent: Tuesday, August 16, 2016 9:14 PM
To: M. F. Douglas
Subject: Re: Frank Douglas - Action Items [MCLANE--.FID698279]
Attachments: image001.jpg; image002.png; image003.png

Thank you, Frank. We will prepare the revised documents accordingly.

Steve

On Aug 16, 2016, at 8:30 PM, M. F. Douglas
<d.management3@myfairpoint.net<mailto:d.management3@myfairpoint.net>> wrote:

Hi Steve,

Very nice job, there are just a few suggested changes as noted below.

Thanks, Frank

From: Burke, Steven [mailto:STEVE.BURKE@MCLANE.com]
Sent: Tuesday, August 16, 2016 4:02 PM
To: M. F. Douglas
Cc: Snow, Jodi
Subject: Frank Douglas - Action Items [MCLANE--.FID698279]

Hi Frank,

I thought it would be helpful if I summarized and confirmed the current actions to be taken regarding your estate plan. We are working on the revised documents now.

1) We will prepare an Amendment to the Omega Trust so that the Omega Trust will provide as follows:

a) Tangibles: Kenny will distribute all of the tangibles at 1 Tammy Street, Salem, New Hampshire, to David J. Apostoloff, or Laura Apostoloff if they are then living. In addition, Kenny will distribute any other tangible items as you may indicate on any memorandum you give to him.

b) Omnos Trust: Omnos Trust and all of the active Nominee Trusts (see below) will be held in the Omega Trust until (i) all of the houses in Eden Estates are sold and any constructions costs and loans are paid in full; and (ii) all of the Mortgages Notes held in Crimson Trust have been paid in full by the Mortgagees. Once both of these conditions have been satisfied, then Omnos will be dissolved. Note that Kenny will have discretion to determine the actual timing of the dissolution in case of unforeseen circumstances.

c) Escrow Account: With regard to allocating the Trust funds, Kenny will be authorized to withhold any amount he deems is necessary to pay outstanding or future real estate taxes on any properties owned by any of the Trusts, satisfy outstanding construction loans, fund future construction costs, and pay other outstanding and future administrative costs (such as his fee and income taxes). We will state your intention that this amount be equal to the amount needed to satisfy outstanding loans and real estate taxes in full, if any, plus maintain a \$200,000 balance for payment of future real estate taxes, plus maintain a \$200,000 balance for payment of future construction costs, plus 10% of the remaining trust estate, and 10% of any future income (i.e. the mortgage payments) thereafter for administrative costs; however, the actual amounts will be within Kenny's discretion since the financial outlook on the project and your trust may change between now and the date of your death.

When Omnos dissolves and after all debts, taxes, and administrative expenses have been paid, then the balance of the escrow account will be added to the remaining trust account and divided among the 9 beneficiaries as stated below.

d) Trust Shares: Assets not needed by Kenny will be divided into 9 equal trust shares:

i. one share
for your daughter, Tammy, if she is living, or if not, then her living issue (her children and grandchildren);

ii. one share
for your former son-in-law, Kevin, if he is living, or if not, then to Kevin's spouse, Martha (so long as they were married and residing together at the time of Kevin's death), and his daughter, Isabella, and his other living issue, if any;

iii. one share
for your grandson, Ariel, if he is living, or if not, then to his living issue, if any;

iv. one share for
your grandson, Brett, if he living, or if not, then to his living issue;

v. one share
for your son, Justin, if he is living, or if not, then to his living issue, if any;

vi. one share for
your close friend, Pamela, if she is living, or if not, then to her living issue;

vii. one share for
your close friend, Grace, if she is living, or if not, then to her husband, Kevin, and then to his living issue;

viii. one share for
your close friend, Laura, if she is living, or if not, then to her husband, David, and then to his living issue;

ix. one share for
your close friend, Dawn, if she is living, or if not, then to her living issue;

Kevin's Share will be held in a fully discretionary Trust and administered in the same manner for Kevin and his family as is currently provided in the Rainbow Trust.

If there is sufficient money available, all of the remaining beneficiaries will receive quarterly payments of \$25,000, or all of his or her share if there is less than \$25,000 in his or her share, until the complete distribution of all of the trust funds. (All of the following in green should be deleted) In addition, we will allow the Trustee to make additional distributions from that beneficiary's trust share, to the extent there are funds available, if needed for emergencies for a beneficiary's basic support and well-being (food, shelter, clothing, and medical needs) to the extent there are no other resources available to that beneficiary.

ALL payments will be subject to the Distribution Guidelines which will allow Kenny to withhold any distributions if the beneficiary is not behaving in a socially responsible manner, or it is not in the best interests of the beneficiary to give them the money (i.e. marital difficulties, addictions, gambling problems, etc.). These are the same Distribution Guidelines which are included in the Tammy Trust and Rainbow Trust now.

If there is no one living to benefit from any one of the above shares, then the remaining balance will be divided among the living beneficiaries.

e) Trustee Reports: One of the concerns you had in establishing the Tammy Trust and the Rainbow Trust was to limit the information a trust beneficiary had on the assets passing to others. As all of the above beneficiaries, except Kevin, are on the same schedule, there is less concern for this. However, your Trust already provides that the Trust Protector will be the only person entitled to receive Trust Accountings, therefore, no beneficiary will receive any information on any other beneficiary's trust shares (except for Dawn, if she is serving as Trust Protector). In addition, we will allow for Dan to appoint his own successor in the event he is the last Trust Protector serving.

f) Dawn's Address: We will reference Dawn's new address in this Amendment: 8000 Tottenham Drive, Harrisburg, NC 28075.

2) Trust Protector for Omega Trust: We will amend the appointment of Trust Protectors to allow Dawn, then Susan, then Dan to serve. The last serving of Dawn, Susan and Dan will be able to appoint his or her own successor to ensure there is someone always serving.

3) The Omnos Trust, The Crimson Trust, and Crest Realty Trust. Will amend these Trusts to provide that Dawn, then Susan, then Dan, and then the trust beneficiaries will appoint successor Trustees.

4) Crest Realty Trust, Maple Leaf Realty Trust, Spruce Trust, and Waterfield Trust. We will prepare the necessary documents to assign the beneficial interests in these Trusts from you individually to the Omnos Trust in order to avoid probate.

5) Delta Management Trust, Eden Trust, The Tammy Trust and Rainbow Trust. We will prepare the necessary documents to terminate these Trusts.

6) I know of the following Trusts. Please let me know (i) if you have any Trusts which are not listed below; and (ii) the assets in each active Trust:

Active Trusts (I have copies of all of these Trusts):

Omega Trust
Omnos Trust
Crest Realty Trust
Crimson Trust

Maple Leaf Realty Trust
Spruce Trust
Waterfield Trust

Trusts To Be Dissolved (I have copies of all of these Trusts)

Rainbow Trust
Tammy N. Rowan Irrevocable Trust
Delta Management Trust
Eden Trust

Trusts For Which Final Tax Returns have been filed (I have a copy of the Pen Trust, but no others). Note that the filing of a final tax return does not officially terminate a trust. Out of an abundance of caution, I suggest that we prepare a set of simple documents for you and Kenny to sign confirming the termination of these trusts.

Archer Trust	Final Return 2004	Date Formed 11-30-93	EIN# 04-6870827
Ashley Trust	Final Return 2003	Date Formed 04-24-89	EIN# 04-6869232
Delta Trust	Final Return 2011	Date Formed 12-09-02	EIN# 55-6154802
Grace Trust	Final Return 2004	Date Formed 05-13-98	EIN# 04-6869047
Jupiter Trust	Final Return 2014	Date Formed 12-31-97	EIN# 04-6870908
Pen Trust	Final Return 2014	Date Formed 06-18-97	EIN# 04-6847420
Summit Trust	Final Return 2011	Date Formed 05-05-98	EIN# 04-6869349
Ten Trust	Final Return 2015	Date Formed 06-06-97	EIN# 04-6841557
Violet Trust	Final Return 2011	Date Formed 12-11-88	EIN# 04-6870618

7) Sadim, LLC. The ownership of Sadim is in trust, so that it will not go through Probate. Please let me know if you hold an interest in any other business entity in your name (we know of none).

Thank you.

Steve

[http://www.mclane.com/assets/images/McLane_PA_Logo_resize_135x62.jpg]<http://www.mclane.com/>
>

Steven M. Burke, CPA, CGMA
Director

Direct: (603) 628-1454
Fax: (603) 625-5650

900 Elm Street
Manchester, NH 03101

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website<<http://www.mclane.com/>> | bio<<http://www.mclane.com/staff/Steven-Burke>> |
email<<mailto:STEVE.BURKE@MCLANE.com>> | blog<<http://www.employmentlawbusinessguide.com/>>

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**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT**

10th Circuit - Probate Division - Brentwood
PO Box 789
Kingston NH 03848-0789

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

**LISA J. BELLANTI, ESQ
CASASSA LAW OFFICE
459 LAFAYETTE ROAD
HAMPTON NH 03842-2242**

Case Name: In RE: The Omega Trust
Case Number: 318-2019-EQ-01253

On February 07, 2020, Judge Mark F. Weaver issued orders relative to:

Proposed Order approved and so ordered on February 7, 2020. A copy is enclosed.

Any Motion for Reconsideration must be filed with this court by February 23, 2020. Any appeals to the Supreme Court must be filed by March 14, 2020.

February 13, 2020

LoriAnne Hensel
Clerk of Court

C: David J Apostoloff; Kenneth M. Verolla; Pamela J. Newkirk, ESQ; Benjamin T. Siracusa Hillman, ESQ

RECEIVED

JAN 27 2020

THE STATE OF NEW HAMPSHIRE

10th CIRCUIT COURT

10th Circuit at Brentwood

PROBATE DIVISION
Brentwood

#318-2019-EQ-01253

In re: The Omega Trust

PROPOSED ORDER

NOW COME Kenneth M. Verolla, Trustee of The Omega Trust (the "Trustee"), by and through his attorneys, Barradale, O'Connell, Newkirk & Dwyer, P.A., and David Apostoloff, by and through his attorneys, Casassa Law Office, and submit by agreement the following Proposed Order:

1. Kenneth Verolla, Trustee of The Omega Trust, The Tammy N. Rowan Trust and The Rainbow Trust does not have a duty to defend this action due to the conflicts created by his duty of impartiality.
2. Attorney Benjamin Siracusa Hillman shall be appointed Special Trustee for the limited purpose of representing the beneficial interests of The Tammy N. Rowan Trust and The Rainbow Trust, and their respective beneficiaries, in this equity action. As between Kenneth Verolla, Trustee, and Benjamin Siracusa Hillman, Special Trustee, the Special Trustee shall have the sole and exclusive fiduciary authority to represent the aforementioned beneficial interests in this equity action.
3. The Special Trustee shall be subject to the notice provisions of The Omega Trust, The Tammy N. Rowan Trust and The Rainbow Trust.
4. The fees of the Special Trustee shall be paid by The Omega Trust, subject to any request for fee reimbursement or allocation under the terms of The Omega Trust or the New Hampshire statutory and common law.

5. On or before February 28, 2020, the Special Trustee shall file any motions or requests for instruction regarding notice to the beneficiaries of The Rainbow Trust and The Tammy N. Rowan Trust. The Special Trustee shall file an answer to the Petition after any motions or requests for instruction are ruled upon. In the event no motions or requests for instruction are filed by the Special Trustee, an answer shall be filed by March 15, 2020.


Respectfully submitted,

KENNETH VEROLLA, TRUSTEE OF
THE OMEGA TRUST

By his attorneys,

BARRADALE, O'CONNELL, NEWKIRK
& DWYER, P.A.

Dated: 1/24/2020

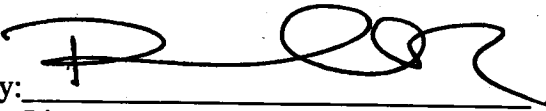
By: 
Pamela J. Newkirk, #4104
P.O. Box 10239
Bedford, NH 03110
(603)644-0275
pnewkirk@bondpa.com

DAVID APOSTOLOFF

By his attorneys

CASASSA LAW OFFICE

Dated: 1/24/2020

By: 
for Lisa J. Bellanti, #13792
459 Lafayette Road
Hampton, NH 03842
(603)926-6336
lbellanti@casassalegal.com

Approved and so ordered.

Mark & Jean 2/7/2020

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
10TH CIRCUIT – PROBATE DIVISION – BRENTWOOD

IN RE: THE OMEGA TRUST

DOCKET NO.: 318-2019-EQ-01253

**SPECIAL TRUSTEE'S MOTION TO DISMISS
PETITION TO VALIDATE THE THIRD AMENDMENT
AND RESTATEMENT OF THE OMEGA TRUST**

NOW COMES Benjamin T. Siracusa Hillman, Special Trustee for the beneficial interests of The Tammy N. Rowan Trust, The Rainbow Trust, and the individual beneficiaries of the same, by and through counsel, Shaheen & Gordon, P.A., and moves to dismiss the Petition to Validate the Third Amendment and Restatement of the Omega Trust (“Petition” or “Pet.”). In support thereof, the Special Trustee states as follows:

1. The Petition must be dismissed because even taking its factual allegations as true, this court cannot conclude that the emails presented in the petition constitute a valid amendment to the Omega Trust (“Trust”).
2. In the course of having estate planning documents prepared, clients routinely exchange correspondence, often quite detailed correspondence, with their attorneys. Yet there are inevitably further questions that come up in the course of drafting and refining an amendment. Particularly with more complex plans—and it cannot reasonably be disputed that a plan involving nested trusts is complex—details must be ironed out, provisions assessed in relation to one another, i’s dotted and t’s crossed. In this case, there was not even a draft amendment, let alone a final amendment, circulated by the lawyer to the client; there was neither full nor substantial compliance with the requirements in the trust instrument for an amendment or the execution of the same; and most significantly, there was no indication that the settlor

intended or expected that his email correspondence itself constituted a valid, final amendment to his trust. Even planned or proposed amendments reduced to writing are often reconsidered or modified in minor or major ways before signing; sometimes, they are not signed at all. Under these circumstances, even taking the well-pled factual allegations in the Petition as true, it must fail as a matter of law.

