THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2021-0138

IN RE: THE OMEGA TRUST

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

RESPONSE BRIEF OF APPELLEE SPECIAL TRUSTEE

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

Benjamin T. Siracusa Hillman, NH Bar No. 20967
Stephanie K. Annunziata, NH Bar No. 265298
SHAHEEN & GORDON, P.A.
107 Storrs Street, PO Box 2703
Concord, NH 03302
603-225-7262
If oral argument is held,
Attorney Siracusa Hillman will argue

TABLE OF CONTENTS

Page

STATUTES INVOLVED IN THE CASE …….6

STATEMENT OF THE CASE AND FACTS ……...9

ARGUMENT ……14

I. THE PETITION WAS PROPERLY DISMISSED BECAUSE DOUGLAS DID NOT EXECUTE AN AMENDMENT BEFORE HIS DEATH. 16

A. The Trust identifies the execution of an instrument as the exclusive method of amendment. 16

B. The terms of the Trust prevail over the language of the New Hampshire Trust Code. 18

C. The "modern" rule referenced in *In re Wendland-Reiner Trust* does not support a conclusion that the Trust may be modified without an executed instrument. 21

II. THE PETITION WAS PROPERLY DISMISSED BECAUSE THE PETITIONER DID NOT ALLEGE FACTS SUFFICIENT TO DEMONSTRATE THAT THE PROFFERED DOCUMENTS ARE A CLEAR AND CONVINCING MANIFESTATION OF THE GRANTOR'S INTENT. 22

A. New Hampshire law requires a demonstration of clear and convincing intent if a purported amendment does not substantially comply with the methods of amendment contained within a trust. 22

1. The notice is not evidence of Douglas' intent to use his emails as an amendment to his Trust. 24

2. The Petitioner did not challenge the other findings of fact supporting the dismissal of this action. 25

III. THE PETITION WAS PROPERLY DISMISSED BECAUSE THE PETITION DID NOT ALLEGE FACTS SUFFICIENT TO DEMONSTRATE THAT THERE WAS SUBSTANTIAL COMPLIANCE WITH THE METHODS OF AMENDMENT CONTAINED WITHIN THE TRUST. 26

A. The New Hampshire Trust Code allows a grantor to amend a trust via substantial compliance with the methods contained within the trust. 27

B. The Trust contained a method of modification which required an executed amendment and the filing of the amendment with the Trustee. 29

C. The facts alleged in the Petition cannot support a finding that the Grantor substantially complied with either of the two requirements for modification contained within the Trust. 30

1. The Petition does not allege that the amendment was executed.....30

2. The facts alleged in the Petition cannot support a finding that the Grantor substantially complied with the notice requirement contained within the Trust. 31

CONCLUSION ……..….34

REQUEST REGARDING ORAL ARGUMENT …….……..…35

STATEMENT OF COMPLIANCE …….…….….36

ADDENDUM TO BRIEF OF BENJAMIN T. SIRACUSA HILLMAN AS SPECIAL TRUSTEE …….…….37

TABLE OF AUTHORITIES

Page(s)

State Cases

Bartlett v. Dumaine, 128 N.H. 497, 504-05 (1986) 32

Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010) 16

Elter-Nodvin v. Nodvin, 163 N.H. 678, 680 (2012) 15, 16

Estate of Burton v. Didricksen, 358 P.3d 1222, 1227 (Wash. Ct. App. 2015) 29

Estate of Wood, 108 Cal. Rptr. 3d 522, 535 (Cal. Ct. App. 1973) 20, 25, 29

Glick v. Chocorua Forestlands Ltd. Partnership, 157 N.H. 240, 249 (2008) 17

Hodges v. Johnson, 170 N.H. 470, 481 (2017)..... 17, 28

In re Estate of Field, 953 A.2d 1281 (Pa. Super. Ct. 2008) 19, 20, 21, 31

In re Estate of Tosh, 920 P.2d 1230, 1233 (Wash. Ct. App. 1996)..... 29

In re Pack Monadnock, 147 N.H. 419, 423 (2002) 19

In re Wendland-Reiner Trust, 677 N.W.2d 117 (Neb. 2004) 21, 31

Kirschbaum v. Wennett, 806 N.E.2d 440, 445-46 (Mass. App. Ct. 2004) (internal citation omitted) 25, 28, 29, 30

McEachern v. Budnick, 964 N.E.2d 999, 1003 (Mass. App. Ct. 2012) 22

McOuatt v. McOuatt, 69 N.E.2d 806 (Mass. 1946) 30

Miller v. Exchange Nat. Bank of Tulsa, 80 P.2d 209 (Okla. 1938) 27

Signal Aviation Services, Inc. v. City of Lebanon, 164 N.H. 578, 582 (2013) 15

Surprenant v. Mulcrone, 163 N.H. 529, 530-31 (2012) 16

State Statutes

RSA 564-B:6-602 ..... 6, 14, 22, 27

RSA 564-B:4-401 8

RSA 564-B:1-105(a) 18

RSA 564-B:1-105(b) 19

RSA 564-B:8-801 32

Other Authorities

BLACK'S LAW DICTIONARY (11th ed. 2019) 30

GEORGE G. BOGERT & AMY MORRIS HESS, BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, §46 (rev. 2d and 3d ed. 2021) 22

RESTATEMENT (THIRD) OF TRUSTS § 63 (2003) 27

UNIF. TRUST CODE § 602 28

STATUTES INVOLVED IN THE CASE

The statutes involved in this case are:

564-B:6-602 Revocation or Amendment of Revocable Trust. –

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before the effective date of this chapter.

