

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

Case No. 2021-0138

In re: The Omega Trust

RULE 7 APPEAL OF FINAL DECISION FROM THE  
10<sup>th</sup> CIRCUIT - PROBATE DIVISION – BRENTWOOD

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BRIEF FOR RESPONDENT  
KENNETH VEROLLA, TRUSTEE

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*Argument to be presented by Pamela J. Newkirk, Esq.*

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## QUESTION PRESENTED FOR REVIEW

- I. Whether the Petitioner's pleadings are **not** reasonably susceptible of a construction that would permit recovery.

## STATEMENT OF THE CASE

This matter came before the 10<sup>th</sup> Circuit Court, Probate Division, upon the Petitioners' filing of an Equity Petition seeking a determination that the Mark Frank Douglas, the settlor of the Omega Trust (the "Omega Trust") amended the Trust in accordance with RSA 564-B:6-602(c). The Probate Court correctly ruled that the Petitioner's pleadings fail to include facts necessary to sustain the Petitioner's claim of an amendment pursuant to RSA 564-B:6-602(c), and the case was dismissed.

## STATEMENT OF THE FACTS

The Petitioner's pleadings contain no allegations of fact that Mark Frank Douglas conclusively determined all of the terms of the purported amendment or that he notified the Trustee of the Omega Trust, Kenneth Verolla (the "Trustee"), of the terms of the alleged amendment to the Omega Trust. The Petitioner's pleadings contain no allegations of fact from which an inference may be drawn that Mark Frank Douglas notified the Trustee of the Omega Trust of the terms of the alleged amendment of the Omega Trust. The Petitioner's pleadings contain no allegations that Mark Frank Douglas signed an amendment to the Omega Trust. The Petitioner's pleadings contain allegations of fact that Mark Frank Douglas was waiting to review and sign an amendment to the Omega Trust that was being prepared by his attorney when he died.

## SUMMARY OF ARGUMENT

RSA 564-B:6-602(c)(1) expressly requires that in order to be valid, an amendment to a revocable trust substantially comply “with a method provided in the terms of the trust.” This is exclusive method for establishing an amendment to a revocable trust under RSA 564-B:6-602 if the trust sought to be amended expressly precludes other methods of amendment. *See* RSA 564-B:6-602(c)(2). If the trust does not prohibit other methods of amendment, an amendment may be established by another method “manifesting clear and convincing evidence of the settlor’s intent.” *Id.*

The Omega Trust clearly and unequivocally requires that an amendment be signed by the settlor and that the Trustee be notified of the amendment. The Trust contains a no contest clause that precludes other means of amending the Trust except for those methods prescribed by the Trust.

The Petitioner’s pleadings do not contain facts on which the Probate Court could establish an amendment to the Trust. There is no signed amendment. The Trustee was not notified of the purported amendment and there are no allegations of fact from which it may be inferred that the Trustee was notified of the purported amendment. Thus, the Omega Trust was not amended pursuant to RSA 564-B:6-602(c)(1). Other methods of amendment are expressly precluded by the Omega Trust, but even if there were no such preclusion, the Petitioner’s pleadings fail to establish facts on which an amendment could be established under RSA 564-B:6-602(c)(2).

## ARGUMENT

This appeal arises from a ruling on a motion to dismiss. The standard for reviewing an order of dismissal on appeal is “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, 48 A.3d 908 910 (2012). The Probate Court correctly dismissed the Petition, as the Petitioner’s pleadings do not establish grounds for a Court to find an amendment to the Omega Trust.

I. THE PETITIONER’S PLEADINGS, INCLUDING ALL INFERENCES OF FACT ARISING THEREFROM, DO NOT ESTABLISH GROUNDS ON WHICH THE PETITIONER COULD ESTABLISH AN AMENDMENT PURSUANT TO RSA 564-B:6-602(c)(1)

RSA 564-B:6-602(c)(1) provides that a trust may be amended by substantial compliance with a method established by the trust instrument. The Omega Trust requires, by its terms, that the Trustee be notified of an amendment in order for it to be effective:

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.

Appellant’s Appendix, Page 67. The Omega Trust also requires that any amendments be signed by the grantor. Appellant’s Appendix, Pages 68-69.

The Petitioner’s pleadings contain no allegations of fact that the Trustee was notified of the purported amendment to the Omega Trust. The Petitioner’s pleadings contain no allegations of fact from which an inference may be drawn that the Trustee was notified of the purported amendment. The allegation that the settlor informed the Trustee that he was seeking to amend

his trust and would be speaking with his attorney about an amendment is not “substantial compliance” with the notice required by the Omega Trust and is not an amendment to the trust pursuant to RSA 564-B:6-602(c)(1).<sup>1</sup> There is no written amendment to the trust signed by Mark Frank Douglas. Therefore, the Probate Court properly dismissed that Petitioner’s claim that the Omega was amended pursuant to RSA 564-B:6-602(c)(1).