Factual Allegations¹

3. The Trust was established by Mark Frank Douglas (“Frank”) upon the execution of a written trust agreement on December 30, 2005. Pet. ¶ 7. Frank amended the Trust two times via written amendments on June 4, 2015 and September 29, 2015. Pet. ¶ 8.

4. By July 2016, Frank was in poor health. Pet. ¶ 11. He told his Trust Protector, Dawn Corrente (“Corrente”), that he planned to make changes to the Trust. *Id.* Corrente assisted Frank in the preparation of an email to Frank’s estate planning attorney, Steven Burke. Pet. ¶ 11.

5. The email to Attorney Burke articulated a desire to amend the Trust with instructions as to how the amendment should be drafted. Pet. ¶ 12.

6. Frank advised the Trustee, Kenneth Verolla (“Verolla”) that he would be making changes to the Trust and he was contacting his attorney to amend the Trust. Pet. ¶ 14, 25. There is no allegation that Frank informed Verolla of the nature of the changes planned by Frank. The date of this communication was not alleged.

¹ For purposes of this motion to dismiss, the Special Trustee must accept well-pled factual allegations in the Petition (but not conclusions of law) as true. However, the Special Trustee does not concede the truth of these allegations, and reserves the right to file an Answer to the Petition in the event that this motion to dismiss is denied in whole or in part.

7. On August 11, 2016, an email was sent to Attorney Burke from Frank's email address ("First Email"). Exhibit 1 to Pet, p.1.² The First Email explains that Frank's poor health required this matter to be addressed via email only. Id. The First Email presented a series of questions regarding Frank's estate plan, as well as questions about how he can change the distribution of certain assets.³ Id. p. 1-2.

8. Attached to the First Email was an unsigned "letter" addressed to Attorney Burke which contained additional questions ("Letter"). Id. p. 3-5. The Letter included a list of proposed changes to the Trust and a request that Attorney Burke "draft something simple for the various documents stating these changes." Id. p. 3. The Letter concluded with a request for a reply from Attorney Burke. Id. p. 5.

9. The following day, Attorney Burke responded via email ("Burke Email"). Pet. ¶ 15; *see also* Exhibit 2 to Pet., p. 1. Attorney Burke wrote that his office was "working on the revised documents now" and that his office would "prepare an Amendment to the Omega Trust." Id. He "summarized and confirmed the current actions to be taken regarding" the estate plan. Id.

10. Throughout the Burke Email, Attorney Burke references actions to be taken. Id. p. 2, 3 ("We will state your intention that this amount be equal to"; "We will amend the appointment of Trust Protectors to allow Dawn, then Susan, then Dan, to serve", etc.).⁴

² On a motion to dismiss, the court may consider documents attached to the plaintiff's pleadings or documents sufficiently referred to in the complaint without converting the motion to dismiss to a motion for summary judgment." Beane v. Dana S. Beane & Co., P.C., 160 N.H. 708, 711 (2010).

³ "What I would like to know is when I die can [various assets be paid into the Trust] without having to go through probate?" Exhibit 1 to Pet., p. 1. "... will it be necessary to have appraisals of [assets] or can they continue to operate independently?" Id. at 2. "Can Omega give this property to Dave [Apostoloff] now or does it need to go through probate?" Id. "... can Ken do that at any time without having it go through probate?" Id.

⁴ In this Motion, the Special Trustee has bolded certain words and phrases for emphasis. The emphasis is not native to the document quoted unless otherwise indicated.

11. Four days later, Frank responded with additional revisions to the plan described in the Burke Email (“Frank Response”). Pet. ¶ 16. These revisions, including directions to delete specific lines in text, were made in line with the Burke Email. Notably, the Frank Response did not include any ratification of the document, with or without the revisions.

12. An hour later, Attorney Burke responded: “Thank you, Frank. We will prepare the revised documents accordingly.” Exhibit 2 to Pet. P. 1 (emphasis added).

13. Verolla, the Trustee of the Trust, was not copied on any of the correspondence between Frank and Attorney Burke. Exhibits 1 and 2 to Pet.

14. Petitioner does not allege any further correspondence between Frank and Attorney Burke, nor does Petitioner allege that Attorney Burke provided Frank with the revised documents referenced in Attorney Burke’s final email to Frank.

15. Frank died on August 18, 2016 without ever receiving, reviewing, or signing the proposed Third Amendment discussed with Attorney Burke. Pet. ¶ 18.

16. Petitioner now seeks the validation of email correspondence with Attorney Burke (“Purported Amendment”) as the third amendment to the Trust.

Applicable Law

17. A motion to dismiss must be granted unless the allegations contained in a petition “are reasonably susceptible of a construction that would permit recovery.” Signal Aviation Serv., Inc. v. City of Lebanon, 164 N.H. 578, 582 (2013).

18. Allegations made in the complaint must be viewed through the lens of the applicable law. Id. at 582. The court must assume the plaintiff’s allegations to be true and construe all reasonable inferences in the light most favorable to the plaintiff. Id. However, the

court "need not accept allegations in the writ that are merely conclusions of law." Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010).

19. If the facts alleged do not provide a foundation for legal relief, the action must be dismissed. Surprenant v. Mulcrone, 163 N.H. 529, 530-31 (2012).

20. The New Hampshire Trust Code provides that a revocable trust may be amended by "substantial compliance with a method provided in the terms of the trust; or by any other method manifesting clear and convincing evidence of the settlor's intent if the terms of the trust . . . do not expressly prohibit methods other than methods provided in the terms of the trust." RSA 564-B:6-602(c)(1)-(2).

21. A settlor's intent is a question of fact, ascertainable by competent evidence, rather than a question of law. Bartlett v. Dumaine, 128 N.H. 497, 505 (1986). See also King v. Onthank, 152 N.H. 16, 18 (2005). The analysis requires the court to look to the terms of the trust "interpreted in the light of all the circumstances." Id.

Argument

22. This action must be dismissed because the facts alleged in the Petition cannot demonstrate, by clear and convincing evidence, that the Purported Amendment may be validated as a third amendment to the Trust.

23. Petitioner's claim is based on two theories: (1) Frank's correspondence with Attorney Burke substantially complied with the method of modification allowed by the terms of the Omega Trust; and/or (2) the correspondence is not a method of modification prohibited by the terms of the trust, and is a clear and convincing manifestation of Frank's intent to modify the Trust, notwithstanding the failure to substantially comply with a method provided in the terms of the trust. See RSA 564-B:6-602(c)(1), (2).

24. The facts alleged fail to satisfy either theory.

I. The Petition must be dismissed because the Purported Amendment does not substantially comply with the method of amendment allowed by the Trust.

25. The New Hampshire Trust Code allows a settlor to amend a revocable trust “by substantial compliance with a method provided in the terms of the trust.” RSA NH 564-B:6-602(c). Substantial compliance – as compared to strict compliance – allows for *some* flexibility in the manner in which the methods contained in trust agreement can be satisfied. For example, if the terms of a revocable trust require a grantor to deliver an amendment to a trustee to effectuate the amendment, this requirement is substantially complied with if the grantor places the amendment in the mail to the trustee but dies before delivery is completed. Restatement (Third) of Trusts § 63 (2003).

26. Substantial compliance does not allow for the wholesale rejection of the methods of amendment contained in the trust.

27. The operative Trust instrument is the Second Amendment to the Trust, which is attached hereto as **Exhibit A**. The Trust sets forth the method for future amendments:

19. AMENDMENT AND REVOCATION. The Grantor reserves the right at any time or from time to time without the consent of any person and without notice to any person other than the Trustee to revoke or modify the trust hereby created, in whole or in part, the change the beneficiaries hereof, or to withdraw the whole or any part of the trust estate by filing notice of such revocation, modification, change, or withdrawal with the Trustee; provided, however that the terms of this agreement may not be modified by the Grantor in such manner as to increase the obligations or alter the rates of the commissions of the Trustee without its written consent.

...

23. EXECUTION. This trust agreement, and any amendments hereto, shall be effective when executed by the Grantor, notwithstanding that the signature of the Trustee is provided for, the

Trustee's signature being intended to denote the acceptance of the Trustee to serve in that capacity only.

This trust agreement may be executed in any number of counterparts with the same effect as if all of the parties had signed the same document. All counterparts shall be construed together and shall constitute one agreement. Trust, pp. 17, 18-19.

28. Consistent with the express language of the Trust, an amendment of the Trust requires: (1) the filing of a notice of the modification or change with the Trustee; and (2) execution of the amendment by the Grantor.

29. The Petition does not allege that the Purported Amendment comports with either of these requirements. Rather, Petitioner relies on the minimal flexibility afforded by RSA 564-B:6-602(c) to argue that Frank's correspondence with Attorney Burke substantially complied with the method of amendment contained in the Trust.

30. This argument must fail because the facts alleged do not allow for a legal conclusion that Frank's conduct was substantially compliant with the methods of amendment contained in the Trust.

A. The Petition does not allege facts sufficient to support a conclusion that Frank substantially complied with the Trust's requirement that a notice of modification be filed with Verolla.

31. In an effort to show substantial compliance with the Trust's requirement that a notice of "such modification" be filed with the Trustee, the Petition alleges that Frank informed Verolla that he would be making changes to the Trust and he was contacting his attorney to amend the Trust. Pet. ¶ 14, 25. There is no allegation that Frank informed Verolla of the nature of the changes planned by Frank, nor that there was notice to Verolla following any alleged adoption of the changes.

32. Frank did not substantially comply with the requirements of Paragraph 19 of the Trust for either of two reasons: (1) his notice to Verolla was a statement of *future intent* to make

unspecified modifications to the Trust, not a notice of “such modification”; and (2) his notice to Verolla was not memorialized and therefore not “filed” with the Trustee.

33. As two critical elements of the notice requirement are unfulfilled by the Purported Amendment, there was no substantial compliance with the modification requirements of the Trust, and the Petition must be dismissed.

i. Any notice provided to Verolla was substantively deficient.

34. Frank retained an unrestricted right to modify the Trust at any time, with the caveat that he file a notice of “such modification” with Verolla. Second Amendment, ¶ 19.

35. This notice requirement makes sense in context. Bartlett, 128 N.H. at 505 (1986) (holding that all circumstances surrounding the execution of an instrument are relevant in determining the intent of a settlor).

36. The Trust is a unique and complex instrument. It contains unusual provisions regarding notice to beneficiaries, comprehensive dispositive provisions, and a no-contest clause which could divest beneficiaries of their interest under certain circumstances. Moreover, there are two subtrusts set forth in separate instruments that are beneficiaries of the Trust, each of which in turn has its own individual beneficiaries. If Frank were to substantially modify the dispositive provisions of the Trust, as has been alleged, Verolla would need a detailed description of these changes.

37. Verolla – the Trustee – has a statutory obligation to “administer, invest and manage the trust and distribute the trust property in good faith, in accordance with its terms and purposes . . .” RSA 564-B:8-801. He could not fulfill this obligation without meaningful, specific information regarding the impact of the Purported Amendment on the Trust’s terms and purposes.

38. The inclusion of the notice provision in the Trust supports an inference that Frank intended that Verolla receive a substantive notice of all modifications so that the Trust could be carried out as intended. Any other reading of the Trust would defeat Frank's intent and result in a nonsensical paradigm in which Frank could modify the Trust without informing the person responsible for carrying out the substantive changes – including the distribution of Trust assets. It would also eliminate the ability of Verolla to have reasonably relied on the notice provision in determining the operative version of the Trust, requiring him to undertake an investigation prior to acting to determine if there were any amendments of which the Trustee was not notified even though the Trust's terms required such notification to him.

39. The Petition alleges that Frank "informed [Verolla] that he was making changes to his Trust and he was contacting his attorney to amend the Trust" and that Frank "notified Mr. Verolla that he intended to modify the trust and that Mr. Douglas was communicating with his attorney to make such modification." Pet. ¶¶ 14, 25.

40. These allegations support a conclusion that Frank informed Verolla of his intention to meet with Attorney Burke to make an unspecified modification to the Trust. The Petition does not allege that Frank provided any pertinent information regarding his timeline for modification or the substance of the planned modification. There is no allegation that Verolla received the terms or language of the Purported Modification from Frank.

41. As a result, Verolla may have been on notice that Frank had plans to direct the drafting of a third amendment, but there are no facts alleged to support a conclusion that Verolla received notice of the modification itself, including its operative date and its material terms. This information would be critical for the discharge of Verolla's duties as trustee.

42. Frank's communication with Verolla fails to substantially comply with the terms of the Trust because it literally does not comply and because it does not fulfill the underlying rationale behind the notice requirement, such that it does not substantially comply either.