(b) If a revocable trust is created or funded by more than one settlor:

(1) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; and

(2) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution; and

(3) upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.

(c) The settlor may revoke or amend a revocable trust:

(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.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

(e) A settlor's powers with respect to the revocation of a revocable trust, the amendment of a revocable trust, or the distribution of trust property from a revocable trust may be exercised by an agent under a power of attorney only to the extent expressly authorized by both the terms of the trust and the power of attorney.

(1) Any revocation or amendment of a revocable trust by an agent under a power of attorney shall be effective only if:

(A) The amendment or revocation is made in substantial compliance with a method provided in the terms of the trust; or

(B) The amendment or revocation is made by any other method manifesting clear and convincing evidence of the agent'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.

(2) Any revocation or amendment of a revocable trust by an agent under a power of attorney shall be effective only upon the trustee's receipt of notice of the amendment or revocation.

(3) A trustee, trust advisor, or trust protector is an excluded fiduciary to the extent that:

(A) In accordance with this subsection, a settlor's agent exercises the settlor's powers with respect to the revocation of

a revocable trust, the amendment of a revocable trust, or the distribution of trust property from a revocable trust; and

(B) The trustee, trust advisor, or trust protector acts in accordance with the agent's exercise of the settlor's powers.

(f) A conservator of the settlor or a guardian of the estate of the settlor, or, if no guardian of the estate has been appointed, a guardian of the person of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the conservatorship or guardianship.

(g) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

564-B:4-401 Methods of Creating Trust. –

A trust may be created by:

(1) transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;

(2) declaration by the owner of property that the owner holds identifiable property as trustee;

(3) exercise of a power of appointment in favor of a trustee; or

(4) judgment or decree of a court.

STATEMENT OF THE CASE AND FACTS

The Omega Trust ("Trust") was established by Mark Frank Douglas ("Douglas") via the execution of a written trust agreement on December 30, 2005. PP 10.[1] Douglas executed two written amendments in 2015. PP 10. The operative version of the Trust is the Second Amendment to the Trust executed in September 2015. PP 76. The Trust contains the following language regarding 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.
>
> …

[1] PP__ refers to the Petitioner's Appendix.

> 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. PP 67, 68-69.

Douglas' estate plan also included a nominee trust and two subtrusts set forth in separate instruments. PP 38, 45. The subtrusts are the beneficiaries of the Trust, each of which in turn has its own individual beneficiaries. PP 38. Upon his death, Douglas' estate plan required the management of real property interests, the dissolution of the nominee trust, and a disproportionate distribution of Trust assets to the two subtrusts. PP 10.

In 2015, Douglas amended the Trust twice by signing a document, prepared by his attorney, Steven Burke ("Attorney Burke"). PP 70. An acknowledgement of receipt, signed by Kenneth Verolla ("Verolla"), the trustee of the Trust, was affixed to each amendment. Id.

By July 2016, Douglas was in poor health. PP 11. He told his Trust Protector, Dawn Corrente ("Corrente"), that he planned to make changes to the Trust. Id. ¶ 11. Douglas advised Verolla that he would be making

changes to the Trust, and he would be contacting his attorney do so. PP 11, 13.

On August 11, 2016, an email was sent from Douglas' email address to Attorney Burke. ("First Email"). PP 17-18. Corrente assisted in the drafting of the email. PP 11. The First Email stated that Douglas' condition prevented telephone or in-person communication. Id. Douglas and Attorney Burke did not meet in person or speak on the telephone between August 11, 2016 and Douglas' death. The First Email contained a series of questions regarding Douglas' estate plan and requested information regarding the process to change the distribution of certain assets. PP 17-18. The First Email expressed Douglas' desire to make substantial changes to the Trust's scheme of distribution. Id. An unsigned letter addressed to Attorney Burke was attached to the First Email ("Letter"). PP 19-21. The Letter contained further changes to be made to Douglas' estate plan, including the Trust. Id. These changes include the addition of new Trust beneficiaries including Corrente and Laura L. Apostoloff, Petitioner's wife. Id. The Letter directed Attorney Burke to "draft something simple for the various documents stating these changes" and concluded with a request for a reply from Attorney Burke. Id.