II. THE PETITIONER’S PLEADINGS, INCLUDING ALL INFERENCES OF FACT ARISING THEREFROM, DO NOT ESTABLISH GROUNDS ON WHICH THE PETITIONER COULD ESTALISH AN AMENDMENT PURSUANT TO RSA 564-B:6-602(c)(2)

A. The No Contest Clause Within the Omega Trust Precludes Other Means of Amending the Trust

A trust may only be amended pursuant to RSA 564-B:6-602(c)(2) if the trust does not expressly prohibit other methods of amendment (in addition to the method provided within the trust). The Omega Trust contains a no contest, or *in terrorem*, clause that precludes other methods of amendment. The no contest clause clearly and unequivocally expresses this intention:

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

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<sup>1</sup> Nor should it be. If a trust were deemed to be conclusively amended upon the statement of an intention to make an amendment, trust law would be thrown into turmoil. Trustees would have to be on alert that any statement of intention to pursue a change to the terms of a trust would constitute an amendment. Further, trusts are often complex documents with interrelated provisions. The Court would be opening the door to the creation of ambiguities within trusts and/or the creation of incomplete trusts for which all of the terms are not known if statements that an amendment was being contemplated or pursued and its general terms alone constituted an amendment to a trust.



actions or 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 hereinafter 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 action which invalidate the effectiveness of this paragraph.

Appellant's Appendix, Pages 67-68 (emphasis added).

Mark Frank Douglas went so far as to declare that the no contest clause was a material purpose of the Omega Trust. This declaration is a statement of the settlor's express intention that the beneficiaries are precluded from claiming the Trust was amended except in the manner he expressly provided within the Trust. Further, this declaration precludes any claim of an amendment pursuant to RSA 564-B:6-602(c)(2).

A prevailing theme within the New Hampshire Trust Code is that the construction, administration, modification and termination of a trust may not violate a material purpose of the

trust. *See e.g.*, RSA 564-B:1-111 (a nonjudicial settlement agreement may not violate a material purpose of the trust), RSA 564-B:4-410(d) (**a modification or termination of a trust may not violate a material purpose of the trust**), RSA 564-B:4-418(f) (a trustee may not decant to a trust that is inconsistent with a material purpose of the original trust), and RSA 564-B:7-706 (a trustee may not be judicially removed if the court finds that the removal is inconsistent with a material purpose of the trust). If the Court were to consider an amendment of the Omega Trust pursuant to RSA 564-B:6-602(c)(2), it would open the door to allowing the violation of a material purpose of the Omega Trust.

- B. Even if the Court Were to Consider that the Omega Trust Could Be Amended By RSA 564-B:6-602(c)(2), the Petitioner's Pleadings Do Not Contain Allegations of Fact Sufficient to Establish an Amendment to the Omega Trust.

As the Probate Court properly determined, based upon the facts submitted by the Petitioner, Mark Frank Douglas did not believe his communications with counsel regarding the amendment of the Omega Trust constituted an amendment, and Mark Frank Douglas was waiting for a draft amendment to review when he died. The facts submitted by the Petitioner actually preclude Petitioner's claim that the communications between Mark Frank Douglas and his attorney were an amendment to the Omega Trust.

## CONCLUSION

The Petitioner's pleadings, construed in a light most favorable to him, fail to establish a basis on which the Probate Court could determine that the Omega Trust was amended. The decision of the Probate Court dismissing the Petitioner's claims should be affirmed.

REQUEST FOR ORAL ARGUMENT

The Trustee requests a 15 minute oral argument be provided to the Appellees, to be allocated between them. Any argument on behalf of the Trustee will be made by Attorney Pamela J. Newkirk.

Respectfully submitted,

KENNETH VEROLLA, TRUSTEE OF  
THE OMEGA TRUST

By his attorneys,

BARRADALE, O'CONNELL, NEWKIRK  
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Dated: 7/28/2021

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Statement of Compliance

I hereby certify that the foregoing brief was filed electronically and that pursuant to Supreme Court Supplemental Rule 18 for Electronic Filing the requirements of Supreme Court Rule 26(2) were satisfied as to Attorney Lisa J. Bellanti, lbelanti@casassalegal.com, Attorney Benjamin Siracusa Hillman, bsiracusahillman@shaheengordon.com, Attorney Stephanie K. Annunziata, sannunziata@shaheengordon.com, Kevin M. Rowan, kevin.rowan.51@gmail.com, Martha G. Rowan, mgr0912@ymail.com, Justin Douglas, jdouglas.jtd@gmail.com, and Tammy Rowan, TammyRowanEstate@aol.com. On July 29, 2021 copies of the foregoing brief were sent via first class mail to: Isabella Rowan, 22 Bobwhite Trail, Gales Ferry, CT 06335, Brett M. Rowan, 10 Hancock Street, Brooklyn, NY 11216, and Ariel Douglas, 442-D Lorimer Street, #135, Brooklyn, NY 11206-1030.

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