43. If Frank intended that his emails with Attorney Burke constituted a modification of the Trust, compliance with the notice provision would have been glaringly simple: Frank could have copied Verolla on his email correspondence with Burke or could have forwarded that correspondence to Verolla. He did not.

44. Even when viewed in the light most favorable to the Petitioner, the Petition does not allege sufficient facts to support a conclusion that Frank substantially complied with the notice requirement contained in the Trust.

ii. Any notice was insufficient because it was not "filed" with Verolla as required by the terms of the Trust.

45. The notice described in the Petition also did not substantially comply with the terms of the Trust because it was not filed with Verolla as required by the modification requirements.

46. The Trust requires Frank to provide notice of a modification to Verolla by "filing notice of such revocation, modification, change, or withdrawal with the Trustee" Trust, ¶ 19.

47. The term "filing" is commonly understood to refer to the handling of a document. *See* FILE, Black's Law Dictionary (11th ed. 2019) ("1. To deliver a legal document to the court clerk or record custodian for placement into the official record ... 3. To record or deposit something in an organized retention system or container for preservation and future reference"); *see also* FILE, Oxford Languages ("place (a document) in a cabinet, box, or folder in a particular order for preservation and easy reference").

48. Fulfilling the filing requirement requires that the notice of "such modification" be in writing and that it set forth the terms of the modification. Verolla's ability to fulfill his fiduciary

obligations is hindered if he is not able to refer to use the notice as a reference to guide future conduct while managing the Trust.

49. The Petition suggests that Frank's message to Verolla was not in writing. Pet. ¶ 24 ("The Trust does not require that the notice be in writing nor does it require an executed document."). There are no allegations that there is *any* record or memorialization of the notice given to Verolla.

50. The claim that the notice required by the Trust does not need to be made in writing is contrary to the plain language of the Trust. The Trust does not simply require *notice* to the Trustee of a modification; it requires the *filing* of the notice of "such modification" with the Trustee.

51. In this case, substantial compliance could have been achieved by a method which would have memorialized the content of the modification for preservation by Verolla. For example, Verolla could have been copied on email correspondence with Attorney Burke. Consistent with the example provided in the Restatement of Trusts, substantial compliance could have been achieved even if Verolla did not receive the notice until after Frank had died.

52. In stark contrast to reasonable, substantially compliant alternatives, Petitioner alleges only that an undated, unpreserved, and nonspecific notice has substantially complied with the terms of the Trust. Even when viewed in the light most favorable to Petitioner, these allegations cannot support a conclusion that there was substantial compliance with the filing requirement.

B. The Petition does not allege sufficient facts to support a conclusion that the Purported Amendment substantially complies with the Trust's execution requirement.

53. The Purported Amendment does not substantially comply with the requirement that amendments to the Trust be executed by the Grantor. *See* Second Amendment, ¶ 23 ("This trust

agreement, and any amendments hereto, shall be effective **when executed by the Grantor ...**"). Execution in this context means a signature. See id. ("This trust agreement may be executed in any number of counterparts with the same effect as if **all of the parties had signed** the same document.").

54. There is no allegation that Frank signed or otherwise executed the Purported Amendment, despite the execution requirement contained in the Trust. As a result, the Purported Amendment could not have been effectuated before Frank's death.

55. Petitioner again relies on the theory of substantial compliance to adopt Frank's correspondence with Attorney Burke as an operative testamentary instrument. Petitioner alleges that Frank "approv[ed] the Third Amendment to the Trust with some minor changes." Pet. ¶ 16; *see also* Frank Response ("Very nice job, there are just a few suggested changes as noted below."). The Special Trustee disputes that the Frank Response is accurately described as an "approval" or that it otherwise manifests intent that the email exchange itself constitute a trust amendment. Regardless of interpretation, an "approval" is not an execution of an amendment because it is not a signature. Therefore, the Frank Response fails to effectuate the Purported Amendment as a valid amendment to the Trust.

56. Substantial compliance with the execution requirement could have been completed in a number of accessible ways. For example, Frank – with or without the assistance of Corrente – could have printed his correspondence with Attorney Burke and signed the document. *See Matter of Trust Estate of Doang*, 87 Hawai'i 200, 203, 953 P.2d 959, 962 (1998) (holding that a testator's signature on an informal confirmatory letter prepared by counsel was substantially compliant with the execution requirements of the trust.). Frank could have applied an electronic signature to the document, confirming his acceptance of the correspondence as an unorthodox amendment of his

estate plan. Arguably, he could have affirmatively stated in an email that he ratified the terms of the Burke Email and desired the document to be immediately effective as an amendment to his Trust. He did not do so. Instead, the plan was to have Burke draft an amendment based on the correspondence for Frank's further review.

57. The facts alleged by the Petitioner request a determination by this Court that Frank substantially complied with the method of modification contained in his Trust despite failing to attempt to meet *three* material requirements. The Purported Amendment cannot be validated on the basis of "substantial compliance" because any compliance was not substantial: there was insufficient notice given to Verolla regarding the modification, the notice was not filed with Verolla, and the Purported Amendment was not executed by Frank before his death.

58. Though substantial compliance allows for some flexibility, the terms of modification cannot be stretched so thin as to defeat the settlor's intent and to jeopardize the legitimacy of the testamentary document. Accordingly, the Petition must be dismissed.

II. The Petition must be dismissed because the facts alleged could not meet the Petitioner's burden of demonstrating that the Purported Amendment is a clear and convincing manifestation of Frank's intent.

59. If Petitioner is unable to demonstrate that Frank did not substantially comply with the method of modification contained in the Trust, Petitioner must then rely upon the language of RSA 564-B:6:602(c)(2) to validate the Purported Amendment as a clear and convincing manifestation of Frank's intent.

60. Intent in this context has three layers. First, Petitioner has to demonstrate that Frank had the intention to amend his Trust. Second, Petitioner has to demonstrate that the text of the Purported Amendment is the document Frank intended to use as an amendment to his Trust. Third, the Petitioner has to demonstrate that Frank adopted the Purported Amendment as a manifestation

of his intent. Petitioner cannot meet either the second or third requirement, and so the Petition must fail.

61. For purposes of this motion to dismiss, the Special Trustee does not dispute that the Petition successfully alleges sufficient facts to demonstrate that Frank had a general future intention to amend his Trust:

- a. "Mr. Douglas informed Ms. Corrente of the changes that **he planned to make** and she assisted him in drafting an email to his attorney, Steven Burke to make the changes to the trust." Pet. ¶ 11.
- b. "Mr. Douglas informed the Respondent that he was making changes to his Trust and he was **contacting his attorney to amend the Trust.**" Pet. ¶ 14.
- c. "Mr. Douglas notified Mr. Verolla that he **intended to modify** the trust and that Mr. Douglas was **communicating with his attorney to make such modifications.**" Pet. ¶ 25.
- d. "I **think** that a radical change in my estate plans is necessary. I would like to simplify it as much as possible." First Email p. 1.
- e. "I **certainly hope that this is doable** as it would greatly simplify things." First Email p. 2.

62. However, a generalized statement of future intent to amend the trust is not sufficient to demonstrate that the Purported Amendment is an expression of Frank's intent. The circumstances are similar to that of a couple engaged to be married. By virtue of the couple's engagement, they are expressing a general desire and plan to marry. This intent, however, is merely a future plan. They are not married – and their intention has no legal effect – until after they confirm and carry out this intent by actually getting married.

63. The same can be said by Frank's future intent to modify his estate plan. While the Petitioner can demonstrate that Frank had a general intent to amend his estate plan, there is no evidence that Frank carried out his intent and executed, or even approved, an amendment to his estate plan which accurately memorialized his intentions.

A. The facts alleged in the Petition do not support a conclusion that the substance of the Purported Amendment is a manifestation of Frank's intent.

64. The second facet of intent touches upon the substance of the Purported Amendment. The Petition does not allege any facts sufficient to support a finding that the terms contained in the Purported Amendment are an accurate manifestation of Frank's intent.

65. The Burke Email, which is presumed to be the Petitioner's Purported Amendment, is equivocal and facially incomplete.

66. The Burke Email affixed to the Petition cannot be fully deciphered because Frank made his edits to Attorney Burke's summary in line with the proposed text. This included the application of a green font to text which was intended to be deleted from the following draft. Burke Email, p. ("All of the following in green should be deleted"). The email produced by Petitioner does not include any green font. It is not possible to determine which lines of text Frank wanted to omit from the following draft.

67. Attorney Burke's recitation of Frank's wishes were often equivocal and requiring clarification. For example, he requested confirmation of the roster of active Nominee Trusts (beneficiaries of the Trust). Burke Email, p. 1. He dropped notes, which would not otherwise be included in an estate planning document, to draw Frank's attention to the impact of particular provisions ("Note that Kenny will have the discretion to determine the action timing of the dissolution in case of unforeseen circumstances.") Burke Email, p.1.

68. Further, the Burke Email creates confusion regarding whether the non-disclosure requirement in the Trust would endure after the amendment. On page 3, Attorney Burke references the limitations on trustee reports which was intended "to limit the information a trust beneficiary had on the assets passing to others." Burke Email, p. 3. He then notes that the original purpose of that limitation is extinguished because "all of the above beneficiaries, except Kevin, are on the same schedule." *Id.* Despite these observations, Attorney Burke does not conclusively state whether the limitation on trustee reports would survive the amendment. Though he does reference the role of the Trust Protector, it is unclear why he would discuss the change in rationale for the limitation on the reports.

69. Without a clarification as to the duty of the Trustee to report to the beneficiaries, Frank's intent – whatever it may have been – had a fifty-fifty chance of being frustrated.

B. Finally, the Petition did not allege that Frank intended for the email correspondence to serve as an amendment to his Trust.

70. To prevail on his claim, Petitioner must demonstrate that Frank intended the Purported Amendment to be *the* amendment he contemplated in his communications. In the absence of affirmative evidence that Frank intended for *this* set of documents – to the exclusion of *any other* statement of testamentary intent – to serve as the effective, final amendment to this Trust, this Court cannot conclude by any standard, let alone by a standard of clear and convincing evidence, that the Purported Amendment was intended to be incorporated as an amendment to the Trust.

71. If Petitioner's requested relief may be granted without this critical facet of intent, any utterance or document related to any trust could be presented to the Court and validated, simply because the testator had expressed a nebulous intent to modify the trust at some point.

72. The Petition is entirely devoid of any facts to support a conclusion that Frank acknowledged this particular set of documents as an amendment to his Trust.

73. In fact, the evidence points to the contrary. Throughout the Petition, it is alleged that Frank advised third parties, including Corrente and Verolla, that he needed to contact Attorney Burke to amend his Trust.⁵

74. Attorney Burke served as Frank's estate planning attorney for years. Attorney Burke prepared Frank's prior estate planning documents, which were executed consistent with best practices. It is no surprise that the Burke Email reflects an understanding that Attorney Burke was being directed to follow the ordinary course of drafting estate planning documents for Frank's further review and execution.⁶ There are no facts alleged in the Petition which could allow for a conclusion that Frank desired to deviate from this established routine and have his trustee and beneficiaries rely on an incomplete and muddled series of correspondence in carrying out his wishes.

75. Even though he recognized that he was nearing his death, Frank did not take any affirmative steps to ratify his correspondence with Attorney Burke as fulfilling his testamentary intent. The Petition points to no correspondence, no communications, and no evidence that Frank ever articulated to any person that he perceived his estate planning as having been completed or

⁵ "Mr. Douglas informed Ms. Corrente of the changes that he planned to make and she assisted him in drafting an email to his attorney, Steven Burke to make the changes to the trust." Pet. ¶ 11; "Mr. Douglas informed the Respondent that he was making changes to his Trust and he was contacting his attorney to amend the Trust." Pet. ¶ 14; "Mr. Douglas notified Mr. Verolla that he intended to modify the trust and that Mr. Douglas was communicating with his attorney to make such modifications." Pet. ¶ 25; "I hope that you can draft something simple for the various documents stating these changes." Letter p. 1; "I will await your reply." Letter p. 3.

⁶ "We are working on the revised documents now." Burke Email, p. 1; "We will prepare an Amendment to the Omega Trust ..." *Id.*; "We will prepare the revised documents accordingly." *Id.*

that he felt that the email correspondence fully and accurately expressed his intent. In fact, the final correspondence from Frank to Attorney Burke referenced additional revisions that he wanted incorporated in the final documents.

Conclusion

76. The Petition must be dismissed because the facts alleged, even if proven, could not support Petitioner's request to validate the Purported Amendment as the third amendment to the Trust.

77. The facts pled directly contradict a claim that the Purported Amendment substantially complied with the methods of modification contained within the Trust instrument.

78. Further, the Petition contains insufficient allegations to support a conclusion that the Purported Amendment is a manifestation of Frank's intent.

79. As the facts alleged are insufficient to support the necessary findings, this matter must be dismissed.

WHEREFORE, Benjamin T. Siracusa Hillman, Special Trustee, respectfully requests this Honorable Court:

- A. Dismiss the Petition to Validate the Third Amendment and Restatement of the Omega Trust; and

B. Grant such other relief as is just and equitable.

Respectfully submitted,

Benjamin T. Siracusa Hillman, Esq., *Special Trustee*

By His Attorneys:

Dated: November 24, 2020



Benjamin T. Siracusa Hillman, Esq. (NH Bar # 20967)

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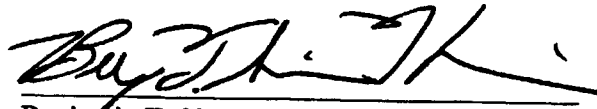
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via U.S. mail, postage prepaid, to all parties of record, and by electronic mail to counsel for the Petitioner and counsel for the Trustee.