On August 12, 2016, Attorney Burke responded via email ("Burke Email"). PP 11; PP 23-27. 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. The Burke Email was written informally and sought confirmation from Douglas that Attorney Burke had properly understood the changes to be

made to the estate plan. No draft documents were attached to the Burke Email and Attorney Burke referred to the changes as actions to be taken. Id.

Four days later, Douglas responded via email with additional revisions to the summary contained in the Burke Email ("Douglas Response"). PP 11. These revisions included directions to delete specific lines of text, and were made by adding lines of text ("in line") to the Burke Email. The Douglas Response did not ratify the Burke Email, with or without the revisions. An hour later, Attorney Burke responded: "Thank you, Frank. We will prepare the revised documents accordingly." PP 23. Douglas and Attorney Burke were the only parties to their correspondence. Verolla, the trustee, was not included on the email chain. Id. Douglas and Attorney Burke did not communicate further. Douglas died on August 18, 2016. PP 11.

On or about August 5, 2020, David J. Apostoloff ("Petitioner") petitioned the 10th Circuit – Probate Division – Brentwood ("Probate Court") to validate Douglas' email correspondence with Attorney Burke as a third and final amendment to the Trust. The individual beneficiaries of the Trust and subtrusts were not initially notified of the litigation because the Trust prohibited Verolla from disclosing Trust information to the beneficiaries. Apx. at 15 ¶ 33. Verolla appeared in his capacity as trustee and requested instruction from the Probate Court due to his apparent conflict of interest. Apx. at 16 ¶ 43. The Probate Court appointed the Appellee to serve as a Special Trustee to represent the beneficial interests of the subtrusts and the individual beneficiaries of the same. PP 29; Apx. at 19.

Appellee moved to dismiss this action because the facts alleged in the Petition could not be reasonably construed to support a conclusion that the emails exchanged by Douglas and Attorney Burke constituted a valid amendment to the Trust. PP 35; Apx. at 2.

The Probate Court granted Appellee's motion to dismiss over Petitioner's objection. The Probate Court concluded that the emails did not substantially comply with the method of amendment contained within the Trust, that the Trust required an executed document to effectuate an amendment, and that the emails did not manifest clear and convincing evidence of Douglas' intent to amend his Trust. PP 79.[2] Petitioner's request for reconsideration was also denied. PP 86. This appeal followed.

[2] The Order granting the Motion to Dismiss was included within Petitioner's Appendix at pages 76-81. Pursuant to Rule 16(3)(i), the Order is attached hereto as an Addendum. For ease of reference and continuity with Petitioner's Brief, citations to the Order refer to the Petitioner's Appendix.

ARGUMENT

The facts alleged by Petitioner cannot reasonably support a conclusion that Douglas validly amended the Trust for a third time before his death. More precisely, the facts alleged cannot support a conclusion that Douglas substantially complied with the method of amendment contained in the Trust or that Douglas intended for his email correspondence to serve as an amendment to his Trust. Accordingly, the Probate Court's dismissal of this action must be affirmed.

A revocable trust may be amended by "substantial compliance" with a method of amendment contained within the trust instrument. RSA 564-B:6-602(c)(1). If the trust does not contain a method of amendment, or if the trust does not expressly prohibit other methods of amendment, the trust may be amended by any method which manifests "clear and convincing evidence of the settlor's intent . . . ." RSA 564-B:6-602(c)(2). Douglas' Trust contains an exclusive method of amendment, requiring the execution of the amendment by Douglas. Petitioner did not allege that Douglas executed any documents prior to his death. This alone is basis for dismissal.

Even if the method of amendment provided in the Trust were not exclusive, the Probate Court correctly found that the facts pled could not lead to the conclusion that the emails were a manifestation of clear and convincing evidence of Douglas' intent.

The Probate Court reached three substantive conclusions. First, there had not been substantial compliance with the method of amendment contained within the Trust. PP 79. Second, the absence of facts alleging

that an amendment had been executed was a fatal flaw because the execution of documents was the exclusive method of amendment per the terms of the Trust. Id. Third, even when considered in the light most favorable to Petitioner, the facts alleged could not support a finding that Douglas' emails were a clear and convincing manifestation of his intent. PP 80.

On appeal, Petitioner appears to challenge two of these findings. First, Petitioner argues that there is no statutory requirement for a trust to be in writing, and therefore Douglas' Trust cannot require its amendments to be in writing. Appellant Br. 5. Then, Petitioner argues that the facts alleged are sufficient to support a finding that the emails are a manifestation of Douglas' clear and convincing intent because Douglas notified Verolla (the Trustee) "that he intended to modify the trust and that Mr. Douglas was communicating with his attorney to make such modifications." Id., p. 6. Petitioner also alludes to an argument that Douglas' notice to Verolla satisfied the notice requirement in paragraph 19 of the Trust, suggesting that Douglas substantially complied with the method of amendment contained within the Trust.

