THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2022 Term
Docket No. 2022-0145

In re Robert T. Keeler Maintenance Fund for the Hanover County Club at Dartmouth College

RULE 7 MANDATORY APPEAL FROM
2nd CIRCUIT COURT OF NEW HAMPSHIRE
PROBATE DIVISION - HAVERHILL

BRIEF OF THE ESTATE OF ROBERT T. KEELER AND THE ROBERT T. KEELER FOUNDATION – APPELLANTS

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the exclusivity of scope accorded the Uniform Prudent Management of Institutional Funds Act, N.H. RSA 292-B:1, *et seq.* (UPMIFA) was intended, as has been ruled in this matter, to utterly supplant and displace all prior contract law, charitable trust law, and common law rules in the field of charitable giving.
Hearing on Motion: Transcript at pp. 5-9, 20-22; Motion to Intervene, App. at 38-46; Reply to Objection to Motion to Intervene, App. at 53-59; Motion for Reconsideration, App. at 68-74; Motion for Interlocutory Appeal, App. at 80-85; Interlocutory Appeal Statement, App. at 86-93.[1]

II. Whether UPMIFA was intended to, and should be interpreted to require, the sweeping nullification of all other applicable law outside of itself, thereby rendering the rights and standing of the donor, his/her beneficiaries, and the parties to an erstwhile enforceable written agreement complete legal nullities – leaving no circumstance under which the interested parties would have the right to enforce either the terms of a valid contract or the terms of the donor's will.

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[1] Citations of the record are as follows:

"App." refers to the Appendix to the Appellants Brief and page number.

"Transcript" refers to the Transcript filed with the Court on August 8, 2022 of the December 9, 2021 hearing on the Appellants' Motion to Intervene.

Hearing on Motion: Transcript at pp. 5-9, 20-22; Motion to Intervene, App. at 38-46; Reply to Objection to Motion to Intervene, App. at 53-59; Motion for Reconsideration, App. at 68-74; Motion for Interlocutory Appeal, App. at 80-85; Interlocutory Appeal Statement, App. at 86-93.

III. Whether and to what extent the Statement of Understanding entered into by the Estate and Dartmouth established a contractual relationship under which Dartmouth had contractual obligations to the Estate and to the Foundation as the Estate's third-party beneficiary and therefore provided grounds for the Estate and the Foundation to Intervene in the underlying matter and whether the trial court's prohibition against the Estate and Foundation from intervening and enforcing the terms of its negotiated gift and permitting the Attorney General's office to endorse the donee's repudiation of the contract and avoid the Foundation's erstwhile vested interest, amounts to a taking without due process of law. N.H. CONST. pt. I, art. 12.
Hearing on Motion: Transcript at pp. 5-9, 22; Motion to Intervene, App. at 38-46; Reply to Objection to Motion to Intervene, App. at 53-59; Motion for Reconsideration, App. at 68-74; Motion for Interlocutory Appeal, App. at 80-85; Interlocutory Appeal Statement, App. at 86-93.

IV. Whether the trial court, in this matter of first impression, has prematurely silenced the Intervenors by refusing to allow them

standing as parties-in-interest and any right to be heard and air both their factual and legal arguments.

Hearing on Motion: Transcript at pp. 5-9, 20-22; Motion to Intervene, App. at 38-46; Reply to Objection to Motion to Intervene, App. at 53-59; Motion for Reconsideration, App. at 68-74; Motion for Interlocutory Appeal, App. at 80-85; Interlocutory Appeal Statement, App. at 86-93.

TEXT OF RELEVANT AUTHORITIES

PERTINENT FEDERAL CONSTITUTIONAL PROVISIONS

Article I, Section 10, Clause 1: [Powers denied states—Treaties—Money—Ex post facto laws—Obligation of contracts.] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

PERTINENT NEW HAMPSHIRE CONSTITUTIONAL PROVISIONS

Part I, Article 12: [Protection and Taxation Reciprocal.] Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this State controllable by any other laws than those to which they, or their representative body, have given their consent.

Part I, Article 23: [Retrospective Laws Prohibited.] Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.

Part I, Article 37: [Separation of Powers.] In the government of this State, the three essential powers thereof, to wit, the Legislative, Executive, and Judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of union and amity.

PERTINENT NEW HAMPSHIRE STATUTES

292-B:2 Definitions. –
In this chapter:
I. "Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.
II. "Endowment fund" means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.
III. "Gift instrument" means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.
IV. "Institution" means:
(a) A person, other than an individual, organized and operated exclusively for charitable purposes;
(b) A government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; or
(c) A trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.
V. "Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term does not include:
(a) Program-related assets;
(b) A fund held for an institution by a trustee that is not an institution, unless the court has ordered, pursuant to RSA 292-B:6, V, the adoption of the provisions of this chapter with respect to that fund;
(c) A fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund; or
(d) A fund held by a town or other municipality under RSA 31:19, RSA 202-A:23, unless the court has ordered, pursuant to RSA 292-B:6, V, the adoption of the provisions of this chapter with respect to that fund.
VI. "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.
VII. "Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

VIII. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

292-B:6 Release or Modification of Restrictions on Management, Investment, or Purpose. –

I. If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

II. The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall notify the attorney general of the application, and the attorney general must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

III. If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the attorney general of the application, and the attorney general must be given an opportunity to be heard.

IV. If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, 60 days after notification to the attorney general, may release or modify the restriction, in whole or part, if:

(a) The institutional fund subject to the restriction has a total value of less than $25,000;

(b) More than 25 years have elapsed since the fund was established; and

(c) The institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

V. Upon application to the court by an institution holding a fund with a market value of $1,000,000 or more, which fund would be an institutional fund but for the provisions of RSA 292-B:2, V(b) or (d), the court may order

the adoption of the provisions of this chapter with respect to that fund. The institution shall notify the attorney general of the application, and the attorney general shall be given an opportunity to be heard. In reviewing the application, the court shall consider the intent of the donor expressed in a gift instrument, the purposes of this chapter, and the capacity of the institution to comply with the requirements of this chapter.

498:4-a Cy Pres Doctrine. –

I. The superior court shall exercise jurisdiction pursuant to RSA 498:4-a through RSA 498:4-e only where the claims or defenses raised are related to a matter otherwise pending before or within the jurisdiction of the superior court. In all other cases involving the doctrine of cy pres, jurisdiction shall lie in the probate court.

II. If property is or has been given in trust to be applied to a charitable purpose, and said purpose or its application is or becomes impossible or impracticable or illegal or obsolete or ineffective or prejudicial to the public interest to carry out, the trust will not fail. Upon petition by the trustee or trustees or the attorney general, the superior court may direct the application of the property to some charitable purpose which is useful to the community, and which charitable purpose fulfills as nearly as possible the general charitable intent of the settlor or testator. In applying the doctrine of cy pres, the court may order the distribution of the trust assets to another charitable trustor to a charitable corporation to be held and administered by it in accordance with the terms of the governing instrument as said terms may be modified by the application of cy pres under this section and RSA 498:4-b.

III. Prior to any court proceeding under this chapter on the intent to offer for sale or change the use of any land, buildings, or both, given, devised, or bequeathed to the town for charitable purposes, the municipality shall hold at least one public hearing with no less than 14 days notice.

564-B:4-413 Cy Pres. –

(a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes impossible, impracticable, illegal, obsolete, ineffective or prejudicial to the public interest to achieve:

(1) the trust does not fail, in whole or in part;

(2) the trust property does not revert to the settlor or the settlor's successors in interest; and

(3) upon petition by a trustee, the director of charitable trusts or an interested person other than the settlor, the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, to a charitable purpose that is useful to the community and fulfills as nearly as possible the general charitable intent of the settlor.

(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a) to apply cy pres to modify or terminate the trust only if, when the provision takes effect:

(1) the trust property is to revert to the settlor and the settlor is still living; or

(2) fewer than 21 years have elapsed since the date of the trust's creation.