Dated: November 24, 2020



Benjamin T. Siracusa Hillman, Esq. (NH Bar # 20967)

EXHIBIT
A

**SECOND
AMENDMENT AND RESTATEMENT
OF
THE OMEGA TRUST**

Prepared By: Steven M. Burke, Esq.
McLane, Graf, Raulerson & Middleton,
Professional Association
900 Elm Street, P.O. Box 326
Manchester, NH 03105-0326

**SECOND
AMENDMENT AND RESTATEMENT**

OF

THE OMEGA TRUST

WHEREAS, I, Mark Frank Douglas, of Salem, New Hampshire, did execute a TRUST AGREEMENT on December 30, 2005 entitled THE OMEGA TRUST, of which I am the Grantor, and of which Kenneth M. Verolla, CPA, of Andover, New Hampshire, is the current Trustee; and

WHEREAS, Paragraph 19 of said TRUST AGREEMENT expressly reserves the right in the Grantor to modify said TRUST AGREEMENT, in whole or in part; and

WHEREAS, pursuant to said right reserved by the Grantor, I have previously modified said TRUST AGREEMENT by FIRST AMENDMENT dated June 4, 2015.

NOW, THEREFORE, pursuant to the powers granted to, and rights reserved by, the Grantor, I hereby further modify said as follows:

1. *All provisions of said TRUST AGREEMENT, as previously amended, are hereby modified, and restated in their entirety, such that after modification said TRUST AGREEMENT shall read as follows:*

TRUST AGREEMENT, made as of December 30, 2005 between Mark Frank Douglas, residing in Salem, New Hampshire (hereinafter called the "Grantor"), and Kenneth M. Verolla, CPA, residing in Andover, Massachusetts (hereinafter called the "Trustee").

The Grantor's children are Tammy N. Rowan and Justin T. Douglas.

1. **TRUST PROPERTY.** All property transferred and delivered to the Trustee, which the Trustee may, at any time, hold or acquire, including cash, securities, or other property, shall be referred to collectively as the "trust estate" and held and administered and disposed of by the Trustee for the uses and purposes, and upon the terms and conditions, herein set forth.

2. **DISPOSITIVE PROVISIONS: LIFETIME.** The Trustee shall hold, manage, invest and reinvest the trust estate, and shall collect the income thereof and dispose of the net income and principal as follows:

- A. Pay such parts of the income, if any, and such parts of the principal of this trust to, or for the benefit of, the Grantor as the Grantor directs from time to time for the Grantor's support in reasonable comfort, education (including college, graduate, and professional education), and maintenance in health (including medical, dental, hospital, nursing and nursing home expenses). Any income accrued or accumulated at the time of the Grantor's death shall be paid and transferred to principal, to be administered according to the terms hereinafter provided.
- B. In addition, during the lifetime of the Grantor, if the Grantor becomes so incapacitated that the Grantor cannot exercise the Grantor's rights under subparagraph 2.A. above, and there are sufficient assets in this trust to do so, the Trustee is authorized to pay such parts of the income, if any, and such parts of the principal of this trust to, or for the benefit of, the Grantor and the Grantor's children as it deems advisable for their support in reasonable comfort, education (including college, graduate, and professional education), and maintenance in health (including medical, dental, hospital, nursing and nursing home expenses), taking into consideration the amount of their income from sources other than this trust.

It is the Grantor's intention that the support in reasonable comfort, education (including college, graduate, and professional education), and maintenance in health (including medical, dental, hospital, nursing and nursing home expenses) of the Grantor shall be of primary concern, and the Trustee shall exercise its sole, absolute, and uncontrolled discretion in using principal for the Grantor, considering all other beneficiaries to be secondary and without liability to any other beneficiary for the use of principal for the Grantor.

- C. Further, the Trustee is authorized to give, transfer or convey any of the trust estate to charities and persons of the Grantor's natural affection to whom the Grantor would normally consider making such gifts, transfers or conveyances, whether outright or in trust, having in mind the ultimate objective of such gifts, transfers or conveyances is either (i) the qualification for state or federal medical, welfare or other assistance programs for the Grantor's benefit, or (ii) the reduction of the state and federal estate, inheritance, transfer, legacy and succession taxes and any interest and penalties thereon imposed by reason of the Grantor's death.

3. DISPOSITIVE PROVISIONS: AFTER DEATH. Upon the death of the Grantor, the trust estate shall be held and administered and disposed of as follows:

- A. If there is found with this trust agreement a written memorandum regarding certain items of tangible personal property and if said items of tangible personal property are then part of the trust estate, the Grantor expresses the hope that the Trustee will distribute the items of tangible personal property contained on said memorandum as therein provided.

- B. Immediately upon the death of the Grantor, the Trustee serving hereunder shall make demand on the Trustee serving under The Omnos Trust to dissolve and revoke said Omnos Trust. Upon the completions of said dissolution, the Trustee of the Omnos Trust shall be instructed to distribute all remaining assets to the Trustee serving hereunder, said assets to be held and administered and disposed of pursuant to the provisions below.
- C. Thereafter, the Trustee shall distribute all of the trust estate then remaining as follows:
1. The Trustee shall distribute twenty percent (20%) of the remaining trust estate to the then serving Trustee of The Tammy N. Rowan Irrevocable Trust, an irrevocable trust created by the Grantor dated SEPTEMBER 24, 2015 ("Tammy's Trust"), to be added to the trust estate thereunder and administered as a part thereof ; and
 2. The Trustee shall distribute eighty percent (80%) of the remaining trust estate to the then serving Trustee of The Rainbow Trust, an irrevocable trust created by the Grantor dated SEPTEMBER 24, 2015, to be added to the trust estate thereunder and administered as a part thereof.
 3. If either of Tammy's Trust or The Rainbow Trust shall not then be in existence, then the Trustee shall distribute all of the trust estate to the Trust which is then in existence, to be added to the trust estate thereunder and administered as a part thereof.
 4. If neither Trust shall then be in existence, then the Trustee shall distribute all of the trust estate then remaining, outright and free of trust, to those persons then living who would have taken the Grantor's estate, and in such shares thereof as they would have taken, had the Grantor then died unmarried, intestate, and domiciled in New Hampshire.
- D. The provisions contained hereinabove which require the Trustee to apportion the trust estate into shares and parts of shares are for purposes of computation only and shall not be construed to require the Trustee to make physical segregation of one share or a part of a share from the others, although the Trustee shall have full right to make such segregation if it thinks it better to do so.
- Notwithstanding said provisions, the Trustee shall have the full right to regard the trust estate as one undivided estate for purposes of management and investment.
- E. If the Grantor or the executor of the Grantor's estate or any other individual (including any individual who shall transfer property in trust hereunder or the executor or administrator of the estate of such individual), has allocated any portion or all of any Generation Skipping Transfer ("GST") exemption provided by Section 2631(a) of the Internal Revenue Code to any property to be held in

trust hereunder, then notwithstanding anything to the contrary contained in this agreement, the Trustee is authorized to establish such number of separate trusts, with identical terms, to hold the property received in trust hereunder as it, in its sole, absolute, and uncontrolled discretion, shall deem advisable, bearing in mind the allocation of the said GST exemption and the desirability that any trust to which all or any portion of the said GST exemption is allocated shall, if practical, have an inclusion ratio of zero.

Further, the Trustee is authorized to allocate such trusts among the trust shares hereinabove created in order to minimize (or eliminate, if possible) any GST tax.

4. **TRUSTEE'S POWERS.** In the administration of the trust estate, the Trustee shall have all of the powers granted to trustees by New Hampshire common law and statutory authority (including, but not limited to, the Uniform Trustees' Powers Act, R.S.A. 564-A, and the Uniform Trust Code, R.S.A. 564-B, as they may be amended from time to time), without restrictions.

In addition to such power, and not in limitation thereof, the Trustee shall have the following powers, all of which shall be exercised in a fiduciary capacity:

A. During the lifetime of the Grantor, the Trustee may retain as an investment, unless and until the Grantor by a writing delivered to the Trustee shall otherwise direct, all of the securities and other property originally assigned, transferred, or delivered to the Trustee hereunder or at any time forming a part of the trust estate, whether or not such securities or other property be of the character authorized by the laws of the State of New Hampshire for the investment of trust funds.

Upon the death or incapacity of the Grantor, the Trustee is authorized to purchase, sell, lease, or alter any investment by buy or sell orders transmitted by it, whether by telephone call, electronic facsimile transmission, computer message or other current non-written method of business communication.

- B. To buy, sell and trade in securities of any nature, on margin, and for such purpose to maintain and operate margin accounts with brokers, and to pledge any securities held or purchased by it with such brokers as security for loans and advances made to the Trustee.
- C. To take and hold title to real estate, and to convey any interest in real estate and improvements thereon held in trust, and no purchaser or third party shall be bound to inquire whether the Trustee has said power or is properly exercising said power, or see to the application of any trust asset paid to the Trustee for a conveyance thereof.
- D. To have all of the necessary banking powers to open, close, and manage financial accounts, including but not limited to, checking accounts, savings accounts, financial accounts and other related financial instruments and to conduct all

necessary financial business in reference to the management of the financial assets of the trust.

- E. To rent a safe deposit box and to retain such assets in said box as the Trustee, in its sole, absolute, and uncontrolled discretion, determines appropriate.
- F. To borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust.
- G. To loan funds to the Grantor's estate upon such terms and conditions as to interest rates, maturities, and security as the Trustee shall determine.
- H. To make payments, transfers or conveyances, to the extent possible, to the estate of the Grantor (after exhaustion of the assets of the Grantor's estate) to satisfy legacies, bequests or devises, if any, made under the Grantor's will or included in the Grantor's estate for other purposes, if the Grantor's estate shall be insufficient to satisfy such legacies, bequests or devises.
- I. To invest in common trust funds.
- J. To select property, in its sole, absolute, and uncontrolled discretion, to be allocated to any trust hereunder or to be distributed in satisfaction of any gift provided for herein without respect to the income tax basis of such property, and the Trustee is specifically excused from any duty of impartiality with respect to the income tax basis of such property.
- K. To coordinate the filing of any information returns required under Section 6018 of the Internal Revenue Code in cooperation with the executor of the Grantor's estate, if any.
- L. To establish user names and passwords for electronic accounts, to have access to and modify any existing user name and password established by the Grantor or a predecessor Trustee for assets in the trust estate, and to assume complete control of those electronic accounts.
- M. If at any time during the Grantor's lifetime, there is delivered to the Trustee other than the Grantor, if any, or, if none, then to the successor Trustee, a written opinion, signed by a licensed physician, stating that the Grantor has become incompetent or incapacitated, then from and after the delivery of such written opinion the Trustee other than the Grantor, or the successor Trustee, as the case may be, shall have those powers and authorities with respect to the trust estate given to the Trustee in this trust agreement.
- N. Regardless of the extent of the authority that the Trustee holds to currently distribute income and/or principal of the trust estate to one or more beneficiaries of the trust, the Trustee shall have full power and authority, to be exercised in its

sole, absolute, and uncontrolled discretion, to appoint any or all assets held in this trust estate to any other trust or trusts created under will, deed or otherwise, for the benefit of one or more of the beneficiaries hereunder and to the exclusion of one or more of the other beneficiaries hereunder; provided that no such application may be made to a trust in which a person or entity who is not a beneficiary of this trust has any beneficial interest.

This authority shall be subject to the limitations set forth in R.S.A. 564-B:4-418, as amended from time to time, provided that such appointment clause shall be null and void in the event there is a determination that the application of such clause shall result in the inclusion of any of the trust estate in the Grantor's gross estate under any provision of the Internal Revenue Code, including but not limited to Sections 2041 and 2042, which would not otherwise be includable in the Grantor's gross estate.

- O. If, at any time before the final distribution of the principal of any trust share hereinabove described, the value of the principal of said trust share shall be equal to, or less than, ONE HUNDRED THOUSAND DOLLARS (\$100,000), then the Trustee may, in its sole discretion, terminate said trust share and distribute the principal of said trust share, and any accumulated and undistributed income thereof, outright and free of trust, to those persons then entitled to benefit from said trust share, and in the proportions in which they are then entitled to benefit from said trust share, notwithstanding any provisions of this trust to the contrary.
- P. To exercise all the powers, authorities and discretions herein conferred, after the termination of the trust hereunder, until the complete distribution of the trust estate.

5. CLOSELY-HELD BUSINESS. The Grantor anticipates that at the time of the Grantor's death the Grantor may own a significant interest in a business enterprise (whether operated in the form of a corporation, a limited liability company, a partnership or a sole proprietorship), hereinafter referred to as the "business", and consequently the Grantor expects that some such business enterprise will be in the Grantor's estate or in this trust at the time of the Grantor's death and if in the Grantor's estate, then subsequently in this trust.

Since the Grantor desires that the Trustee may continue to hold and operate each such business as part of the trust herein created, the Grantor hereby vests said Trustee, including any successors, with the following powers and authority, as supplemental to the ones contained hereinabove, the applicability of which to the business the Grantor confirms, without limitation by reason of specification, and in addition to powers conferred by law, all of which may be exercised with respect to every such business, whether a corporation, a limited liability company, a partnership or a sole proprietorship:

- A. To retain and continue to operate the business for such period as the Trustee may deem advisable.