This Court must consider "whether the allegations in the petitioner's pleadings are reasonably susceptible of a construction that would permit recovery." Elter-Nodvin v. Nodvin, 163 N.H. 678, 680 (2012). The facts presented by Petitioner must be viewed through the lens of the applicable law. Signal Aviation Services, Inc. v. City of Lebanon, 164 N.H. 578, 582 (2013). While the Court must assume Petitioner's allegations are true and construe all reasonable inferences in the light most favorable to him, 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). The facts must then be tested against the applicable law and if the facts alleged do not provide a foundation for legal relief, the Court must uphold the granting of the motion to dismiss. Surprenant v. Mulcrone, 163 N.H. 529, 530-31 (2012); Elter-Nodvin, 163 N.H. at 680.

I. THE PETITION WAS PROPERLY DISMISSED BECAUSE DOUGLAS DID NOT EXECUTE AN AMENDMENT BEFORE HIS DEATH.

A. The Trust identifies the execution of an instrument as the exclusive method of amendment.

Douglas executed two amendments to the Trust in 2015, including the Second Amendment and Restatement.[3] At all times relevant to this action, Trust contained the following language regarding the amendment of the 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, 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.

[3] As noted in the Order, references to the Trust refer to the Trust as amended by the Second Amendment executed by the Grantor in 2015. PP 76.

…

> 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. PP 67, 68-69.

The Probate Court found that this language established an exclusive method of amendment, requiring the execution of all future amendments. PP 79. Petitioner appears to challenge this conclusion, effectively asking this Court to disregard Douglas' express intent.

The Probate Court was correct. Douglas' use of "shall" in paragraph 22 identifies the execution of a document as the exclusive method of amendment. New Hampshire recognizes that "the word 'shall' is used to express a command … or to signify something it is required or mandatory . . . ." Glick v. Chocorua Forestlands Ltd. Partnership, 157 N.H. 240, 249 (2008). Douglas' use of "shall" in paragraph 22 must be interpreted in the context of the Trust as a whole, as well as "in the light of all the circumstances and other competent evidence of the settlor's intent . . . ." Hodges v. Johnson, 170 N.H. 470, 481 (2017).

Douglas' prior estate planning habits are "competent evidence" of his intent to require the execution of a written document to dispose of his substantial estate. While trusts, generally, need not be in writing, Douglas

chose to memorialize his intent in writing when he established the Trust and when he amended the Trust twice in 2015. When Douglas amended his trust in June and September 2015, he did so via the execution of a written instrument, delivered and acknowledged by Verolla as trustee. These actions established a pattern of conduct. The Second Amendment was a full restatement of the Trust and its retention of the word "shall" in paragraph 22 served to ratify Douglas' intent that future amendments be executed with the same degree of formality. When Douglas sought to amend his Trust in 2016, he initiated the process by contacting Attorney Burke to request the preparation of another formal document. This evidence supports the Probate Court's conclusion that the execution of a written document was the exclusive method to amend Douglas' Trust.

Competent evidence can also be gleaned from what Douglas did *not* do in 2016. Though he was in poor health and understood that his life was nearing an end, Douglas did not attempt to amend his Trust through another, faster method. Douglas' desire to comport with the terms of the Trust despite the exigent circumstances requires a conclusion that the Trust could not be modified by any other method.

B. The terms of the Trust prevail over the language of the New Hampshire Trust Code.

In 2004, New Hampshire adopted what is now called the New Hampshire Trust Code ("NHTC"), a modified version of the Uniform Trust Code ("UTC"). The NHTC "governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary." RSA 564-B:1-105(a). The NHTC serves a critical purpose by establishing default rules upon which interested parties can rely when a trust instrument

is silent as to important administrative matters. With few specific and enumerated exceptions, however, the rules contained in the NHTC are supplemental and do not supplant the terms of a trust or the intent of the grantor. RSA 564-B:1-105(b). The method of revocation and modification of a trust are not among those enumerated exceptions. Therefore, the "terms of a trust prevail over any provision" which relates to the amendment of a trust. Id. This is consistent with New Hampshire's "signal regard for the intention of a settlor of a trust," which requires the court to first "look to the terms of the trust" to interpret its meaning. In re Pack Monadnock, 147 N.H. 419, 423 (2002) (internal citations and quotation omitted). Consequently, any application of the NHTC to Douglas' Trust must give priority to the language of the Trust instrument.