STATEMENT OF THE CASE

This appeal arises out of litigation commenced in the Grafton County, 2nd Circuit Court – Probate Division – Haverhill (the "Court" or "Trial Court") on August 17, 2021 by the Trustees of Dartmouth College ("Dartmouth") pertaining to a $1.8 million charitable gift made to Dartmouth pursuant to the terms of the will of one of its alumni, Robert T. Keeler ("Mr. Keeler"). App. at 4. Under his Last Will and Testament ("Keeler Will" or "Will"), Mr. Keeler made a cash gift for the express and limited purpose of "sufficiently upgrading and adequately maintaining the golf course" with the further condition that "any amounts in excess of the amount the Executor determines to be necessary to sufficiently upgrade and adequately maintain the golf course shall be distributed to the ROBERT T. KEELER FOUNDATION, an Ohio nonprofit corporation …." (the "Foundation") App. at 3. There was no time limit expressed for how long this fund might persist in the hands of Dartmouth, nor any time limit expressed as to this possible recapture of funds back into the hands of Mr. Keeler's charitable foundation. Mr. Keeler's wishes were further memorialized in a Statement of Understanding ("Agreement" or "SOU") between the Executor of Mr. Keeler's Estate and Dartmouth. App. at 4. The funds became known as The Robert T. Keeler Maintenance Fund for the Hanover Country Club at Dartmouth College ("Keeler Fund" or the "Fund").

On August 17, 2021, Dartmouth filed an Application for Modification Pursuant to RSA 292-B:6(III) (the *cy pres* procedure that is to be scrupulously adhered to before a charitable institution is allowed to deviate from the terms of a controlling gift instrument) with regards to the Keeler Fund ("Modification Application" or "Application"). Despite no claim in the Application that the purpose of the Fund had become unlawful,

impracticable, impossible to achieve or wasteful, the Director of Charitable Trusts Division of the Department of Justice in the Attorney General's Office for the State of New Hampshire ("DCT" or "Attorney General") assented to the Modification Application.

The Estate of Robert T. Keeler (the "Estate") was reopened and Peter P. Mithoefer was appointed Fiduciary for the Estate by the Vermont Superior Court – Probate Division on September 20, 2021. App. at 44. Peter P. Mithoefer is also the President of the Foundation. App. at 38.

On October 29, 2021, the Estate and the Foundation filed a Motion to Intervene with the Court in order to enforce the terms of the Agreement. App. at 38. Dartmouth objected to the Motion to Intervene and a hearing was held on December 9, 2021. App. at 47 and 60-61. The DCT took no position on the Motion to Intervene. App. at 63. On December 23, 2021, the Court Denied the Motion to Intervene. App. at 61. The Court also denied the Estate and Foundation's Motion for Reconsideration (App. at 78) and Motion for Interlocutory Appeal (App. at 97), which followed the December 23, 2021 Order. On February 18, 2022, without any hearing on the merits of Dartmouth's Modification Application, the Court endorsed Dartmouth's Proposed Order. App. at 97-99).

STATEMENT OF FACTS

On May 14, 1999, Robert T. Keeler signed his Last Will and Testament which included a specific bequest to Dartmouth of a portion of his residual estate:

> Fifty percent (50%) to DARTMOUTH COLLEGE, Hanover, New Hampshire, for the sole purpose of upgrading and maintaining its golf course. Nevertheless, if in the Executor's sole and absolute discretion, the golf course has been sufficiently upgraded and is being adequately maintained, then any amounts in excess of the amounts the Executor determines to be necessary to sufficiently upgrade and adequately maintain the golf course shall be distributed to the ROBERT T. KEELER FOUNDATION, an Ohio nonprofit corporation, located in Cincinnati, Ohio.

App. at 20.

Mr. Keeler passed away on December 19, 2002. App. at 87. As the executor of Mr. Keeler's probate estate, his widow, Margaret P. Keeler, through counsel, entered into negotiations with Dartmouth to create a uniquely tailored and mutually developed Statement of Understanding (the "Agreement" or "SOU") that further developed and clarified the terms of the gift to Dartmouth expressed in the Will. App. at 34. This Agreement was established prior to the completion of the donation to Dartmouth and its execution was a condition precedent to the gift being made. The dispositive words of the Will were central to the Statement of Understanding and consistent with them. Dartmouth expressly agreed to this limited purpose and restriction on the gift: "Income (and/or principal if needed) is restricted to support upgrades and maintenance of the golf course, including golf course

facilities." App. at 34. This was the sole purpose of the gift and the very *raison d'être* of the gift.

During the negotiations between Dartmouth and the Executor of Mr. Keeler's estate, Dartmouth sought to have the following release provision in the Agreement:

> If, at some time in the future, it is the opinion of the Trustees that all or part of the income from this fund can no longer be usefully applied to the objectives as stated above, then the Trustees of the College may use the income for another purpose which, in their opinion, most nearly approximates the Donor's objectives.

App. at 40. The Estate did not agree to this provision, which, if accepted, would have permitted Dartmouth to unilaterally change the purpose of Mr. Keeler's bequest. App. at 40. This provision was refused by the Estate and, accordingly, was removed from the final, signed Agreement. App. at 40.

On or about July 9, 2020, College President Phillip J. Hanlon, announced Dartmouth's decision to permanently close the golf course. App. at 137-139. Eventually, it came to the attention of Mr. Keeler's family, personal representatives, and the President of the Foundation, Peter P. Mithoefer, that Dartmouth intended to abandon the purpose and restricted conditions of the Keeler Fund and use the now $3.8 million for altogether different purposes than had been agreed to by Dartmouth in the negotiated terms of the Statement of Understanding. App. pp.154 -162.

Rather than honoring the terms of the Agreement, specifically, to return the surplus funds to either the Estate or its named successor (*i.e.*, the Foundation), after acting, of its own volition, to destroy the sole purpose of the gift, Dartmouth filed the Modification Application to remove the restrictions on the Keeler Fund. App. at 1.

SUMMARY OF THE ARGUMENT

The usual rule is that only the attorney general's office has standing to protect a donor's intentions in a *cy pres* proceeding such as the one set forth in RSA 292-B:6(III). However, this rule is subject to well-recognized exceptions. A prominent factor in allowing other parties standing in these matters is whether and to what extent the attorney general's office has been effective, or not, in advocating and defending the donor's intentions. As argued below, the DCT was utterly ineffective in defending Mr. Keeler's intentions with regard to the use and disposition of the gift funds.

In this case, there was no factual support at a merits hearing (there was no such hearing). The Trial Court, therefore, relied solely on Dartmouth's Modification Application itself when determining whether the Modification Application was appropriate under the provisions of the statute. The Modification Application, however, did not even allege the predicate requirements of RSA 292-B:6(III), that the purpose and restrictions of the Fund had become unlawful, impracticable, impossible to achieve or wasteful.

In order for determining whether the *cy pres* relief provided by RSA 292-B:6(III) was appropriate, the Court was also required to construe the gift instrument and find that Mr. Keeler had expressed a general charitable intent beyond his specific purposes, which general intent comports with the requested modification. There were no allegations of a general charitable intent in the Modification Application. No factual inquiry was conducted nor was there ever a finding made that Mr. Keeler had a general charitable intent. These defects in the Application and in the Trial Court's conduct of Application proceeding should have been fatal to the success of the Modification Application.

The Appellant Intervenors sought to enforce Mr. Keeler's intent and raise claims concerning the application of both charitable trust and contract law, but were excluded which, as argued below, was a reversible error. The Estate and the Foundation should have been permitted to intervene because they had a special interest in the outcome of the litigation. The proper interpretation of Mr. Keeler's intent and the application of the doctrine of *cy pres*, the Intervenors argue, would have certainly resulted in the failure of the charitable gift and imposition of a resulting trust to the Estate/Foundation.