- B. To control, direct and manage the business: in this connection, the Trustee in its sole, absolute, and uncontrolled discretion, shall determine the manner and extent of its active participation in the operation, and the Trustee may delegate all or any part of its power to supervise and operate, to such person or persons as it may select, including any associate, partner, officer or employee of the business.
- C. To hire and discharge officers and employees, fix their compensation and define their duties; and similarly to employ, compensate and discharge agents, attorneys, consultants, accountants and such other representatives as the Trustee may deem appropriate, including the right to employ any beneficiary (or individual Trustee) in any of the foregoing capacities.
- D. To invest other trust funds in such business, to pledge other assets of the trust as security for loans made to such business; and to loan funds from the trust to such business, and to borrow from any bank or other lending institution, including any named corporate fiduciary, on such terms as are currently competitive.
- E. To organize a corporation, a partnership, a limited liability company or other business under the laws of this or any other state or country and to transfer thereto all or any part of the business or other property held in the estate or trust, and to receive in exchange therefor such stocks, partnership interests, membership interests, bonds and other securities as the Trustee may deem advisable.
- F. To take any action required to convert any corporation into a partnership, a limited liability company or sole proprietorship.
- G. To treat the business as an entity separate from the trust: in its accountings to the court and to any beneficiaries, the Trustee shall only be required to report the earnings and condition of the business in accordance with standard corporate accounting practice.
- H. To retain in the business such amount of the net earnings for working capital and other purposes of the business as the Trustee may deem advisable in conformity with sound business practice.
- I. To purchase, process and sell merchandise of every kind and description, and to purchase and sell machinery and equipment, furniture and fixtures and supplies of all kinds.
- J. To sell or liquidate all or any part of any business at such time and price and upon such terms and conditions (including credit) as the Trustee may determine, whether or not said business shall, in the Trustee's sole and uncontrolled determination, be a productive investment of the trust estate: the Trustee is specifically authorized and empowered to make such sale to any partner, officer or employee of the business (or to any individual Trustee) or to any beneficiary hereunder.

- K. To exercise any of the rights and powers herein conferred in conjunction with another or others.
- L. To diminish, enlarge or change the scope or nature of any business.
- M. To elect, continue, revoke or terminate an S Corporation election under Section 1362 of the Internal Revenue Code.
- N. To cause the redemption of any business interest to obtain funds for payment of estate, inheritance, legacy and succession taxes (including any interest collected thereon) payable from the Grantor's estate, and to the extent permitted, for funeral expenses and expenses of administration, in such manner as to take full advantage of Sections 302 and 303 of the Internal Revenue Code.

The Grantor is aware that certain risks are inherent in the operation of any business and expects that decisions will be required of a "businessman's risk" nature as contrasted with the "prudent man rule." Therefore, the Grantor directs that the Trustee shall not be liable for any loss arising out of the retention and operation of any business unless such loss shall result from the Trustee's bad faith or willful misconduct. In determining any question of liability for loss, it should be considered that the Trustee is engaging in a speculative enterprise at the Grantor's express request.

If any business operated by the Trustee pursuant to the authorization contained in the trust shall be unincorporated, then the Grantor directs that all liabilities arising therefrom shall be satisfied first from the business itself and second out of the trust. It is the Grantor's intention that in no event shall any such liability be enforced against the Trustee personally. If the Trustee shall be held personally liable, it shall be entitled to indemnity first from the business and second from the trust.

It is recognized that any business interest which may be included in any trust may require additional efforts and expertise on the part of the fiduciary. Accordingly, additional fees may be required. Such fees may be taken as a director's fee, which will be remitted to the fiduciary, and/or as a management consultant charge by the fiduciary.

Notwithstanding the foregoing, the Trustee shall have no power or authority with respect to shares of any Sub-Chapter S Corporation allocated to any trust share which power or authority would cause said trust share not to qualify as a Qualified Sub-Chapter S Trust or an Electing Small Business Trust, as the case may be, under the Internal Revenue Code.

6. NON-DIVERSIFICATION OF CLOSELY-HELD BUSINESS INTERESTS. It is the Grantor's intent that all closely-held business interests which have been transferred to the trust (the "Closely-Held Interests") shall be held for the benefit of the beneficiaries. Each such business has served as a valuable long-term asset for the Grantor at various times providing, among other benefits, financial rewards, employment opportunities, visibility, recognition and unifying features for the Grantor. The Trustee shall not be subject to any duty to sell the

Closely-Held Interests for purposes of diversification or any other purpose at any time. The Trustee shall hold the Closely-Held Interests to the extent that the Trustee deems it appropriate in its sole, absolute and uncontrolled discretion.

The Grantor understands that certain risks are inherent in the retention of any business interest and, in particular, closely-held businesses. The Grantor directs that the Trustee shall not be liable for any loss arising out of the retention of Closely-Held Interests unless such loss shall result from the Trustee's bad faith or willful misconduct. In determining any question of liability for loss, it should be considered that the Trustee is retaining the Closely-Held Interests at the Grantor's express request, and the provisions of the "prudent investor rule," as set forth in R.S.A. 564-B:9-901 and as may be amended from time to time, shall not apply to the administration or management of the such Closely-Held Interests by the Trustee. Further, the Trustee is authorized to place reasonable reliance on this trust provision pursuant to R.S.A. 564-B:10-1006, as amended from time to time.

7. ADDITIONAL PROPERTY. The Grantor, may, by will, trust or during the Grantor's lifetime, from time to time, transfer and deliver to the Trustee cash, securities, and other property acceptable to the Trustee, in addition to the property presently transferred and delivered, and such cash, securities, and other property shall be held, administered, and disposed of by the Trustee in accordance with the provisions of this agreement without the execution of any further instrument or declaration.

8. REPORTING BY TRUSTEE.

A. At any time and from time to time, the Grantor shall have the power, by written instrument signed and acknowledged by the Grantor and delivered to the Trustee, to settle the report of the Trustee with respect to principal or income, or with respect to both principal and income, and to release and discharge the Trustee of and from any and every claim, demand, accountability, and liability of every nature, arising from any matter or thing done or omitted to be done, in connection with this agreement or any trust hereby created, during the period in respect of which the report of the Trustee shall have been so settled.

Every such settlement, release, and discharge shall be conclusive and binding upon, and shall be an absolute protection to the Trustee against all claims of any income beneficiaries, remaindermen, or other persons who might then or thereafter have or claim any interest under this agreement, and no such income beneficiary, remainderman, or other person shall have any right of accounting, reporting, any claim, or any cause of action against the Trustee arising from any matter or thing done or omitted to be done in connection with this agreement or any trust hereby created, during any period in respect of which the report of the Trustee shall have been so settled.

B. After the death or incapacity of the Grantor, so long as there is a Trust Protector serving hereunder, the Trustee shall not provide a copy of this trust, any report, accounting, information, notice, or the like (hereinafter "Trust Information") to

any beneficiary hereunder. During such period of time, the Trustee is exempted from such provisions found in the Uniform Trust Code, R.S.A. 564-B:8-813, as it may be amended from time to time, which require the Trustee to provide Trust Information to the beneficiaries.

The Trustee may, at the Trustee's sole, absolute, and uncontrolled discretion render a Trustee's report as described in the Uniform Trust Code, at such intervals as the Trustee may choose, to the Trust Protector as provided in R.S.A. 564-B:12-1201(a)(4).

- C. At such time as there shall be no Trust Protector serving hereunder, then the Trustee may, at the Trustee's sole, absolute, and uncontrolled discretion, and shall, to the extent required by the Uniform Trust Code, R.S.A. 564-B, as it may be amended from time to time, render a Trustee's report as described in the Uniform Trust Code, as it may be amended from time to time, at such intervals as the Trustee may choose or at such times as required by the Uniform Trust Code.
- D. A recipient of such a report (or, if under guardianship or conservatorship, then by the Guardian or Conservator, or, if deceased, then by the Executor or Administrator), may, by a written instrument, assent to the report of the Trustee with respect to principal or to income, or with respect to both principal and income.

The assent of the recipient of such report (or, if under guardianship or conservatorship, then by the Guardian or Conservator, or, if deceased, then by the Executor or Administrator) shall make such report binding and conclusive upon all persons then having or who may thereafter have any interest, vested or contingent, in the income or principal of the trust estate and such assent shall forever release and discharge the Trustee of and from any and every claim, demand, accountability, and liability of every nature, arising from any matter or thing done or omitted to be done, in connection with this agreement or any trust hereby created, during the period in respect of which the report of the Trustee shall have been so settled.

The assent of the Trust Protector shall be binding upon all other persons as provided in R.S.A. 564-B:12-1201(b).

- E. The failure of any person to object in writing to the Trustee to such a report within thirty (30) days after the delivery of the same to such person hereunder shall be final and binding to the same extent as the written assent hereinabove provided.
- F. The Trustee is specifically directed to take reasonable compensation for its services in the administration of the trusts created herein and is hereby released and discharged of and from any and every claim, demand, accountability, and liability of every nature relating to such reasonable compensation paid to said Trustee and disclosed on such report upon complete settlement of said report.

- G. Any person entitled to such a report, accounting, information, notice and the like (or, if under guardianship or conservatorship, then by the Guardian or Conservator, or, if deceased, then by the Executor or Administrator) may by a written instrument signed and acknowledged by him or her or them, as the case may be, and delivered to the Trustee, waive the right to said Trustee's report or to other information otherwise required to be furnished under the Uniform Trust Code, as it may be amended from time to time.

9. SUCCESSOR TRUSTEE. The following provisions shall govern the addition, removal and succession of the Trustee:

- A. The Grantor may, during the Grantor's lifetime, add any additional Trustee, or remove any Trustee hereunder and appoint a successor Trustee.
- B. If Kenneth M. Verolla, CPA shall be unable or unwilling to serve in the capacity of Trustee for any reason, then the Grantor's friend, Dawn M. Corrente, of Concord, North Carolina, shall serve as successor Trustee.
- If Dawn M. Corrente shall be unable or unwilling to serve in the capacity of Trustee for any reason, then the Grantor's niece, Susan J. Hopkins, of Salem, New Hampshire, shall serve as successor Trustee.
- C. Upon the Grantor's death or incapacity, the Trust Protector may remove any Trustee serving hereunder. Further, upon the Grantor's death or incapacity, if at any time there is a vacancy in the role of Trustee, then the Trust Protector shall appoint one or more successor Trustee(s).
- D. It is the Grantor's hope, but not direction, that upon the Grantor's death, the Trustee will consider employing the Grantor's friend, Laura Apostoloff, of Derry, New Hampshire, to perform administrative tasks in settling the Grantor's estate and administration of this trust, such as bookkeeping, as may be mutually agreeable.
- E. In the event that any beneficiary of the trust, other than the Grantor, shall serve in the capacity of co-Trustee, then the discretionary powers to determine whether income or principal is to be distributed to said beneficiary or to any person to whom said beneficiary owes an obligation of support shall be exercisable only by the remaining Trustee.

It is the Grantor's intention by this sub-paragraph to prohibit said beneficiary from benefiting himself or herself as beneficiary in any way by the exercise of such discretionary powers vested in the Trustee as a group.

- F. In the event that an attorney, an accountant, a certified financial planner or a corporation or financial institution shall be serving as Trustee hereunder, a

majority of the beneficiaries to whom or for whose use the current net income of the trust estate is at the time authorized or required to be paid or applied and who shall at the time be at least eighteen (18) years of age may by a written instrument signed and acknowledged by them and delivered to such attorney, accountant, certified financial planner or corporation or financial institution remove said Trustee and, subject to the successor trustee appointments herein, appoint as its successor Trustee, any attorney, accountant, certified financial planner or corporation or financial institution having a trust department capable of rendering financial advice concerning the investments of the trust estate.

- G. In the event that any beneficiary of the trust, other than the Grantor, shall serve in the capacity of sole Trustee and the Trustee has discretionary powers to distribute income or principal to himself, herself, or to any person to whom he or she owes an obligation of support, then such distributions of income or principal shall be exercisable by the sole Trustee. The maximum amount that may be withdrawn annually by each such beneficiary under this sub-paragraph, however, shall not exceed the maximum amount over which an individual may have a power of withdrawal without its lapse in such year being deemed to be a release of such power under Section 2514(e) of the Internal Revenue Code.
- H. No successor Trustee shall be liable or responsible in any way for any actions or defaults of any predecessor Trustee, or for any loss or expense from or occasioned by anything done or neglected to be done by any predecessor Trustee. Any successor Trustee shall have, from and after its appointment or succession to office hereunder and without any assignment or other action by any person, all the rights, interests, and powers, including discretionary rights and powers, which are by the provisions of this trust agreement granted to and vested in the Trustee named herein.
10. TRUST PROTECTOR. The Trust Protector's sole duty shall be receipt of Trust Information as provided in Paragraph 8 above, and the removal, replacement and other appointment of Trustees as provided in Paragraph 9 above, at such times and upon such conditions, as specifically provided herein.
- A. During the Grantor's lifetime, the Grantor may appoint one or more Trust Protectors to serve as Trust Protector hereunder.
- B. The Grantor may remove any Trust Protector serving hereunder and appoint a successor Trust Protector.
- C. No beneficiary shall have the right to appoint, remove and replace a Trust Protector.
- D. Each removal and appointment exercised by the provisions hereunder shall be by a written instrument signed and duly acknowledged by the Grantor.