Petitioner requests that this Court ignore Douglas' self-imposed restriction on the method of amendment and find that the NHTC overrides the plain language of a trust where a grantor has identified a specific method of amendment. Petitioner has not identified any authority to support a conclusion that the NHTC may be applied this way. Instead, he directs the Court to a Pennsylvania case which not only fails to reach the legal conclusion requested by Petitioner but is based upon a substantially different set of facts. Appellant Br. 4. In the case cited, the grantor called upon her attorney three times to prepare amendments to her trust prior to her death. In re Estate of Field, 953 A.2d 1281 (Pa. Super. Ct. 2008). After drafting the third amendment, the attorney mailed the completed document to the grantor "in the form of replacement pages . . . ." Id. at 1284. When the grantor died alone in her home, her estate plan, including the third amendment, was located in a binder in her kitchen. Id. Unlike Douglas'

Trust, the trust in Field did not require amendments to be executed. Id. at 1285. Rather, the dispute concerned whether the grantor fulfilled the trust's requirement that any amendment be delivered to the trustee in writing. Id. The court validated the third amendment because the grantor *was* the trustee, and concluded that any underlying purpose of the delivery requirement was satisfied as a result of the grantor's acceptance of the amendment as a part of her own estate plan. Id. at 1290. The court did not need to consider whether a trust's execution requirement could be waived under similar circumstances because there was no such language in the Field trust.

Notably, before concluding that the amendment was valid, the court in Field stated that "fraud is unquestionably a relevant concern in the context of trusts." Id. at 1289. However, based on the facts at issue in that case, the court determined that it could validate the amendment because there was no evidence "the decedent was induced, manipulated, or unduly influenced" into amending her trust. Id. at 1289. The Field court would likely have ruled differently if presented with the set of facts here. Before formalities pertaining to the adoption of amendments may be disposed of, the court must consider "the purposes to be served by the provision" in light of the facts presented. Estate of Wood, 108 Cal. Rptr. 3d 522, 535 (Cal. Ct. App. 1973). Unlike the decedent in Field, Douglas never met or spoke directly with his attorney at any time relevant to this matter. Douglas communicated only via email with the assistance of Corrente, who was also identified as a new beneficiary to be added to the Trust. Douglas did not receive any draft documents from Attorney Burke, let alone printed documents in the form of replacement pages. Douglas did not place the

emails among his estate planning materials before he died. Verolla did not receive notice of the completed amendment or its content. Petitioner requests that this Court dispose of the very requirements which could have "assured the authenticity of the document." Id. It is unlikely that the court in Field, faced with the facts here, could have found that the fraud-prevention purpose of execution and delivery had been fulfilled.

C. The "modern" rule referenced in *In re Wendland-Reiner Trust* does not support a conclusion that the Trust may be modified without an executed instrument.

Petitioner points to a "modern" movement identified by the Supreme Court of Nebraska to support an argument that this Court stretch the flexibility afforded by the NHTC. Appellant Br. 5.; In re Wendland-Reiner Trust, 677 N.W.2d 117 (Neb. 2004). The "modern trend"[4] referenced over fifteen years ago has been the law in New Hampshire since 2004. Id. at 121. As acknowledged by the Court in Wendland-Reiner, the "substantial compliance" standard described in the UTC was a departure from the strict compliance standard applied in many jurisdictions. Id. As discussed in more detail below, though, even if the "modern trend" is to support some relaxation of strict compliance, the language of the NHTC does not support overriding the Trust's express intent that amendments be executed to be valid.

II. THE PETITION WAS PROPERLY DISMISSED BECAUSE THE PETITIONER DID NOT ALLEGE FACTS SUFFICIENT TO DEMONSTRATE THAT THE PROFFERED

[4] The Supreme Court of Nebraska did not choose to adopt the "modern trend" and decided the case on other grounds. 677 N.W. 2d 121 ("Here, it is unnecessary for us to choose between the strict compliance rule and the more modern rule endorsed by the restatement, *supra*, and the Uniform Trust Code.").

DOCUMENTS ARE A CLEAR AND CONVINCING MANIFESTATION OF THE GRANTOR'S INTENT.

Even if the Trust did not require the execution of future amendments, the dismissal of the Petition must be upheld because the facts alleged could not support a finding that the proffered documents are a clear and convincing manifestation of Douglas' intent. In fact, even when viewed in the light most favorable to Petitioner, the facts support the Probate Court's conclusion that Douglas did not intend for his emails to be adopted as a third amendment to his Trust.

A. New Hampshire law requires a demonstration of clear and convincing intent if a purported amendment does not substantially comply with the methods of amendment contained within a trust.

A grantor may revoke or amend a revocable trust by any method "manifesting clear and convincing evidence of the settlor's intent" provided the trust does not expressly prohibit "methods other than methods provided in the terms of the trust." RSA 564-B:6-602(c)(2). Intent, in this context, refers to the intent to amend the trust by the method employed in the manner expressed in the language of the amendment. The "expression of a generally benevolent attitude or of a general donative intent is not the equivalent of an intent" to create or modify a trust. GEORGE G. BOGERT & AMY MORRIS HESS, BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, §46 (rev. 2d and 3d ed. 2021). Evidence of intent may be found in a number of places, including a person's "declarations, conduct and motive, and all the attending circumstances." McEachern v. Budnick, 964 N.E.2d 999, 1003 (Mass. App. Ct. 2012) (internal citations omitted).