Further, by virtue of an unusual event in the implementation of Mr. Keeler's gift, the Estate and Foundation have an alternate claim for special interest in addition to the *cy pres* protections. There was a bargaining and negotiation process by and between the Estate and Dartmouth in which these parties haggled and bargained with each other and made a "deal" with each other as a result. Accordingly, a contract remedy exists, that being the treatment of the gift as a contractually enforceable transfer subject to a condition subsequent. The condition subsequent is that in the event the transferee fails to perform a specified act, that failure is a breach of condition and results in a termination of the transferee's interest. For authority on this, we would cite a line of cases discussed below with L.B Research & Education Foundation v. UCLA Foundation, 29 Cal. Rptr. 3d 710 (2005).

STANDARD OF REVIEW

The Intervenors are seeking the Court's review of the trial court's denial of their Motion to Intervene in an Application for Modification Pursuant to RSA 292-B:6(III). In New Hampshire, the right to intervene has "been rather freely allowed as a matter of practice". Brzica v. Trs. of Dartmouth Coll., 147 N.H. 443, 446 (2002). The right to intervene is usually a matter of discretion of the trial court. Snyder v. N.H. Savings Bank, 134 N.H. 32, 34 (1991). "A trial court trial court should grant a motion to intervene if the party seeking to intervene has a right involved in the trial and a direct and apparent interest therein." Brzica 147 N.H. at 446. Whether the Intervenors have a "direct and apparent interest" is strictly an interpretation of RSA 292-B:6(III). The underlying facts were neither presented in an evidentiary hearing nor adjudicated by the lower court, the Trial Court here. A probate court's interpretation of the statute is a question of law for which the Court uses a *de novo* standard of review. In Re Estate of Locke, 148 N.H. 754, 755-56 (2001). The Supreme Court "is the final arbiter of the intent of the legislature as expressed in the words of a statute." Appeal of Estate of Van Lunen, 145 N.H. 82, 86 (2000).

ARGUMENT

I. THE TRIAL COURT'S DENIAL OF THE INTERVENORS' MOTION TO INTERVENE IS UNSUPPORTED BY THE EVIDENCE AND PLAINLY ERRONEOUS AS A MATTER OF LAW.

A. Doctrine of Special Interest Standing in Cy Pres Proceedings Applies Under RSA 292-B:6 (III).

The Intervenors sought to participate in Dartmouth's Application for Modification pursuant to RSA 292-B:6(III) of certain funds donated to Dartmouth by the Estate of Robert T. Keeler pursuant to the terms of the Keeler Will. RSA 292-B:6 is silent concerning the issue of standing in such a proceeding, with the exception of the petitioning institution and the involvement of the attorney general. As discussed *infra* at 37-38, RSA 292-B:6 embraces existing charitable trust law. This Court has recognized the doctrine of special interest standing in matters concerning charitable trusts. In re Trust of Eddy, 172 N.H. 266, 274 (2019). The Intervenors request the Court confirm the availability of special interest standing in this action for modification pursuant to RSA 292-B:6(III) and find that the trial court erred in denying the Intervenors standing. As standing is a question of law, the Court should review the issue *de novo*. Id.

B. The Facts and Applicable Law in the Instant Case Favor Allowance of Standing to the Intervening Estate and Charitable Foundation of the Donor.

The Court in Eddy found that the five-factor "Blasko Test" best comports with New Hampshire law because it considered the various interests at play in charitable trust matters. Id. The Blasko Test addressed standing to enforce charitable obligations generally and was not limited to charitable

trusts. See Mary Grace Blasko, Curt S. Crossley, David Lloyd, *Standing to Sue in the Charitable Sector*, 28 U.S.F.L.REV. 37,61 (1993) (hereinafter "Blasko"). The five factors as described by the Court in Eddy are: "(1) the extraordinary nature of the acts complained of and the remedies sought; (2) the presence of bad faith; (3) the attorney general's availability and effectiveness; (4) the nature of the benefitted class and its relationship to the charity; and (5) the social desirability of conferring standing." In re Trust of Eddy, 172 N.H. at 271.

Each of the five factors is expounded upon and further developed in the body of the Blasko law review article. The Court in Eddy declined to adopt a requirement proposed by the American Law Institute which had similar factors but required all factors to be met to bestow standing. Id. at 274. Rather, the Court determined that the factors should create a "balancing test" of the facts and circumstances at issue.

(1) The Extraordinary Nature of the Acts Complained of and the Remedy Sought.

The Intervenors sought to intervene in the trial court to prevent Dartmouth from fundamentally changing Mr. Keeler's charitable bequest contrary to the applicable law and sought to be heard on its arguments founded in contract and charitable trust law. In light of unusual circumstances and documentation of the "gift instrument's" creation, and the enormity and permanency of the change to the gift funds use, this first factor should weigh heavily in the Intervenors' favor under the Blasko test. In re Trust of Eddy, 172 N.H. at 276 ("When trustees seek to fundamentally change the charitable bequest by dissolving the nonprofit corporation or

closing the facility created by the trust, and the plaintiffs seek to stop this action, then the plaintiffs are more likely to establish standing.").

As discussed *infra* at 38-41, the Court should have conducted a proper *cy pres* analysis to determine whether the modifications requested by Dartmouth were even available under New Hampshire precedent. Had the Intervenors been given the opportunity to participate, they would have been able to develop the factual record to support a conclusion that the modification requested was not available, the charitable gift failed, and a resulting trust to the donor (here the Estate) would have been appropriate. The remedy sought would not have been "highly intrusive" and would not open Dartmouth up to further or vexatious litigation as were the concerns of the Court in evaluating the third party standing in Eddy. In re Trust of Eddy, 172 N.H. at 277. This issue will only be litigated once and is more akin to the parties in Alco Gravure and Hooker which involved, as is true in the instant matter, the proposed destruction of a specific charitable purpose and the parties seeking standing sought to protect the donor's intent. Alco Gravure v. Knapp Found., 64 N.Y.2d 458 (1985); Hooker v. Edes Home, 579 A.2d 608 (1990).

(2) Presence of Bad Faith.

In July 2020, Dartmouth announced the closure of the golf course and related country club. App. at 137. Beginning in December, when it became aware of the closure, and over the next eight months, the Foundation sought to work with Dartmouth and the Attorney General's office on how the funds should be used and request that the Agreement's terms be honored. Despite initial suggestions made to Peter Mithoefer for the Estate (and the Foundation, as its President), that the fate of the golf course had not been

finally determined, that the Estate would be included in any discussion of the disposition of the funds, and that an accounting would be provided, eventually, in August 2020, Dartmouth sought to modify the terms of the Agreement pursuant to RSA 292-B:6(III) without any notice to, or participation by, the Estate or the Foundation. These, of course, are facts alleged only in pleadings and partial submission of some communications found in the Appendix at pages 150-162. As far as Dartmouth was concerned, the Estate and Foundation simply "had no rights" and its counsel bluntly said so during the December 9, 2021 motion hearing. Transcript at 20. This hardly smacks of good faith towards the donor's representative.

The Intervenors would argue that Dartmouth's Application itself is evidence of its bad faith. As developed *infra* at 39-40, Dartmouth failed to articulate any of the quintessential factual circumstances required by RSA 292-B:6(III) and failed further to articulate that Mr. Keeler had expressed a general charitable intent in the gift instrument. Unlike in the Eddy case, there has been no effective oversight by the DCT to protect the donor's intent; the DCT's involvement has been visible but patently ineffective as will be discussed *infra* at 24-31.

(3) Attorney General's Availability and Oversight – Palpably Ineffective.