Each such removal or appointment shall be effective when delivered to the person so being removed, or upon acceptance of the person so being appointed.

E. Each Trust Protector hereunder (whether originally designated herein or appointed as successor) shall have the right to resign at any time by giving written notice as follows:

1. to either: (i) the Grantor, if the Grantor is living and competent, or (ii) after the Grantor's death or incapacity, then each adult beneficiary to whom the Trustee is then authorized to distribute income; and
2. to the Trustee.

The Trust Protector's resignation shall be effective as of the date of such written notice.

F. No person may serve simultaneously as Trustee and Trust Protector hereunder. In the event the Trust Protector then serving shall accept appointment as Trustee hereunder, then said person(s) appointment as Trust Protector shall automatically terminate upon commencement of service as Trustee.

G. The Grantor is not imposing any fiduciary responsibility on the Trust Protector to monitor the actions of the Trustee.

Except for any matter involving the Trust Protector's own individual willful misconduct or gross negligence proved by clear and convincing evidence, no Trust Protector shall incur any liability by reason of any error of judgment, mistake of law, or action of any kind taken or omitted to be taken hereunder if in good faith reasonably believed by such Trust Protector to be in accordance with the provisions and intent hereof.

The Trust Protector shall not be liable for the failure to remove any Trustee, even if such Trustee may be guilty of a gross violation of his or her fiduciary duties hereunder.

Any successor Trust Protector shall have all the powers of the initial Trust Protector.

Different trusts hereunder may, but need not, have different Trust Protectors.

More than one person may act collectively as a Trust Protector for any given trust hereunder, in which case decisions of the Trust Protector shall be made by majority vote if more than two (2) persons are acting collectively.

II. There need not be a Trust Protector serving at all times, provided, however, one may be appointed from time to time pursuant to the provisions herein.

11. FIDUCIARIES. No person dealing with the Trustee shall be responsible for the application of any money, securities, or other property paid or delivered, and the receipt of the Trustee shall be a full discharge; and no person dealing with the Trustee, and no issuer, transfer agent, or other agent of any issuer of any securities shall be under any obligation to ascertain or inquire into the power of the Trustee to purchase, sell, exchange, transfer, mortgage, pledge, create a security interest in, lease, distribute, or otherwise dispose of or deal with any money, securities, or other property.

The Trustee shall not at any time be held liable for any action taken or not taken, including any action intended to lessen or eliminate the impact of estate or generation-skipping transfer taxes with respect to any generation or beneficiary, whether or not such action is successful in achieving the results sought and without regard to its effect on other beneficiaries in the same or different generations, or for any loss or depreciation in the value of any property in any trust created herein, whether due to an error of judgment or otherwise, where the Trustee has exercised good faith and ordinary diligence in the exercise of its duties.

The Trustee shall receive reasonable compensation for its services in the administration of the trusts created herein, including reimbursement for amounts reasonably expended for bookkeeping services, investment services and advice, and other professional or para-professional services. In addition to the compensation herein provided, the Trustee shall receive reasonable compensation for any legal services provided for the benefit of the trust estate, such as handling any litigation involving the trust, preparing state or federal income tax returns, and transferring any real estate.

12. PERPETUITIES. All trusts established under this instrument shall be exempt from the application of the rule against perpetuities. This provision is intended to comply with R.S.A. 564-B:4-402A, and accordingly, the Grantor specifically authorizes the Trustee to sell, mortgage or lease property for any period of time beyond the period that is required for an interest created under this instrument to vest in order to be valid under the rule against perpetuities, as measured by the period defined hereinabove.

The trusts created hereunder shall be perpetual to the fullest extent permitted by the governing law. If any trust created hereunder is deemed to be subject to the law of a jurisdiction (including, but only to the extent applicable to real property) that has a rule against perpetuities or similar rule which limits the period during which property can be held in trust, then such trust (other than a trust created by the exercise of a power of appointment conferred hereunder which exercise commences a new rule against perpetuities period under the law of such jurisdiction) shall terminate in all events upon the expiration of the longest period that property may be held in trust under this trust agreement under the law of such jurisdiction (including any applicable period in gross, such as 21 years, 90 years or 110 years); provided, however, that if the jurisdiction has a rule against perpetuities or similar rule which applies only to certain types of property, such as real property, the provisions of this paragraph shall apply only to such property. If under the law of such jurisdiction the longest period that property may be held in trust may be determined (or alternatively determined) with reference to the death of the last survivor of a group of individuals in being upon the date of this trust agreement, those

individuals shall consist of all of the descendants of the Grantor's parents who were in being on the date of this trust agreement. Upon termination of a trust pursuant to the provisions of this paragraph, the trust property shall be transferred, conveyed and paid over to the persons then entitled to receive or have the benefit of the income from the trust in the proportions in which they are entitled thereto, or if their interests are indefinite, then in equal shares.

13. SPENDTHRIFT PROVISION. Except as herein otherwise provided, the interest of any beneficiary hereunder, either as to income or principal, shall not be anticipated, alienated or in any other manner assigned or pledged or promised by such beneficiary, and shall not be reached by, or be subject to, any legal, equitable or other process, including any bankruptcy or divorce proceeding, or be subject to the interference or control of creditors or others in any way or manner, and all payments to, or the interest of, any beneficiary shall be free from the control or claim of any parent or spouse or former spouse or any other third party. Moreover, no power of appointment or power of withdrawal shall be subject to involuntary exercise. Provided, however, this spendthrift provision shall not restrict the exercise of a disclaimer or the exercise of a power of appointment or withdrawal right granted by this trust agreement. This provision is intended to be a material purpose of this trust and any other trust established hereunder.

14. TAX PROVISION. The trust estate shall not be charged with the payment of any estate, inheritance, legacy, death taxes or duties of any nature (state or federal), or any interest or penalty thereon, except to the extent that the other assets in the Grantor's estate (excluding any assets which may be exempted from the payment of such taxes by the last will of the Grantor) shall be insufficient to discharge such taxes, interest or penalties or shall be insufficiently liquid to satisfy the same. The Trustee may rely conclusively upon written certification from the executor of the Grantor's estate, or if no probate administration of the Grantor's estate is required under applicable law, upon request of the person or persons nominated as executor under the Grantor's will or upon any other evidence, as to the existence of such insufficiency and the amount thereof; provided, however, that the Trustee shall not pay any additional tax imposed under Section 2032A or 2057 of the Internal Revenue Code or any generation-skipping transfer taxes imposed under Chapter 13 of the Internal Revenue Code imposed by reason of the Grantor's death.

If the Trustee shall be required to pay any such taxes, they shall be charged against the principal of the trust estate as an expense without apportionment.

Provided that in the event that no probate administration of the Grantor's estate is required under applicable law, the Trustee shall have all the powers and authority given the executor under the Grantor's will in relation to such taxes, including all elections and allocation of the generation-skipping transfer tax exemption under Section 2631 of the Internal Revenue Code.

15. DEBTS AND EXPENSES. The trust estate shall not be charged with the payment of legal debts of the Grantor's estate, funeral expenses or expenses of administration of the Grantor's estate except to the extent that the other assets in the Grantor's estate shall be insufficient to discharge such debts and expenses, or shall be insufficiently liquid to satisfy the same. The Trustee may rely conclusively upon written certification from the executor of the

Grantor's estate, or if no probate administration of the Grantor's estate is required under applicable law, upon request of the person or persons nominated as executor under the Grantor's will, or upon any other evidence, as to the existence of such insufficiency and the amount thereof. If the Trustee shall be required to pay any such debts and expenses, the same shall be treated as debts and expenses of the trust estate (to the extent the assets of the Grantor's estate are insufficient to satisfy the same) or as loans to the Grantor's estate (to the extent the liquid assets of the Grantor's estate are insufficient to satisfy the same) if any such debts and expenses are deducted for federal estate tax purposes in computing the value of the Grantor's taxable estate under Section 2053 of the Internal Revenue Code.

If any such debts and expenses are either not so deducted or deductible under Section 2053 of the Internal Revenue Code, however, the same shall be charged against the principal of the trust estate as an expense without apportionment.

This provision shall confer no rights upon anyone except the executor of the Grantor's estate.

Notwithstanding any other provision herein, no such debts or expenses shall be paid from the proceeds or any other benefits of a policy of life or endowment insurance effected by the Grantor on the Grantor's own life or on the life of another of which this trust, or any sub-trust hereunder, is the designated beneficiary.

16. SURVIVAL REQUIREMENT. No person shall be deemed to have survived the Grantor, or any other person or event under the terms of this trust, unless such person survives the end of the period commencing with the close of the calendar day of the Grantor's death, the death of such other person or on which such event occurs, and ending with the close of the thirtieth (30th) calendar day thereafter.

17. DISTRIBUTIONS TO MINORS. In any case where property or funds become distributable to a minor, then the Trustee shall have the additional power to distribute the same in any one or more of the following ways: (1) by distribution directly to the minor; (2) by distribution to the legal guardian of the minor; (3) by distribution to a parent, relative or friend of the minor for the minor's support in reasonable comfort, education and maintenance in health; (4) by applying the same directly for the minor's support in reasonable comfort, education and maintenance in health; (5) by depositing the same in a bank account in the name of the minor or by transferring property to or purchasing property in the name of a custodian for his or her benefit under a Uniform Law relating to transfers or gifts to minors; or (6) by holding the same hereunder in trust or in custody for the minor's support in reasonable comfort, education and maintenance in health and by distributing the remainder thereof to the minor upon coming of age or otherwise to the minor's estate in case of the death of the minor. The receipt of the person to whom property or funds are actually distributed in accordance with any of the foregoing provisions shall fully discharge the Trustee from further accountability therefor.

18. GOVERNING LAW AND SITUS. The Grantor declares that this agreement and the trust created hereby shall be construed and administered under the laws of the State of New

Hampshire, that the validity and effect of this agreement and of this trust shall be determined in accordance with the laws of that State.

Further, the trust shall be under the jurisdiction of the courts of the State of New Hampshire and the Trustee shall voluntarily enter a general appearance in any legal action relating to an accounting of the trust or a declaratory judgment interpreting this trust agreement. The Trustee shall not be chargeable in any court other than one of the courts of that State.

However, the Trustee, at any time and from time to time, in its discretion, may, (1) remove all or part of the trust estate and hold and administer the same in any other jurisdiction where the Trustee shall be then located, (2) change the situs of administration of any trust from one jurisdiction to another jurisdiction; and (3) elect that the law of such other jurisdiction shall thereafter govern the trust to such extent as may be necessary and appropriate, and to amend the administrative provisions of the trust as the Trustee deems appropriate to ensure compliance and compatibility with such law, whereupon the courts of such other jurisdiction shall have the power to effectuate the purposes of this trust agreement to such extent. The determination of the Trustee as to any such removal of assets or change of situs or governing law shall be conclusive and binding on all persons interested in such trust.

19. AMENDMENT AND REVOCATION. The Grantor reserves the right at any time or from time to time without the consent of any person and without notice to any person other than the Trustee to revoke or modify the trust hereby created, in whole or in part, to change the beneficiaries hereof, or to withdraw the whole or any part of the trust estate by filing notice of such revocation, modification, change, or withdrawal with the Trustee; provided, however, that the terms of this agreement may not be modified by the Grantor in such manner as to increase the obligations or alter the rates of the commissions of the Trustee without its written consent.

20. CONTEST OF THE GRANTOR'S WILL OR ANY TRUST CREATED BY THE GRANTOR. It is the Grantor's will and direction that if any beneficiary hereunder shall, directly or indirectly, institute, conduct or in any manner whatsoever take part in or aid in any legal proceedings to contest the validity of the will of the Grantor, or any codicil thereto, or contest the validity of any trust created by the Grantor, or any amendment thereto, including this trust, or impair, invalidate, set aside or vary the terms of any such instrument as amended at the time of the Grantor's death, or challenge the actions of the executor of the Grantor's estate in the performance of its duties under such will or any codicil thereto, or challenge the actions of any trustee or other fiduciary of any trust created by the Grantor in the performance of such trustee's or other fiduciary's duties as described in such trust, or pursue any other act or proceeding to frustrate or defeat the intent of the Grantor as described in such instrument, or shall induce any other person to pursue any such action, then, in such event, the provision herein made for the benefit of such person or persons shall thereupon be revoked. Such person or persons shall thereafter be excluded from any participation under this trust and shall cease to have any right or title to such estate and the share to which such person or persons would have been entitled shall thereafter be administered as if such person or persons had then died.

Provided, however, in the case of an action brought solely to challenge the acts of an executor, trustee, or other fiduciary, then this provision shall be unenforceable to the extent such executor, trustee, or other fiduciary is found to have committed a breach of its fiduciary duty or a breach of trust.

Nothing contained herein shall be construed to prevent the executor of the Grantor's will or the trustee or any other fiduciary of any trust created by the Grantor, or their successors, from instituting or bringing any action, suit, or proceeding for the construction or interpretation of the provisions of any such instrument. Nor shall the provisions hereunder be construed to prevent any beneficiary from disclosing relevant information in a proceeding for the administration of the Grantor's estate or the administration of any trust created by the Grantor.

This paragraph is intended to be a material purpose of this trust and notwithstanding any provision herein to the contrary, the Trustee may not appoint assets to another trust, change governing law or situs of the Trust, nor may the Trustee or any other persons or individuals enter into any agreement or take any actions which invalidate the effectiveness of this paragraph.