The Probate Court appropriately concluded that the facts alleged in the Petition could not support a conclusion that Douglas intended for his emails to serve as the third amendment to the Trust. PP 80. To reach this conclusion, the Probate Court considered:

- The absence of a representation by Douglas that he intended the emails to serve as an 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.") PP 80;

- Douglas' expectation that Attorney Burke would be preparing an amendment to the Trust ("It is clear that Mr. Douglas expected that documents were to be prepared and forwarded to him for final review and signature.") PP 79;

- The incomplete nature of the emails exchanged ("Indeed, he was still making corrections and waiting to see the final version from the attorney when he died. His last email does not indicate any intention that the amendment was completed at that point.); PP 80; and

- The failure to deliver any document purporting to be an amendment to the trustee ("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.") Id.

Petitioner has identified only one fact supporting the argument that Douglas intended for the emails to be validated as the third amendment to his Trust: Douglas' notice to Verolla that he planned to amend his Trust and would be contacting his attorney to do so. Appellant Br. 6. This single fact—an expression of future intent—is not sufficient to meet the Petitioner's burden.

1. The notice is not evidence of Douglas' intent to use his emails as an amendment to his Trust.

The notice from Douglas to Verolla is described by Petitioner as follows: "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." ("Notice"). PP 13. Petitioner has not disclosed when, where, or how this notice occurred.

Based upon the facts presented, the Notice cannot be relied upon as evidence of Douglas' intent for three reasons. First, the *content* of the Notice does not support Petitioner's position that Douglas intended for his email correspondence to serve as an amendment to his Trust. Douglas' statement to Verolla – as described by Petitioner – requires a conclusion that Douglas intended for *Attorney Burke* to prepare an amendment to his Trust.

Second, the *timing* of the Notice cannot support a conclusion that the language of the emails is a manifestation of Douglas' intent because the Notice occurred before the emails had been drafted. The First Email and Letter were not draft amendments, but a compilation of questions and directives. The Burke Email was not a draft amendment, but a summary of

changes to be made to Douglas' whole estate plan, including the Trust. The Douglas Response contained edits and revisions to the summary prepared by Attorney Burke, which was to be converted into the necessary estate planning documents for Douglas' review. Petitioner did not allege that Douglas contacted Verolla after the emails had been exchanged to either confirm the completion of the amendment or advise Verolla of the content of the changes.

Third, Douglas did not know that he was going to die before the amendment was executed. Douglas' conduct demonstrates that he knew that the execution of an amendment was necessary to effectuate an amendment and that he planned to complete the process. If Petitioner's argument is correct, then the unrevised summary contained in the Burke Email would have been the operative instrument only if Douglas had died before he had the opportunity to revise it. New Hampshire law does not recognize unexpected death as a formality of execution or as a basis to eliminate an otherwise necessary execution requirement.

2. Petitioner did not challenge the other findings of fact supporting the dismissal of this action.

Among its other findings, the Probate Court concluded that Douglas never delivered an amendment to Verolla before he died. This is a particularly damning fact for Petitioner. Delivery of an instrument can be a significant indicator of intent because "[p]lacing a third person in possession of the instrument … may show the necessary intent that the instrument shall have immediate operative effect." Kirschbaum v. Wennett, 806 N.E.2d 440, 445 (Mass. App. Ct. 2004) (internal citation omitted); *see also* Wood at 535 (holding that one of the purposes behind requiring delivery to effectuate an

amendment may be to demonstrate the intent that the executed document be acted upon). Delivery – or the absence thereof – is critical in this case because the Trust requires it and because Douglas had delivered both of his prior amendments to Verolla after execution.[5] If Douglas was satisfied with the language in the Burke Email, he could have forwarded the email to Verolla or copied Verolla on his response to Attorney Burke. He did not do so.

Even if the Notice could be interpreted as a fragment of intent, Petitioner has not plead facts sufficient to carry his burden of demonstrating that Douglas intended for his email exchange to be used as a third amendment to his Trust.

III. THE PETITION WAS PROPERLY DISMISSED BECAUSE THE PETITION DID NOT ALLEGE FACTS SUFFICIENT TO DEMONSTRATE THAT THERE WAS SUBSTANTIAL COMPLIANCE WITH THE METHODS OF AMENDMENT CONTAINED WITHIN THE TRUST.

Petitioner did not clearly or expressly challenge the Probate Court's finding that Douglas did not substantially comply with the Trust's amendment requirements. However, Petitioner alludes to a substantial compliance analysis, suggesting that the Probate Court erred in finding that Douglas did not substantially comply with the terms of the Trust. Though dismissal was appropriate on other grounds, dismissal was also appropriate

[5] Petitioner's assertion that "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," Appellant Br. 6, does not accord with the actual practice Douglas followed in executing and delivering the two written amendments in 2015.

because Petitioner did not allege facts sufficient to support a finding that there had been substantial compliance with the terms of the Trust.

A. The New Hampshire Trust Code allows a grantor to amend a trust via substantial compliance with the methods contained within the trust.