The Intervenors have consistently maintained that the Division of Charitable Trusts in the Attorney General's Office has not protected the intent of the donor in this matter. The case record, especially its final outcome at the hands of the trial court, demonstrates this fact compellingly. Neither Dartmouth nor the DTC have alleged the conduct of any substantive inquiry by the DTC into the merits or factual basis for Dartmouth's

Modification Application. The Intervenors ask that this Court find any conclusion by the trial court that the DCT was sufficiently and/or effectively involved in this matter to be unsupported by the evidence. A review of this factor of the Blasko Test should weigh heavily in the Intervenors' favor. "Under this factor, we consider whether the attorney general is able to enforce the trust or whether the lack of enforcement is due to a conflict of interest, *ineffectiveness*, or lack of resources. In re Trust of Eddy, 172 N.H. at 279 *emphasis added*.

The trial court found at page 5 of its Order of December 23, 2021 (the "Order") as follows: "Attorney Holmes presented records of the significant and meaningful involvement of the Attorney General in this case. Exhibit 1, Tab I. Not only were the Director and Assistant Director personally present at the hearing the records chronical [sic] their involvement and oversight." The Order at p.5, App. at 65. These findings are erroneous as not supported by the evidence.

(a) Dartmouth's Hearing Submission Documents Attorney General's Merely Superficial Involvement and Blind Reliance Upon Dartmouth's Factual Claims.

As a preliminary matter, a review of the Transcript of the December 9, 2021 hearing on the Motion to Intervene confirms that at no time was this "Exhibit 1" with its Tabs A through J offered into evidence as an Exhibit and there is no indication in the Transcript that the trial court marked it as a formal exhibit for evidentiary purposes at the time. This by itself is a substantive failure of due process protections owed to the Intervenors. Close review of the documents set forth in Tab I of "Exhibit 1" (App. at 150-166) demonstrates that the Attorney General's office has not attempted to advocate for Mr. Keeler's intentions in any significant way nor to ensure that

the *cy pres* protections of New Hampshire law were properly invoked. The chronology depicted in the Tab I establishes the Attorney General's uncritical acquiescence and unexamined cooperation with desires of Dartmouth. The Attorney General's involvement was shallow at best. The most that was contributed by the Attorney General's office to the establishment of Dartmouth's new and different terms of the gift were minor (arguably miniscule) revisions and edits to the body of text supplied by Dartmouth. App. at 158.

(b) Attorney General's Unfulfilled Promise to Act Diligently – Assented to Modification Application with Fatal Defects Patent.

As another example of the shallow involvement, on April 22, 2021, Assistant Director Diane Murphy Quinlan wrote an email to Attorney Christopher Bartle of the Keeler Foundation (included in Tab I) (App. at 161) and stated: "If a change in purpose becomes necessary because use of the funds in accordance with donor intent is 'unlawful, impracticable, impossible to achieve or wasteful,' and court approval in a *cy pres* petition is required, we will work with the College to ensure that any proposed modification is consistent with the charitable purposes expressed in the Will."

From the documents compiled under Tab I (App. at 150 -166) it is readily apparent that no inquiry was ever done by the Attorney General's office into any factual claim that the donor's purposes and restrictions on use of the fund had become "unlawful, impracticable, impossible to achieve or wasteful." Nowhere in Dartmouth's Modification Application (App. at 1-37) does the Application allege that the donor's purposes and restrictions on use to the fund had become "unlawful, impracticable, impossible to achieve or

wasteful." The Application is silent on that which is the *sine qua non* of such an Application under RSA 292-B:6(III). As will be discussed further below, in the law of *cy pres*, another quintessential requirement is that the gift instrument must be construed by the court and found to contain a general charitable intent beyond a specific sole purpose. This defect should have been fatal to the Application but was allowed to pass with approval by the DCT.

(c) <u>Director of DCT's Hearing Testimony Does Not Support the Trial Court's Findings and Ruling; DCT Conducted No Discovery or Verification of Essential Facts.</u>

The Director of Division of Charitable Trusts Thomas J. Donovan's testimony at the hearing on the Intervenor's Motion to Intervene (Transcript at 10-12) demonstrates only the most superficial involvement with the matter of the underlying factual basis of the Application. He testified that: "[w]e've reviewed the allegations of the change of circumstances that now are alleged by Dartmouth College, and they make sense to us. We know that colleges are rethinking their athletic programs. There are – there is a financial drain, as we understand it, posed by the college operating full golf course." Transcript at 10. Director Donovan does not say that his office ever made an investigation at any level as to the factual basis of Dartmouth College's protestation of financial distress. Neither did he ever state that he had made a factual determination that the cost of the golf course was an "unjustified financial drain on the institution;" and yet these exact words are erroneously attributed to him by Court in its Order at p.3. App. at 63.

From this testimony and documents appearing under Tab I of Exhibit 1 (App. at 150 -162) that purport to be a complete chronology of the Attorney

General's involvement, it appears evident that the Attorney General's Division of Charitable Trusts merely accepted the unsubstantiated claims of Dartmouth at face value, without any meaningful inquiry, investigation, or discovery.

That there had been no formal discovery conducted in this matter is confirmed at page 4 of the Transcript. Although in her April 22, 2021, email (Tab I) (App. at 161) the Assistant Director assured the Keeler Foundation that the requirement of prosecuting an actual *cy pres* adjudication would be honored, such never occurred. No merits hearing was ever conducted on the Application and after the exclusion of the Intervenors was ordered, the Court simply endorsed the Proposed Order of Dartmouth College without any evidentiary hearing, or factual or legal basis articulated for the relief granted. App.at 98-99.

With so much at stake, $3.8 million (+/-), and the law's purported commitment to honoring donor intent, the DCT had a clear, unavoidable and absolute duty of care to verify these conclusory facts being spoon-fed to them rather than merely trust Dartmouth blindly; Dartmouth, the most self-interested party in this social equation.

(d) Dartmouth Submits Only Public Press Releases to Support Its Application.

Unspecified financial distress is mentioned by Attorney Holmes during his testimony on December 9, 2021, at the Motion to Intervene Hearing (Trans. at 17), in vague and general terms, but nothing specific was articulated and nothing was substantiated with factual proof; rather vague conclusory statements alone were supplied. Attorney Holmes' references the College President's Message to the Dartmouth Community in Tab G (App.at

137-139) and the Dartmouth Athletics Department Website in Tab H (App. at 140-149), both of which are in the character of public press releases, and which provide only a vague outline of a rationale for the College's actions. Such generalized conclusions are meant for public consumption and as such, in the context of this serious legal action, call out to be tested and confirmed factually (with at least rudimentary discovery) rather than facile acceptance at a beginning surface level. It is worthy of repetition that the Transcript indisputably ratifies that these documents were never submitted by Attorney Holmes as "exhibits" on the record to be accepted as such by the Court for the truth of the matters stated, and possible objection by Intervenors' counsel.

(e) Internal Contradiction in Modification Application Casts Shadow on Validity of Financial Claims of Distress.

The Application contains a rather fundamental, factual contradiction on its face. The initial gift was for $1,800,000.00 and was used for the upgrading and maintenance of the golf course. The purpose of the Fund was to insulate the golf course from becoming a financial drain to the College. Since its inception, the Fund had grown to over $3,800,000.00 as of the time of the Application. Had the golf course actually been a financial drain, the Fund would have been depleted, or at least showing signs of it. This fact appearing on the face of the Application as it does, supports the proposition that there was no shortage of available funds to keep the maintenance of the golf course "in the black". Further it negates any claim (not that one had actually been plead) that the purpose of the fund had become impossible or impracticable as required by RSA 292-B:6(III).

(f) Split of Authority in National Case Precedent and Treatises Swinging Strongly Against Attorney General Being the Exclusive Advocate for Donor's Intentions in Cy Pres Matters.

Because the dominant statutory purpose of the Attorney General's involvement was for the protection of and advocacy for the donor's intent via RSA 292-B:6(III) and use of the doctrine of *cy pres* and its corollary rules, judged against that standard, it was factual error for the trial court to find that the Attorney General's involvement had been significant and meaningful when that involvement was so palpably ineffective. Unlike the record in Eddy which found that the "attorney general is actively involved in overseeing the administration of the trust," the Attorney General's office, in this case, provided a mere pro forma assent to Dartmouth's application. In re Trust of Eddy, 172 N.H. at 280. The Intervenors therefore should have been permitted to intervene and defend Mr. Keeler's specific charitable intent.