21. DEFINITIONS. Whenever used in this trust agreement, the words "child", "children", or "issue" are intended to include only persons who are descendants by blood.

References to the "Internal Revenue Code" or "Code" or to provisions thereof are to the Internal Revenue Code of 1986, as amended at the time in question. References to the "Treasury Regulations," "Regulations" and "Regs." are to the Treasury Regulations under the Code. If, by the time in question, a particular provision of the Code has been renumbered, or the Code has been superseded by a subsequent federal tax law, the reference shall be deemed to be to the renumbered provision or the corresponding provision of the subsequent law, unless to do so would clearly be contrary to the Grantor's intent as expressed in this Trust Agreement, and a similar rule shall apply to references to the Regulations.

References to "R.S.A." are to the New Hampshire Revised Statutes Annotated, as amended at the time in question. If, by the time in question, a particular provision of the Statute has been renumbered, or the Statute has been superseded by subsequent law, the reference shall be deemed to be to the renumbered provision or the corresponding provision of the subsequent law, unless to do so would clearly be contrary to the Grantor's intent as expressed in this trust agreement.

Masculine, feminine and neuter pronouns shall each include all genders, and the singular shall include the plural and vice versa, where the context or facts so admit.

The captions and paragraph headings of this trust agreement are inserted only as a matter of convenience and for reference, and in no way define, limit or describe the scope or intent of this agreement, nor in any way affect this agreement.

22. EXECUTION. This trust agreement, and any amendments hereto, shall be effective when executed by the Grantor, notwithstanding that the signature of the Trustee is

provided for, the Trustee's signature being intended to denote the acceptance of the Trustee to serve in that capacity only.

This trust agreement may be executed in any number of counterparts with the same effect as if all of the parties had signed the same document. All counterparts shall be construed together and shall constitute one agreement.

2. *I hereby ratify, confirm, republish and restate said TRUST AGREEMENT in all other respects.*

Signature Pages Follow

IN WITNESS WHEREOF, I, Mark Frank Douglas, Grantor, hereunto set my hand on September 29, 2015.

Signed in the Presence of:

William A. Gear
Witness

William C. [Signature]
Witness

Mark Frank Douglas
Mark Frank Douglas, Grantor

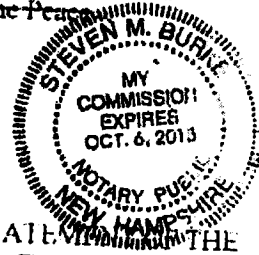
STATE OF NEW HAMPSHIRE
COUNTY OF HILLSBOROUGH

The foregoing instrument was acknowledged before me on September 29, 2015,
by Mark Frank Douglas.

Steven M. Burke
Notary Public, Justice of the Peace

My Commission Expires:

(Seal)



Receipt of the foregoing SECOND AMENDMENT AND RESTATEMENT OF THE OMEGA TRUST is hereby acknowledged by Kenneth M. Verolla, CPA, Trustee, on 9-21, 2015.

Kenneth M. Verolla
Kenneth M. Verolla, Trustee

Certification of Copies to Parties
10th Circuit – Probate Division – Brentwood
In re: The Omega Trust
Docket No.: 318-2019-EQ-01253

SERVICE LIST

I, Benjamin T. Siracusa Hillman, certify that a copy of the foregoing document was/will be served on the following persons using the manner specified below:

By First-Class Mail and Electronic Mail on November 24, 2020

Lisa J. Bellanti, Esq.
Casassa Law Office
459 Lafayette Road
Hampton, NH 03842-2242

Pamela J. Newkirk, Esq.
Barradale O'Connell, Newkirk & Dwyer, PA
3 Executive Park Drive, Ste 107
PO Box 10239
Bedford, NH 03110

By First-Class Mail on November 24, 2020

Kevin M. Rowan
Martha G. Rowan
Isabella Rowan
22 Bobwhite Trail
Gales Ferry, CT 06335

Ariel Douglas
442-D Lorimer Street #135
Brooklyn, NY 11206-1030

Brett M. Rowan
10 Hancock Street
Brooklyn, New York 11216

Justin T. Douglas
295 NW Commons Loop
Suite 115-137
Lake City, FL 32055

Tammy N. Rowan
6221 Glen Abbey Lane
Bradenton, FL 34202

STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY

10TH CIRCUIT – PROBATE DIVISION –BRENTWOOD

CASE NO. 318-2019-EQ-01253

In Re: The Omega Trust

OBJECTION TO MOTION TO DISMISS

NOW COMES, Lisa J. Bellanti, Esq., Attorney for David J. Apostoloff and requests this court deny the Motion to Dismiss, and support thereof states as follows:

1. The Special Trustee has filed a Motion to Dismiss the Petition to Validate the Third Amendment and Restatement of the Omega Trust (the Petition).
2. The Special Trustee argues that the Petition must be dismissed because (1) the Amendment does not substantially comply with the method of amendment allowed by the Trust and (2) the facts alleged could not meet the Petitioner's burden of demonstrating that the Amendment is a clear and convincing manifestation of the Grantor's intent.
3. The legal standard for ruling on a motion to dismiss is whether the Petitioner's allegations are "reasonably susceptible of a construction that would permit the relief sought". *In re Guardianship of Raymond B.*, 163 N.H. 502,504 (2012). The Court "assumes the truth of the facts as alleged in the petitioners' pleadings and construe all reasonable inferences in the light most favorable to the petitioners." *Id.* The threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. See *Tessier v. Rockefeller*, 162 N.H. 324, 330 (2011). "If the allegations constitute a basis for legal relief . . . it [is] improper to grant the motion to dismiss." *Id.* (citations omitted).
4. Under Paragraph 19 of the Second Amendment and Restatement, the Grantor reserved the right to modify the Trust by filing notice of such modifications with the Trustee. The Second Amendment and Restatement provides a method for amending or revoking the Trust; it does not provide the only method:

The Grantor reserves the right at any time or from time to time without the consent of any person and without notice to any person other than the Trustee to revoke or modify the trust hereby created, in whole or in part, to change the beneficiaries hereof, or to withdraw the whole or any part of the trust estate by filing notice of such revocation, modification, change or withdrawal with the Trustee; provided, however, that the terms of this agreement may not be modified by the Grantor in such manner as to increase the obligations or alter the rates of the commissions of the Trustee without its written consent.

5. Unlike a will, a Trust need not be signed or be in writing to be valid, RSA 564-B:4-401.
6. "A trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence. RSA 564-407
7. In New Hampshire, a grantor can validly amend a revocable trust pursuant to RSA 564-B:6-602;
 - (1) by substantial compliance with a method provided in the terms of the trust; or
 - (2) by any other method manifesting clear and convincing evidence of the settlor's intent if the terms of the trust do not provide a method or do not expressly prohibit methods other than methods provided in the terms of the trust.
8. Unless the terms of the trust require a signed writing, there is no statutory or common law support that a trust amendment must be signed by the grantor to be valid. In re Estate of Field, 953 A.2d 1281 (Pa. Super Ct. 2008).
9. In the case of In re Wendland-Reiner Trust, 677 N.W.2d 117 (Neb 2004), the Court noted that the modern trend in trust cases is to allow an amendment to a trust by any method so long as the amendment is established by clear and convincing evidence as to the intent of the settlor, unless the trust provides an exclusive method for amendment.
10. Paragraph 19 of the Second Amendment and Restatement of the Trust specifically grants Mr. Douglas the power to revoke or modify the Trust and prescribes a method of doing so. Mr. Douglas, as Grantor, had the right to modify the Trust by filing notice of the modification with the Trustee. The Trust does not require that the notice be in writing nor does it require an executed document.
11. Based on the standards set forth in RSA 564-B:6-602, the Trustee was given adequate and sufficient notice of the Third Amendment to satisfy the "filing of notice" requirement of Paragraph 19 because Mr. Douglas notified Mr. Verolla that he intended to modify the trust and that Mr. Douglas was communicating with his attorney to make such modifications.
12. Mr. Douglas had made all prior modifications to the trust and that this was his normal practice and procedure to do so in the same manner that he made the changes for the Third Amendment.
13. Moreover, because the terms of the Trust do not expressly prohibit methods to amend the Trust other than the method prescribed in the Trust, Mr. Douglas validly amended the Trust by manifesting clear and convincing evidence of his intent.


14. On or about July 2016, Mr. Douglas informed his Trust Protector Dawn Corrente that he in poor health. He asked Ms. Corrente to assist him in preparing the Third Amendment to the trust. Mr. Douglas informed Ms. Corrente of the changes that he planned to make and she assisted him in drafting an email to his attorney, Steven Burke to make the changes to the trust.
15. On August 11, 2016, Mark Frank Douglas contacted his attorney, Steven Burke, via email regarding his desire to amend the Trust, with specific instructions on what he wished to do. In said email, Mr. Douglas informed Attorney Burke of significant health issues. Exhibit 1 of the Petition. Specifically, the Grantor informed Attorney Burke in a letter attached to said email that he wished to include "some additional heirs to be given 50% of **AVAILABLE** funds available from Omnos Trust quarterly. These are the names of additional beneficiaries:
Pamela J. Silver, 1132 Bryson Drive, Greenville, NC 27834-0081
Grace Lin, c/o PC Max, 492 South Broadway, Salem, NH 03079
Dawn M. Corrente, 8000 Tottenham Drive, Harrisburg, NC 28075
Laura L. Apostoloff, 107 N. Shore Road, Derry, NH 03038"
16. Mr. Douglas informed the Respondent that he was making changes to his Trust and he was contacting his attorney to amend the Trust.
17. On August 12, 2016, Attorney Burke responded to Mr. Douglas' email. Attorney Burke sent an email to Mr. Douglas with some questions about the changes requested by Mr. Douglas.
18. On August 16, 2016, Mr. Douglas sent an email to Attorney Burke approving the Third Amendment to the Trust with some minor changes. Exhibit 2 of the Petition.
19. On August 16, 2016 at 9:14 PM, Attorney Burke responded to Mr. Douglas that he would prepare the revised documents. Exhibit 2 of the Petition.
20. Mr. Douglas passed away on August 18, 2016 without having signed the Third Amendment.
21. The Petitioner has pled facts that Mr. Douglas validly amended his trust pursuant to the New Hampshire Uniform Trust Code. Mr. Douglas' method of amending his Trust is not expressly proscribed in the Trust instrument.
22. Because the Court assumes the truth of the facts as alleged in the Petitioners' pleadings and construes all reasonable inferences in the light most favorable to the Petitioner, the facts as pled constitute a basis for relief. Accordingly, it would be inappropriate to dismiss the petition at this early stage.

WHEREFORE the Petitioner respectfully requests that this Honorable Court grant the following relief:

- A. Deny the Defendant's Motion to Dismiss.
- B. For such other and further relief as this Court deems just and necessary.

Respectfully submitted,

Dated: December 3, 2020



Lisa J. Bellanti, Esq.
NH Bar ID #13792
Casassa Law Office
459 Lafayette Road
Hampton NH 03842
(603) 926-6336

CERTIFICATE OF SERVICE

I, Lisa J. Bellanti, Esq., attorney for David J. Apostoloff hereby certify that I sent a copy of the Motion as required by the rules of the Circuit Court

Dated: Dated: December 3, 2020



Lisa J. Bellanti, Esq.

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT**

ROCKINGHAM COUNTY

10th CIRCUIT - PROBATE DIVISION - BRENTWOOD

IN RE: THE OMEGA TRUST

Case No. 318-2019-EQ-01253

ORDER DISMISSING PETITION

Before the court is a petition regarding the validity of a purported amendment to The Omega Trust (the "Trust").¹ The petitioner, David Apostoloff, seeks to have this court find that a series of e-mails between the grantor of the Trust and his attorney constitute an amendment to the Trust. The grantor of the Trust, Mark Frank Douglas, died after the exchange of the e-mails and before any amendment document was finalized, reviewed and executed.

The trustee of the Omega is Kenneth Verolla. When the petition was filed, Mr. Verolla believed he had a conflict of interest regarding the purported amendment to the Trust given its changes to the beneficial interests in the Trust. As a result, I ordered the appointment of a special trustee to represent the interests of the beneficiaries as they existed prior to any alleged amendment to the Trust. That special trustee, Attorney Sircusa Hillman, filed a motion to dismiss the petition. The petitioner has objected. After reviewing the petition, the law, and the submissions of the parties, I find that the motion to dismiss must be granted.

New Hampshire law requires that in considering a motion to dismiss, I must determine "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." *Harrington v. Brooks Drugs, Inc.*, 148 N.H. 101, 104 (2002)(quotation omitted). Therefore, I must "assume the truth of the facts alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable" to the plaintiff. *Id.* (quotation omitted).

¹ The references to the Trust herein are to the Trust as amended by the Second Amendment and Restatement of the Trust which is not disputed.

The facts, then, must be assessed in light of the applicable law to determine if they constitute a basis for relief. If they do not, then the motion will be granted. *Plaisted v. LaBrie*, 165 N.H. 194, 195 (2013).

In this case, there is no dispute about the facts before the court. The grantor of the Trust, Mr. Douglas, created several trusts. He became very ill, and decided that he wanted to amend his trusts and engaged in an exchange of e-mails with his attorney about changes to his estate plans. The e-mails were exchanged over only a few days. In short, they consisted of an e-mail with an attached letter sent on August 11, 2016. In this first e-mail, Mr. Douglas told his attorney about his illness and that he had reviewed his estate plan and wanted to make some changes. In the letter attached to the e-mail, he outlined specific changes he wished to make to all of his trusts.