The NHTC allows a grantor to amend a revocable trust "by substantial compliance with a method provided in the terms of the trust." RSA 564-B:6-602(c). The NHTC requires the compliance to be *substantial.* This allows for some deviation from the amendment process contained within a trust, but does not allow for a wholesale rejection of a grantor's express intent as to how a trust may be amended. Substantial compliance has generally been used to forgive a variance in administrative and ministerial details, provided that there is compliance with the other provisions of the trust. For example, the Supreme Court of Oklahoma upheld the amendment of a trust where the grantor failed to provide the trustee with the thirty-day notice required by trust. Miller v. Exchange Nat. Bank of Tulsa, 80 P.2d 209 (Okla. 1938). There, the settlor contacted the trustee via telephone contemporaneous with the execution of an amendment and received assent from the trustee to make the necessary changes. The other requirements for amendment were satisfied. Id. at 211. The court found that the trustee had the authority to waive the thirty-day notice because the provision was for the sole benefit of the trustee. Id. A delivery requirement may also be substantially completed if a grantor placed the amendment in the mail to the trustee but dies before delivery is completed. RESTATEMENT (THIRD) OF TRUSTS § 63 (2003).

The common thread in cases where substantial compliance has been found is a proximate, but not precise, adherence to the method of amendment contained within the trust. This is illustrated in Kirschbaum, 806 N.E.2d 440 (Mass. App. Ct. 2004). There, the Appeals Court of Massachusetts determined that a trust amendment was valid despite the grantor's failure to strictly adhere to method of amendment contained within the trust. The amendment in contest in Kirschbaum was "executed and notarized in [settlor's lawyer's] office, in the presence of [settlor's lawyer and the trustees], as well as the requisite number of disinterested witnesses." Id. at 441. During the execution, the settlor "clearly stated to those assembled that his intention in amending his estate documents was to ensure that Kirschbaum received nothing, because she had not helped her mother" or attended her mother's funeral. Id. at 442. After the execution, the settlor and the trustees accepted an offer by the attorney to file the amendment with the settlor's other estate planning documents. Id. at 441. The court's acceptance of the amendment is consistent with the goal articulated in the official comment to the UTC which acknowledged that the UTC seeks to "honor[] a settlor's clear expression of intent even if inconsistent with stated formalities in the terms of the trust." UNIF. TRUST CODE § 602.[6]

While technical errors or omissions are properly excused to avoid frustrating a grantor's intent, a loose application of the substantial compliance standard would open the door for fraud and abuse. When a

[6] The official comments to the UTC are valid authority in New Hampshire. Hodges, 170 N.H. at 480 ("When interpreting a uniform law, such as the Uniform Trust Code, the intention of the drafters of a uniform act becomes the legislative intent upon enactment." (internal citation omitted)).

grantor identifies requirements for the amendment or modification of the grantor's trust, fidelity to those requirements "ensure that the testator has a definite and complete intention to dispose of his or her property and to prevent, as far as possible, fraud, perjury, mistake and the chance of one instrument being substituted for another." Estate of Burton v. Didricksen, 358 P.3d 1222, 1227 (Wash. Ct. App. 2015) (holding that substantial compliance could not be applied to modify a testamentary document where "the risk of mistake – if not fraud – would be high"); *See also* In re Estate of Tosh, 920 P.2d 1230, 1233 (Wash. Ct. App. 1996) (holding that "[c]lear evidence of both intent and belief cannot substitute for actually, or substantially, doing what is required."); Wood at 535 ("No doubt one of the purposes to be served by the provision requiring the appointing instrument to be delivered to the trustee during the lifetime of the donee is that of assuring the authenticity of the document."). When fraud prevention is a priority, substantial compliance cannot support the validation of amendments where, for example, the "requirement of an acknowledgement – i.e., a certificate by an empowered public officer, attached to a written instrument, stating that the maker of the instrument has sworn to the officer that he executed it as his own free act and deed" is unfulfilled. Kirschbaum, 806 N.E.2d at 446.

B. The Trust contained a method of modification which required an executed amendment and the filing of the amendment with the Trustee.

The Probate Court found that Douglas' Trust requires: (1) the filing of a notice of the modification or change with the Trustee; and (2) execution of the amendment by Douglas. PP 79. This conclusion was

based upon text of the Trust and the "history of how the Trust was amended in the past . . . [t]he most recent amendment to the Trust . . . was a document signed by Mr. Douglas, as well as by the trustee." Id.

C. The facts alleged in the Petition cannot support a finding that Douglas substantially complied with either of the two requirements for modification contained within the Trust.

Petitioner cannot demonstrate that there has been substantial compliance with the terms of the Trust because the missing requirements – execution and delivery to the Trustee – are not "mere administrative detail[s] but rather [] a fundamental evidentiary matter, because it 'furnishes formal proof of the authenticity of the execution of the instrument.'" Kirschbaum, 806 N.E.2d at 446, citing McOuatt v. McOuatt, 69 N.E.2d 806 (Mass. 1946).