The standard rule is that the settlor's heirs and successors are excluded from participation in a *cy pres* proceeding, such as is implicated with this Application. However, there is no statutory or common law rule preventing the donor's representatives, successors, or other interested parties from being allowed to intervene. Rather there is a trend across the jurisdictions moving in the opposite direction. In analyzing the current state of the common law on this issue, certain treatise writers have observed, "[t]he traditional rule of no settlor enforcement is under attack. The chief reason for this attack has been lax attorney general enforcement." George Gleason Bogert, George Taylor Bogert & Amy Morris Hess, The Law of Trusts & Trustees, § 415, at 9 (2d. rev. and 3d. ed. 2019) (*citations omitted*).

Particularly instructive on this point is Smithers v. St. Luke's-Roosevelt Hosp. Ctr., 281 A.D.2d 127 (2001). In Smithers, the attorney general was heavily involved in a hospital institution's intention to abandon and disregard the restrictive condition placed upon an institutional fund held by the charity hospital. The plaintiff in Smithers, like the Successor Fiduciary of the Estate, Peter Mithoefer, in this case, was a court-appointed executor empowered to represent the donor in the enforcement of the express conditions of the gift instrument. Also similar to this case, the interests of the Estate in enforcing the terms of the gift were not congruent with the interests of the New Hampshire Attorney General's Office; in fact, they were operating with markedly different agendas. The Attorney General in Smithers acted to settle with the charitable institute at a fraction of the estate's demand for exacting compliance. Smithers, 281 A.D.2d at 137. For all these considerations and in accordance with the well-settled principle that a donor's expressed intent is entitled to protection, the court ruled that the special administrator of the estate was found to have standing. Id.

(4) Nature of the Benefitted Class and its Relationship to the Charity.

"Courts have found special interest standing where the class of entities is 'sharply defined and its members are limited in number'. In re Trust of Eddy, 172 N.H. at 281 *quoting* Hooker, 579 A.2d at 614. "'A plaintiff should have a direct and defined interest, distinct from that of the general public, in the enforcement of the charitable obligations at issue to claim a "special interest" in the charity'" Id. *quoting* Blasko, *supra* at 70. This is perhaps the strongest factor in favor of the Intervenors. Without the Intervenors, there will be no one involved to properly advocate for the Donor's intentions at this

critical crossroads; that being the institutions' election to utterly destroy the very *raison d'être* of the Keeler Fund.

The Intervenors have requested standing in the underlying matter to set forth their various arguments staked in the law of contracts, charitable trusts, and general equitable relief. The trial court has, the Intervenors argue, foreclosed consideration of any proffered factual, legal, and equitable reasons for the denial of Dartmouth's Application. Both the Estate of Robert T. Keeler and The Robert T. Keeler Foundation have distinct special interests in the "Robert T. Keeler Maintenance Fund for the Hanover County Club at Dartmouth".

(a) The Special Interest of the Estate of Robert T. Keeler.

The trial court's denial of the Intervenors' Motion to Intervene amounted to a pro forma approval of Dartmouth's Application for Modification without any development of the facts necessary to establish a record that such a modification is available under RSA 292-B:6(III) and the doctrine of *cy pres*. *Infra* at 38-41. The Estate's "special interest" in the funds at issue is direct and defined. If the application of *cy pres* is not an available remedy because there is a lack of general intent, the gift instrument will fail, and the funds will be subject to "a resulting trust in favor of the donor or his estate." Op. of Justices, 101 N.H. 531, 533 (1957). The Estate, therefore, should be permitted to intervene to protect its vested interest in the resulting trust. This interest is inarguably distinct from the general public.

The Estate also has an unresolved claim for breach of contract that was not permitted to go forward due to the trial court's denial of the Intervenor's Motion to Intervene. That the Statement of Understanding may be a "gift instrument" pursuant to RSA 292-B:2(III) does not necessarily result in it not

also being subject to laws of contract. "[A] gift may have a charitable purpose and yet not constitute a charitable trust." L.B. Research, 130 Cal.App.4th at 177 (Donor's $1,000,000.00 gift to charitable institution held to be a contract subject to a condition subsequent, rather than a charitable trust, donor permitted to pursue enforcement of a contract breach rather than cy pres protections). In L.B. Research, the court found that the Donor may, rather than create a trust, 'transfer it to another on the condition that if the latter should fail to perform a specified act[,] the transferee's interest shall be forfeited either to the transferor or to a designated third party." Id. at176.

The Intervenor's contract claim in this regard is a strongly colorable alternate theory for relief for which it was entitled to have standing to pursue. The trial court's denial of this right of procedural due process appears to have been premised upon an implicit presumption against the merits of the Appellants' well-pleaded claims.

Interpreting RSA 292-B (effective three years after the Agreement was negotiated) as exclusively controlling, therefore, creates a substantial impairment to the contractual relationship in direct violation of the Contract Clause of both the United States and the State of New Hampshire's Constitution. U.S. CONST. art. I, § 10, cl. 1; N.H. CONST. pt. I, art. 23. [2]

"A Contract Clause violation has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." State v. Fournier, 158 N.H. 214, 221 (2009) (internal quotations omitted). If the Estate and

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[2] "Part I, Article 23 of the State Constitution prohibits retrospective laws for the decision of civil causes. Though it does not expressly reference existing contracts, we have held that its proscription duplicates the protections found in the contract clause of the United States Constitution." Petition of Concord Teachers, 158 N.H. 529, 537 (2009) (internal citations and quotations omitted).

Foundation were permitted to intervene in this matter, it would be able to demonstrate the existence of a contract which would be substantially impaired if RSA 292-B were applied in this manner. The principles of recovery on a contract claim under the principles articulated in L.B. Research have ample application to the facts of this case, as discussed in greater detail *supra* at 32-33. The Intervenors would be able to demonstrate that the Estate and Dartmouth specifically negotiated the terms of what would happen to excess funds and negotiated out the provision that permitted Dartmouth to alter the use terms of the funds. The Estate's representatives have the right to hold Dartmouth to the restrictions it agreed to as consideration for the Estate's decision to complete the gift.

The Estate had negotiated a remainder interest for the Foundation in funds in excess of amounts the Executor deemed necessary to upgrade and maintain the golf course at the Hanover Country Club. Dartmouth voluntarily closed the golf course rendering the upgrade and maintenance of the course unnecessary and now seeks to create a new purpose for the gift and avoid the Foundation's interest. Because the Attorney General, in blessing the amended purpose of the gift to Dartmouth, has negated the vested remainder interest, such action is a repudiation of a protected contract right. The Estate's defense of its contract rights further establishes its "special interest" in this matter and the trial court's denial of its standing was plainly erroneous under the law.

(b) The Special Interest of The Robert T. Keeler Foundation.

The Foundation also has a defined interest, distinct from the general public and it should have been granted standing to intervene in this matter.

The Keeler Will identified a specific alternate beneficiary in the Robert T. Keeler Foundation if the funds were in excess of what was necessary to upgrade and maintain the golf course. In the event the application of the law of *cy pres* required a resulting trust to the Estate, the Foundation would be the ultimate beneficiary of the funds pursuant to Mr. Keeler's explicit instructions. Precluding the Foundation from intervening and raising these claims and permitting the Attorney General's office to endorse the misapplication of the *cy pres* doctrine would result in the complete elimination of the Foundation's vested interest would amount to a taking without due process of law. N.H. CONST. pt. I, art. 12. Further due process issues are developed *infra* at 44. The Foundation's interest in the resulting trust is sufficiently direct and distinct from the general public to grant it special interest standing in this matter.