The attorney responded by e-mail dated August 16, 2016 outlining the changes to be made to the estate plan, including the Trust. He asked Mr. Douglas to confirm the changes he was requesting regarding his estate plan. In a return e-mail that day, Mr. Douglas said that the attorney had done a nice job, but noted that there were still some changes needed. The attorney responded that the revised documents would be prepared accordingly. Mr. Douglas died before reviewing or signing any documents prepared by the attorney.

In addition, the petition alleges that Mr. Douglas informed the trustee, Kenneth Verolla, "that he was making changes to his Trust and he was contacting his attorney to amend the Trust." See Petition at paragraph 14. No other facts are alleged regarding the purported amendment or any other actions taken by Mr. Douglas regarding that amendment and providing it to the trustee.

The terms of the Trust regarding amendments are contained in Paragraph 19 of the Second Amendment and Restatement of the Trust. That paragraph provides that the grantor reserved the right to amend the Trust "without the consent of any person and without notice to any person other than the Trustee to revoke or modify the trust hereby created, in whole or in part, to change the beneficiaries hereof, or to withdraw the whole or any part of the trust estate by filing notice of such revocation, modification, change, or withdrawal with the Trustee...". In addition, Paragraph 22 provides that "This trust agreement, and any amendments hereto, shall be effective when executed by the Grantor,

notwithstanding that the signature of the Trustee is provided for, the Trustee's signature being intended to denote the acceptance of the Trustee to serve in that capacity only."

The motion to dismiss argues that the facts before the court, even when viewed in a light most favorable to the petitioner, could not support a finding that the e-mails constituted an amendment to the Trust. Thus, the special trustee points out the following facts:

1. The Trust requires that any amendment be filed with the trustee.
2. The Trust requires that any amendment be executed by the grantor.
3. The only alleged notice to the trustee was that the grantor informed the trustee that he was amending the trust. There is no allegation that anything was ever delivered or filed with the trustee regarding the nature of the amendment.
4. No documents – including the e-mails – were executed as required by the Trust.
5. The Trust, which was the second amended and restated version of the Trust, was signed by the grantor and was signed by the trustee. This shows that the grantor understood the terms of the Trust to require that he sign a written document and have the document delivered to the trustee.

On the other hand, the petitioner argues that the e-mails substantially comply with the terms of the Trust regarding amendments. The petitioner's arguments may be summed up as follows:

1. RSA 564-B:6-602 provides that a grantor can amend a trust by substantial compliance with a method provided in the terms of the trust or by any other method manifesting clear and convincing evidence of the settlor's intent if the terms of the trust do not provide a method or do not expressly prohibit methods other than methods provided in the trust.
2. That if the trust does not require a signed writing, there is no statutory or common law requirement that an amendment must be signed by the grantor to be valid. Citing *In re Estate of Field*, 953 A.2d 1281 (Pa. Super Ct. 2008).
3. That the modern trend in trust cases is to allow an amendment to the trust by any method as long as it is established by clear and convincing evidence as to the intent of the grantor unless the trust itself provides an exclusive method for amendment. Citing *In re Wendland-Reiner Trust*, 677 N.W.2d 117 (Neb 2004).

4. Since the trustee was given notice that the trust was being amended and since Mr. Douglas detailed his clear intention in his e-mails with his attorney, the e-mails were a valid amendment to the Trust.

After a review of the pleadings and the law, I find that the exchange of the e-mails did not substantially comply with the terms of the Trust in this case. I make this finding looking to the history of how the Trust was amended in the past and the language of the Trust. The most recent amendment to the Trust was the second amendment to the trust, which restated the terms of the Trust. That amendment was a document signed by Mr. Douglas, as well as by the trustee.

This history shows that Mr. Douglas understood that documents amending the Trust must be signed – a requirement specifically stated in the Trust. It also shows that he understood that the execution of a document required his signature, and that notice to the trustee included having the trustee acknowledge the receipt of the amendment.

Even more telling is the overall nature of the e-mails. Mr. Douglas was instructing his attorney to revise an entire estate plan that involved numerous trusts. The Omega Trust was simply a part of the overall revisions contemplated by Mr. Douglas and was not the only issue being addressed in the e-mails. Thus, the attorney's e-mail refers to all documents that "will" be drafted. It is clear that Mr. Douglas expected that documents were to be prepared and forwarded to him for final review and signature.

Consistent with this finding is the lack of any allegation by the petitioner that there was any execution of the amendment. Since the Trust required all amendments to be executed, the failure to execute any amendment requires a finding that the petition must be dismissed. *See, e.g. Pena v Dey*, 252 CalReptr 3d 265 (CA 2019)(finding that handwritten interlineations on the trust sent to the grantor's attorney to draft a formal amendment with a post-it note that was signed did not meet the requirement for the signing of an amendment to the trust where the grantor died prior to signing the formally prepared amendment).

Even assuming that the petitioner could rely on the sending of an e-mail as substantially complying with the execution requirement, the petitioner has not shown by clear and convincing evidence that Mr. Douglas intended the e-mails to be the amendment to his trust. A review of those e-mails reveals no indication that Mr. Douglas believed that the e-mails alone constituted an amendment to the Trust. Indeed, he was still making corrections and waiting to see the final version from his attorney when he died.

His last e-mail does not indicate any intention that the amendment was completed at that point, which would be consistent with an expectation that no amendment would be effective until he reviewed the final document and signed it. Moreover, there is no indication of any "filing" of the actual amendment with the trustee as required by the Trust. If Mr. Douglas intended the e-mails to amend the trust, he would have copied his trustee on the final e-mail so that the trustee would have a copy of the amendment. That did not occur. Instead, the only evidence was that he told the trustee that he was amending the trust, but nothing more.

Everything about the e-mails shows an intention to have a document prepared and signed after a final review by Mr. Douglas. Given the requirement that the amendment be filed with the trustee, and the trustee's execution of the last amendment, I cannot find that the mere informing of the trustee of an unspecified amendment is sufficient to amend the Trust. See, e.g., *Banks v. Central Investment and Trust Company*, 388 S.W.3d 173, 176-77 (Mo. 2012)(failure to allege a delivery of an amendment to a trustee when the trust document requires delivery renders the amendment unenforceable). None of the facts show substantial compliance with the terms of the Trust together with clear and convincing evidence that the grantor believed that the e-mails would constitute the amendment of the Trust.

The facts in this case are substantially different from the case relied upon by the petitioner, *In re Estate of Field*, 953 A.2d 1281 (Pa. Super Ct. 2008). In that case, the grantor was the trustee, and she had taken the amendment to the trust prepared by her attorney and placed it in a red binder with the rest of the trust document. Although it was not signed, the court found that the grantor's actions showed clear and convincing evidence that she intended to amend the trust. There is no such evidence here.

Therefore, based on these findings, the special trustee's motion to dismiss is granted.

SO ORDERED.

2/5/21
Date

Mark F. Weaver
Judge Mark F. Weaver

STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY

10TH CIRCUIT – PROBATE DIVISION – BRENTWOOD

CASE NO. 318-2019-EQ-01253

In Re: The Omega Trust

MOTION TO RECONSIDER THIS COURT'S ORDER DATED FEBRUARY 5, 2021

NOW COMES, Lisa J. Bellanti, Esq., Attorney for David J. Apostoloff and requests this court deny the Motion to Dismiss, and requests this Court reconsider its order of November 30, 2020, and support thereof states as follows:

1. The Court granted the Special Trustee's Motion to Dismiss the Petition to Validate the Third Amendment and Restatement of the Omega Trust (the Petition).
2. The Court found that the exchange of the e-mails did not substantially comply with the terms of the Trust.
3. Under Paragraph 19 of the Second Amendment and Restatement, the Grantor reserved the right to modify the Trust by filing notice of such modifications with the Trustee. The Second Amendment and Restatement provides a method for amending or revoking the Trust; it does not provide the only method::

The Grantor reserves the right at any time or from time to time without the consent of any person and without notice to any person other than the Trustee to revoke or modify the trust hereby created, in whole or in part, to change the beneficiaries hereof, or to withdraw the whole or any part of the trust estate by filing notice of such revocation, modification, change or withdrawal with the Trustee; provided, however, that the terms of this agreement may not be modified by the Grantor in such manner as to increase the obligations or alter the rates of the commissions of the Trustee without its written consent.

4. Unlike a will, a Trust need not be signed or be in writing to be valid, RSA 564-B:4-401.
5. "A trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence. RSA 564-407
6. In New Hampshire, a grantor can validly amend a revocable trust pursuant to RSA 564-B:6-602;
 - (1) by substantial compliance with a method provided in the terms of the trust; or
 - (2) by any other method manifesting clear and convincing evidence of the settlor's intent if the terms of the trust do not provide a method or do not

expressly prohibit methods other than methods provided in the terms of the trust.

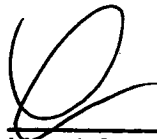
7. Paragraph 19 of the Second Amendment and Restatement of the Trust specifically grants Mr. Douglas the power to revoke or modify the Trust and prescribes a method of doing so. Mr. Douglas, as Grantor, had the right to modify the Trust by filing notice of the modification with the Trustee. The Trust does not require that the notice be in writing nor does it require an executed document.
8. Based on the standards set forth in RSA 564-B:6-602, the Trustee was given adequate and sufficient notice of the Third Amendment to satisfy the "filing of notice" requirement of Paragraph 19 because Mr. Douglas notified Mr. Verolla that he intended to modify the trust and that Mr. Douglas was communicating with his attorney to make such modifications.
9. Moreover, because the terms of the Trust do not expressly prohibit methods to amend the Trust other than the method prescribed in the Trust, Mr. Douglas validly amended the Trust by manifesting clear and convincing evidence of his intent.
10. On or about July 2016, Mr. Douglas informed his Trust Protector Dawn Corrente that he in poor health. He asked Ms. Corrente to assist him in preparing the Third Amendment to the trust. Mr. Douglas informed Ms. Corrente of the changes that he planned to make and she assisted him in drafting an email to his attorney, Steven Burke to make the changes to the trust.
11. On August 11, 2016, Mark Frank Douglas contacted his attorney, Steven Burke, via email regarding his desire to amend the Trust, with specific instructions on what he wished to do. In said email, Mr. Douglas informed Attorney Burke of significant health issues. Exhibit 1 of the Petition. Specifically, the Grantor informed Attorney Burke in a letter attached to said email that he wished to include "some additional heirs to be given 50% of **AVAILABLE** funds available from Omnos Trust quarterly. These are the names of additional beneficiaries:
Pamela J. Silver, 1132 Bryson Drive, Greenville, NC 27834-0081
Grace Lin, c/o PC Max, 492 South Broadway, Salem, NH 03079
Dawn M. Corrente, 8000 Tottenham Drive, Harrisburg, NC 28075
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12. Mr. Douglas informed the Respondent that he was making changes to his Trust and he was contacting his attorney to amend the Trust.

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17. The Petitioner has pled facts that Mr. Douglas validly amended his trust pursuant to the New Hampshire Uniform Trust Code. Mr. Douglas' method of amending his Trust is not expressly proscribed in the Trust instrument.
18. Because the Court assumes the truth of the facts as alleged in the Petitioners' pleadings and construes all reasonable inferences in the light most favorable to the Petitioner, the facts as pled constitute a basis for relief. Accordingly, it would be inappropriate to dismiss the petition at this early stage.

WHEREFORE the Petitioner respectfully requests that this Honorable Court grant the following relief:

- A. Grant the Petitioner's Motion for Reconsideration.
- B. For such other and further relief as this Court deems just and necessary.

Respectfully submitted,



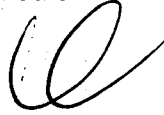
Lisa J. Bellanti, Esq.
NH Bar ID #13792
Casassa Law Office
459 Lafayette Road
Hampton NH 03842
(603) 926-6336

Dated: February 12, 2021

CERTIFICATE OF SERVICE

I, Lisa J. Bellanti, Esq., attorney for David J. Apostoloff hereby certify that I sent a copy of the Motion as required by the rules of the Circuit Court

Dated: February 12, 2021



Lisa J. Bellanti, Esq.

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT**

10th Circuit - Probate Division - Brentwood
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Kingston NH 03848-0789

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NOTICE OF DECISION

**LISA J. BELLANTI, ESQ
CASASSA LAW OFFICE
459 LAFAYETTE ROAD
HAMPTON NH 03842-2242**

Case Name: **In RE: The Omega Trust**
Case Number: **318-2019-EQ-01253**

On March 05, 2021, Judge Mark F. Weaver issued orders relative to:

Motion to Reconsider is denied - see grounds cited in the objection to this motion.

Any Motion for Reconsideration must be filed with this court by March 18, 2021. Any appeals to the Supreme Court must be filed by April 07, 2021.

March 08, 2021

LoriAnne Hensel
Clerk of Court

C: David J Apostoloff; Kenneth M. Verolla; Pamela J. Newkirk, ESQ; Benjamin T. Siracusa Hillman, ESQ; Stephanie Katrina Annunziata, ESQ; Kevin M. Rowan; Martha G. Rowan; Isabella Rowan; Ariel Douglas; Brett M. Rowan; Justin T. Douglas; Tammy N. Rowan