1. The Petition does not allege that the amendment was executed.

The Probate Court found that the Petition did not contain an allegation that an amendment had been executed. PP 79. Petitioner argues that there is no statutory requirement for a trust to be signed, unless "the terms of the trust require a signed writing." Appellant Br. 5. Petitioner does not reconcile this argument with paragraph 22 of the Trust, which requires Douglas to execute future amendments. Petitioner appears to be arguing that the term "execution" does not equate to "signed writing," but offers no alternative definition. As commonly used, "execute" means "to make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form <each party executed the contract without a signature witness>." BLACK'S LAW DICTIONARY (11th ed. 2019). The

common usage is implied by the Trust because paragraph 22 makes multiple references to signatures.

Petitioner's cited authority does not further his position. Neither of the trusts in Field or Wendland-Reiner expressly required a signed writing for an amendment. The decisions in both cases turned on the dual role served by the grantor/trustee, who were one and the same person, and which obviated the notice and delivery requirements contained within the trust. In both cases, the overt conduct of the grantors supported a conclusion that the purported amendments were valid: both amendments were in writing, both amendments were delivered to the trustees, and the amendment in Field was signed by the grantor. While both cases refer to the general rule that a trust need not be in writing to be valid, neither case supports a conclusion that an amendment to Douglas's Trust need not be in writing. Even under the substantial compliance standard, Petitioner is required to show that Douglas engaged in some conduct to arguably satisfy the execution requirement. Petitioner has not done so.

2. The facts alleged in the Petition cannot support a finding that the Grantor substantially complied with the notice requirement contained within the Trust.

Petitioner also appears to argue that Douglas' notice to Verolla substantially complied with the terms of the Trust. This argument ignores the purpose behind a notice requirement and goes well beyond what the NHTC permits.

The Trust allows for amendment or modification "by filing notice of such revocation, modification, change, or withdrawal with the Trustee . . . ." PP 67. Substantial compliance with the Trust's notice requirement is

critical in this case. Bartlett v. Dumaine, 128 N.H. 497, 504-05 (1986) (holding that all circumstances surrounding the execution of an instrument are relevant in determining the intent of a settlor). The Trust is a complex instrument, containing 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. The changes contemplated by Douglas would have modified the Trust beyond recognition. Verolla 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 amendment on the Trust's terms and purposes.

While Petitioner argues that this information was not required to be conveyed in writing, the Petition does not allege that this information was conveyed to Verolla at all. The inclusion of the notice provision in the Trust supports an inference that Douglas intended that Verolla receive substantive notice of all future modifications so that the Trust could be carried out as intended. Any other reading of the Trust would defeat Douglas' intent and result in a nonsensical paradigm in which Douglas 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 Verolla's ability to have reasonably relied on the notice provision to determine the operative version of the Trust,

requiring him to undertake an investigation prior to any time he acted, in order to discover any unknown amendments, even though the Trust's terms required such notification to him.

CONCLUSION

The Probate Court's decision should be affirmed.

REQUEST REGARDING ORAL ARGUMENT

If the Court wishes to hold oral argument, oral argument will be presented by Attorney Benjamin T. Siracusa Hillman.

Respectfully submitted,

BENJAMIN T. SIRACUSA HILLMAN, SPECIAL TRUSTEE OF THE TAMMY N. ROWAN TRUST, THE RAINBOW TRUST, AND THE INDIVIDUAL BENEFICIARIES OF THE SAME

By His Attorneys,

SHAHEEN & GORDON, P.A.

Dated: July 28, 2021

By: /s/ Benjamin T. Siracusa Hillman
Benjamin T. Siracusa Hillman, Esq.
NH Bar No. 20967
Stephanie K. Annunziata, Esq.
NH Bar No. 265298
107 Storrs Street, PO Box 2703
Concord, NH 03302
603-225-7262
bsiracusahillman@shaheengordon.com
sannunziata@shaheengordon.com

STATEMENT OF COMPLIANCE

Statement of Compliance with Rules 26(2)-(3): I hereby certify that on July 28, 2021, a copy of the foregoing RESPONSE BRIEF OF APPELLEE SPECIAL TRUSTEE has been provided to the following parties of record via the Court's e-filing system:

Lisa J. Bellanti, Esq.
Pamela J. Newkirk, Esq.

The following parties of record have been served via First Class Mail and email:

Ariel Douglas
Justin T. Douglas
Brett M. Rowan
Isabella Rowan
Martha Rowan
Tammy Rowan

Statement of Compliance with Rules 26(7) and 16(11): This brief complies with the 9,500 word limit of Rule 16(11). This brief consists of 7,188 words exclusive of pages containing the table of contents, tables of citations, addendum, and this statement of compliance.

ADDENDUM TO BRIEF OF APPELLEE BENJAMIN T. SIRACUSA HILLMAN AS SPECIAL ADMINISTRATOR

1. ORDER DATED FEBRUARY 5, 2021 38

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

Judge Mark F. Weaver