Assuming *arguendo* that with the completion of the initial gift, any future rights of the Foundation were extinguished, if the sole and proper focus would be to surmise in the *cy pres* proceedings what Mr. Keeler would most likely choose as an alternate disposition, it would almost certainly be to his own charitable foundation as the terms of the Will specified.

(5) Subjective Factors and Social Desirability.

The last factor in the Blasko Test also favors the Intervenors. This factor is "somewhat of a catch-all factor, applying to 'those cases where there seemed to have been an egregious wrong which would otherwise go uncorrected'". In re Trust of Eddy, 172 N.H. at 283 *quoting* Blasko, *supra* at 75. The Intervenors have been the only parties to this matter seeking to examine and correct apply UPMIFA's place in New Hampshire charitable trust law, and the only parties demonstrating any respect for the rule of law

and the primacy of the Donor's intent. Ignoring donor intent is in direct contradiction to a stated purpose of New Hampshire embracing UPMIFA. "UPMIFA also improves the protection of 'donor intent' with respect to expenditures from endowments by requiring a charity to follow the express instructions of a donor." 11 New Hampshire Practice Probate § 61.2 (2021).

During the Commerce, Labor, and Consumer Protection Committee (Senate) hearing on the proposed adoption of the Uniform Act, Senator Deborah R. Reynolds asked of Attorney Terry Knowles from the Attorney General's office, "Is this part of the sort of comprehensive plan that we're trying to take in New Hampshire to make our jurisdiction a little bit more attractive to attracting out-of-state trusts, and such?" App. at 196. To this question, Attorney Knowles responded in the affirmative. App. at 196. It naturally follows that in order to encourage donor engagement in the State, individuals need the assurance that their charitable gifting restrictions will be honored. If the Attorney General's office will not step in to defend the donor's intent, standing should be granted to other specially interested parties. Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 Vand. L. Rev. 1093, 1158-59 (2005) ("[A]gainst the background of the current state of civil society with the attendant erosion of 'social capital' in general and the decline of philanthropic activity in particular, a grant of standing on broader grounds can be justified as an inducement to a particular type of donor engagement within the charitable sector.")

If Dartmouth is right on the law here, the policy implications for charitable gifting in New Hampshire are bleak; this ought to be painfully obvious.

II. A COURT OF LAW MAY EXERCISE ITS AUTHORITY IN A CY PRES MATTER ONLY WITHIN THE LIMITS SET BY LAW; THE COURT'S GRANTING OF DARTMOUTH'S MODIFICATION HAS EXCEEDED THOSE LIMITS AND ITS ORDER IS ERRONEOUS.

A. RSA 292-B:6(III) Must Be Read to Require Scrupulous Adherence to Cy Pres Jurisprudence Generally.

"When interpreting a uniform law . . . the intention of the drafters of a uniform act becomes the legislative intent upon enactment" this necessarily relies on the official comments to the uniform law. Hodges v. Johnson, 170 N.H. 470, 480 (2017) *quoting* In the Matter of Ball & Ball, 168 N.H. 133, 137 (2015). The UPMIFA modification provisions embrace the equitable doctrine of *cy pres*. "By expressly including deviation and *cy pres*, UPMIFA requires an institution to seek modifications that are 'in accordance with the donor's probable intention' for deviation and 'in a manner consistent with the charitable purposes expressed in the gift instrument' for *cy pres*." *Unif. Prudent Management Inst. Funds Act § 6 Comment.* (App. at 104-106).

RSA 292-B:6 is New Hampshire's adoption of UPMIFA's Section 6. RSA 292-B:6(III) codifies the *cy pres* rule from trust law. *Unif. Prudent Management Inst. Funds Act § 6 Comment, Subsection (c) Cy Pres.*[3] (App. at 105). "Ordinarily the principles and rules applicable to charitable trusts are applicable to [gifts to] charitable corporations." Austin W. Scott, *The Law Of Trusts* 348.1 (4th ed. 1988). The Court should, accordingly, follow New Hampshire precedent on *cy pres* when interpreting the Agreement and considering Dartmouth's Application for Modification. See Conn. Coll. v.

[3] It "codifies" not in the sense of an encyclopedic restatement, but rather via an express grafting in of the law as it exists generally in its other sources.

United States, 276 F.2d 491, 495 (1960) (It is generally held that a charitable trust may be created by an instrument which does not contain words of trust . . . if its language indicates a charitable purpose on the part of the testatrix.). "Cy pres may also be applied to instruments . . . which do not contain words that explicitly create a trust, if the instrument conveys a charitable purpose." United States ex rel. Smithsonian Inst., Civil Action No. 17-mc-3005 (TSC), 2021 U.S. Dist. LEXIS 143385, at *9 (D.D.C. Aug. 2, 2021).

B. The Trial Court Granted Dartmouth's Cy Pres Application Containing Radical Omissions of Legal and Factual Elements Essential to the Application's Success - Fatal Omissions.

To be entitled to the modification Dartmouth sought under UPMIFA, it was required to show that the restrictions applied by Mr. Keeler on the use of the funds had now become, "unlawful, impracticable, impossible to achieve, or wasteful". RSA 292-B:6(III). This is an explicit derivation from the doctrine of *cy pres* which allowed for "courts of equity" "to permit departure from the literal terms of such a trust by exercise of the power of cy pres. The courts will exercise this power, however, only when the purpose for which the fund was established *cannot be carried out*, and *diversion of the income* to some other purpose can be found to fall within the *general intent* of the donor expressed in the instrument establishing the trust." Op. of Justices, 101 N.H. at 533, *emphasis added*. Similarly, both RSA 498:4-a, which codified *cy pres*, and RSA 564-B:4-413, which is the New Hampshire Trust Code adoption of *cy pres*, require a finding of impossibility, impracticability, illegality, obsolescence, ineffectiveness, or prejudice to the public interest.

Dartmouth's Application does *not* allege that supporting the upgrades and maintenance of the golf course has become "unlawful, impracticable, impossible to achieve, or wasteful". There is no reference in the Application

whatsoever as to the status of upgrading and maintaining the golf course. Rather, the Application merely states that Dartmouth "permanently closed the Club" and that the modification is being requested because Dartmouth seeks to "fully utilize the generous gift" of Mr. Keeler. Where change of circumstances was a result of deliberate action by the donee, the purpose of the gift is not "impossible" or "impracticable". Conn. Coll., 276 F.2d at 498-99. Dartmouth, therefore, failed to even allege the existence of the conditions required to seek a modification under RSA 292-B:6(III).

Even had Dartmouth alleged that supporting the upgrades and maintenance of the golf course had become "unlawful, impracticable, impossible to achieve, or wasteful", it still was required to establish a factual basis for such a finding, and that Mr. Keeler had a general charitable intent beyond the stated purpose in order for the trial court to apply the *cy pres* relief adopted by RSA 292-B:6(III). "It is not true that a charitable trust never fails where it is impossible to carry out the particular purpose of the testator. In some cases . . . it appears that the accomplishment of the particular purpose and only that purpose was desired by the testator and that he had no more general charitable intent and that he would presumably have preferred to have the whole trust fail if the particular purpose is impossible of accomplishment. In such a case the cy pres doctrine is not applicable. Evans v. Abney, 396 U.S. 435, 441 (1970) *quoting* 4 A. Scott, The Law of Trusts § 399, p. 3085 (3d ed. 1967). New Hampshire has affirmed this limitation of the power of *cy pres*. "If the trust instrument discloses no general charitable intent, as distinguished from the particular purpose for which the gift was made, the trust will fail, and its assets will be held by the trustee subject to a resulting trust in favor of the donor or his estate." Op. of Justices, 101 N.H. at 533.

In Kolb v. City of Storm Lake, the court addressed the requirement that, for *cy pres* to apply, the donor must have expressed in the original instrument "'general charitable purposes', or what is recognized at common law as general charitable intent". Kolb v. City of Storm Lake, 736 N.W.2d 546, 558 (2007). The court must "determine whether settlor had a general charitable intent – his purpose was not to benefit or accomplish one specific object." Id. (*citation omitted*). The court "must evaluate all the relevant facts and circumstances, which may include extrinsic evidence not included in the trust document." Id. (*citations omitted*).

Dartmouth does not allege a general charitable intent by Mr. Keeler because there was none. The plain language of the Keeler Will, which was adopted by the Statement of Understanding, identifies a specific purpose ("support of the upgrades and maintenance of the golf course") as well as a specific alternate beneficiary in the Robert T. Keeler Foundation if the funds were in excess of what was necessary for Mr. Keeler's specific purpose.

Mr. Keeler expressed a specific and limited charitable purpose. The upgrades to and maintenance of the golf course were the sole *raison d'être* for the fund; not the study and design of practice areas, not the support of the varsity golf programs as such, nor other physical education and recreation programs related to golf. It was the maintenance and the preservation of the actual golf course itself which was the means by which "future generations of Dartmouth student and members of the Dartmouth community may continue to enjoy the great game of golf". This intended enjoyment of golf by the future generations was not a separate intention or an expression of a more general charitable intention on the part of Mr. Keeler. The Intervenors, however, were not permitted to make these factual and legal arguments.

The gift instrument, to wit, the Statement of Understanding (which very centrally reiterated the relevant text of the Keeler Will) could not have made clearer the restricted scope of Mr. Keeler's intention with these words: "Income (and/or principal if needed) is restricted to support upgrades and maintenance of the golf course, including golf facilities." App. at 34.

C. Gift Instrument Need Not Set Forth Explicitly a Right of Reverter or of Forfeiture.

While it is true that the gift instrument does not expressly provide a reverter back to the Mr. Keeler's estate or successors, it need not do so. Evans v. Abney, 396 U.S. at 440, (holding that when the trust failed and *cy pres* did not apply, the *res* of the trust reverted to the donor's heirs by operation of Georgia law). See Kolb, 736 N.W. at 558 (while the absence of a forfeiture or reverter clause may tend to support a finding of general charitable intent, it is only one of many potential factors to consider and not controlling by itself).

D. Extrinsic Evidence Demonstrating Narrow Purpose of the Fund.

Intervenors have argued the Agreement was an enforceable contract. Even more compelling against the finding there was a "general charitable intent" was Mr. Keeler's representatives harshly limiting the purpose of the gift fund and rejecting any notion of general intent by disallowing any alternative use. Specifically, at one point in the negotiations of the terms and conditions of the Agreement, Dartmouth representatives sought to include the following terms in the Agreement:

> If, at some point in the future, it is the opinion of the Trustees that all or part of the income from this fund can no longer be usefully

> applied to the objectives as stated above, then the Trustees of the College may use the income for another purpose which, in their opinion, most nearly approximates the Donor's objectives.

Motion to Intervene, Exhibit B (App. at 45-46).

This elective power of amendment was refused by the Executor. Dartmouth accepted and agreed to its deletion; the issue was believed to be finally resolved in a manner permanently binding on Dartmouth. This is powerful evidence extrinsic to the gift instrument that the Donor had one specific object and that was his primary and dominant purpose, i.e., the physical state of the golf course and facilities and nothing more or different. To the extent that there were excess funds not used for the golf course, Mr. Keeler expressed a secondary specific charitable purpose, that being a distribution of the remainder to his own Robert T. Keeler Foundation, a 501(c)(3) charitable institution.

As further articulated by the court in Kolb:

> ...that if the mode of application is such an essential part of the gift that you cannot distinguish any general purpose of charity, but are obliged to say that the mode of doing a charitable act was the only one the testator intended or at all contemplated, and that he had no general intention of giving his money to charity, then the court cannot, if the particular mode of doing it fails, apply the money cy pres.

Kolb, 736 N.W. at 558 (*citations omitted*). "In other words, if the specific purpose of the trust is so essential that it becomes the dominate [sic] purpose of the trust, then there is no other 'general purpose of charity' that can be fulfilled cy pres." Id. (*citations omitted*).

E. Constitutional Limitations and Legislative History.

Under the established *cy pres* principles, modification is not an appropriate remedy available for Dartmouth. To interpret RSA 292-B:6(III) as abbreviating or supplanting established *cy pres* doctrine would be an unconstitutional encroachment on the powers of the courts. Op. of Justices, 101 N.H. at 535. N.H. CONST. pt. I, art. 37. "[A] statute will not be construed to be unconstitutional when it is susceptible to a construction rendering it constitutional." Bd. of Trs., N.H. Judicial Ret. Plan v. Sec'y of State, 161 N.H. 49, 53 (2010).

As part of the legislative history of UPMIFA, the attorney general's office included a Uniform Law Commission pamphlet as part of its testimony which promised:

> UPMIFA recognized and protects donor intent more broadly than UMIFA did, in part by providing a more comprehensive treatment of the modification of restrictions on charitable funds. .... The trust law doctrines of cy pres .. probably already apply to charitable funds held by nonprofit corporations. UPMIFA makes this clear.

App. at 269-270. If the conduct of this matter before the courts thus far is a proper application of the law, then that law is doing exactly the opposite of what its proponents had intended.

Cy pres is *not*, therefore, applicable in all circumstances in which the administrator of charitable funds encounters some frustration in following the terms of the gifting instrument. Rather, the trial court is first to confirm whether the charitable purpose can or cannot be accomplished and if not, whether the donor had a *general* charitable intent. Neither of these "gatekeeping" examinations were conducted by the Trial Court here nor did Dartmouth make such representations that the factors existed in its

Application. By excluding the Intervenors from raising these and other arguments, the Trial Court allowed Dartmouth to subvert Mr. Keeler's intent and to misapply the controlling law.

There are also due process concerns for excluding the Intervenors in this action. RSA 292-B:6, III clearly requires an adjudicatory process with an evidentiary proceeding and appropriate legal and factual findings arrived at on an adequate factual basis. When the institution – Dartmouth College – and the Attorney General's office privately come to an agreement on modification and that agreement is merely rubber-stamped by the court without a full and proper adjudicatory deliberation, the law is being subverted and Mr. Keeler's intent left undefended. Alco Gravure v. Knapp Foundation, 64 N.Y.2d at 468-69.

The manner in which Dartmouth pursued the modification of the restrictions on the Keeler Fund, if it were permitted as here, would give it, and any institution similarly situated, the unlimited power of amendment that is in violation of the law. The power of the New Hampshire Circuit Court, Probate Division to approve the amendment sought by Dartmouth is expressly limited by *cy pres* considerations under provisions of the common law, RSA 498:4-a, RSA 564-B:4-413, and RSA 292-B:6, III. Alco Gravure, 64 N.Y.2d at 466. The Court's approval of the amendment was beyond the limit of its power under the law. Further, it manifests a violation of the Appellants rights to due process under the law. N.H. CONST. pt. I, art. 12.

CONCLUSION

Based upon the foregoing, the Appellants request the following relief:

1. Reverse the Trial Court's denial of the Appellants' Motion to Intervene:
2. Vacate the Trial Court's February 18, 2022 Order with additional instructional rulings this Court would deem helpful to the parties and Trial Court in bringing this litigation to prompt resolution;
3. Remand this matter to the Trial Court;
4. Accompany the remand order with the following instructions ordered:
    A. Dartmouth College is enjoined from expending any of the Keeler Fund until further order of the Trial Court thereon;
    B. Appellants are authorized to oppose Dartmouth College's Modification Application and to enforce the intentions of Robert T. Keeler as set forth in the Statement of Understanding, and as illuminated further by extrinsic evidence. The Director of the Division of Charitable Trusts is ordered to cede this responsibility to the Appellants exclusively;
    C. Appellants are authorized, as part of this matter, to bring counterclaims against Dartmouth College for breach of contract, such as may exist, solely for the remedy of forfeiture of the Keeler Fund back to the Donor's successors;
5. Order the Trial Court to schedule a Structuring Conference with Counsel of record as expeditiously as time becomes available with the Trial Court.

REQUEST PURSUANT TO SUPREME COURT RULE 16(3)(H)

The Appellants requests oral argument before the full court which will not exceed fifteen (15) minutes. Oral argument will be presented by John E. Laboe, Esquire.

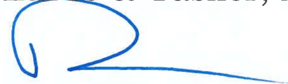
CERTIFICATION PURSUANT TO SUPREME COURT RULE 16(3)(I)

I hereby certify that the decision being appealed from is appended to this brief in the Addendum. Said decision is also included in the Appendix accompanying this brief.

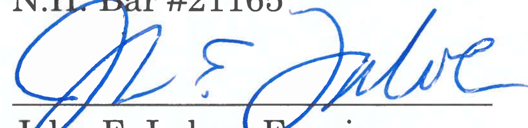
Respectfully submitted,

Peter P. Mithoefer, the Fiduciary
for the Estate of Robert T. Keeler
and the Robert T. Keeler
Foundation

By their Attorneys:
Laboe & Tasker, PLLC



Danielle C. Gaudreau, Esquire
N.H. Bar #21165



John E. Laboe, Esquire
N.H. Bar #1405
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Concord, New Hampshire 03301
Telephone: (603) 224-8700

STATEMENT OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,436 words, exclusive of any pages containing the table of contents, table of authorities, and pertinent texts of statutes and constitutional provisions, which is fewer than the 9,500-word limit permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief. I also certify that this brief complies with all typeface and other formatting requirements set forth in Rule 16

Danielle C. Gaudreau

CERTIFICATION OF SERVICE

I, Danielle C. Gaudreau hereby certify that a copy of Peter P. Mithoefer, the Fiduciary for the Estate of Robert T. Keeler and the Robert T. Keeler Foundation's brief shall be served on the following parties of record, through the New Hampshire Supreme Court's electronic filing system:

Robert A. Wells, Esquire and Ralph F. Holmes, Esquire, counsel for Trustees of Dartmouth College

Diane M. Quinlan, Esquire and Thomas J. Donovan, Esquire, counsel for Director of Charitable Trusts Division of the New Hampshire Attorney General's Office

Date: September 12, 2022

Danielle C. Gaudreau

ADDENDUM

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

2nd Circuit - Probate Division - Haverhill
3785 D.C. Highway Box 3
N. Haverhill NH 03774-4936

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

Case Name: **In Re: Robert T. Keeler Maintenance Fund for the Hanover County Club at Dartmouth College**
Case Number: **315-2021-EQ-00474**

ORDER

A hearing was held in this matter on December 9, 2021 to address the Motion to Intervene (Index #11) filed by Peter P. Mithoefer as fiduciary for the Estate of Robert F. Keeler and the Robert F. Keeler Foundation (hereinafter "Foundation"); the Objection to Motion to Intervene (Index #13) filed by the Trustees of Dartmouth College and the Reply to Objection to Motion to Intervene (Index #14) file by Peter P. Mithoefer. Present at the hearing was Danielle C. Gaudreau, Esquire representing Peter P. Mithoefer in his fiduciary capacity; Ralph F. Holmes, Esquire representing the Trustees of Dartmouth College (hereinafter "Trustees"); Tammy Hickox, Esquire, associate general counsel for Dartmouth College; Thomas J. Donovan, Esquire, Director of Charitable Trusts for the State of New Hampshire and Diane M. Quinlan, Esq., Assistant Director of Charitable Trusts for the State of New Hampshire.

Attorney Gaudreau reiterated the arguments set forth in her pleadings. The thrust of her argument is that the Last Will and Testament (hereinafter, "Will") of Robert T. Keeler gifted funds to Dartmouth College which were to be used for the specific and exclusive purpose of upgrading and maintaining the college's golf course, known as the Hanover Country Club. She argued that her client is the remainder beneficiary of that gift. The decedent's wife, Margaret Keeler, negotiated a Statement of Understanding[1] between the Estate of Robert T. Keeler and the Trustees (a/k/a "the Agreement") which facilitated the provisions of the will. Attorney Gaudreau noted that the initial draft of the Agreement was amended to delete a provision that had originally authorized the Trustees to use the income from the fund for other purposes. That provision was consistent with the law at the time, RSA 292-B:6. Attorney Gaudreau argued that the version of that statute in effect at the time the Agreement in this matter was executed required the institution to obtain the consent of the donor prior to modifying any restrictions on the use of the gift. She argued that since the donor is deceased, the authority to object to any modification lies with the donor's estate.

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[1] ***Exhibit 1***, Tab A

Attorney Gaudreau acknowledged that RSA 292-B has subsequently been amended but asserted that it is unclear whether the either version of RSA 292-B even governs the Agreement. She argued that the doctrine of *cy pres* is not applicable in light of the fact that the Trustees have made a voluntary decision to frustrate the intended purpose of the gift. She argued that amending the stated purpose of the fund pursuant to the pending Petition would constitute a breach of contract, resulting in unjust enrichment on the part of the Trustees and further constitute a violation of trust law. She argued that in his Will Robert T. Keeler established a testamentary charitable trust with Dartmouth being the primary beneficiary and the Foundation being the remainder beneficiary. She argued that the Foundation is entitled to any funds in excess of what was necessary to maintain the golf course. Attorney Gaudreau argued that the proposed modification of the use of the funds would not conform to the negotiated purpose of preservation of the golf course. Attorney Gaudreau argued that, in light of the decision by the Trustees of Dartmouth College to close the Hanover Country Club, any unused funds should be distributed to the Robert F. Keeler Foundation, asserting that this is consistent with the terms of the Will.

Attorney Gaudreau argued that even though the current version of RSA 292-B does not require notice to the donor when seeking modification of restrictions on the use of the funds, that should not preclude the donor's right to intervene. Attorney Gaudreau argued that her client has standing to intervene in this matter because they have a vested interest in the excess funds not used for the stated purpose to upgrade and maintain the golf course. She argued that the events creating the need to modify the purpose of the funds was not outside the control of the Trustees, but rather was totally within their control.

Finally she argued that intervention is appropriate in the context of judicial economy and would be preferable to forcing the interveners from filing a separate equitable action.

Attorney Holmes argued that RSA 292-B, which New Hampshire's adoption of The Uniform Prudent Management of Institutional Funds Act (hereinafter "UPMIFA") governs this proceeding and allows the Court to modify The Robert T. Keeler 1936 Maintenance Fund as requested by the Trustees in their Petition. He noted that RSA 292-B:6.II. allows the Court to modify the purpose of an institutional fund under circumstances with notice to the attorney general. He argued that the statute does not require notice be given to the donor. Similarly, he argued that the law does not require notice of the intended modification be given to any alternative charities that the donor may have favored. Finally, although they argued that the holdings in the case *In re Trust of Mary Baker Eddy*, 172 N.H. 266 (2019) do not apply to this case, they argued that even under the five factor, "Blasko test," the interveners would not have standing.

Director Donovan reported that the State takes no position the Motion to Intervene, but does support the Petition on its merits. His department has reviewed the Will and the Agreement in this matter. The funds in the Robert T. Keeler 1936 Maintenance Fund have been used for the expressed purpose in the Agreement for approximately fifteen years. However, the Trustees decision to close the Hanover Country Club was based on the fact that continuation of the facility constituted an unjustifiable financial drain on the institution. That change in circumstances makes the continuation of the designated use of the funds impracticable. The proposed modification to use the funds for golf related programs and facilities makes sense and would be appropriate.

Director Dovovan reported that his department views the Robert T. Keeler 1936 Maintenance Fund as a completed gift, which would make it an, "institutional fund," as defined by RSA 292-B. The Director advised the Court that they insisted that the fund would continue to be used for golf related programs and facilities.

While not taking a position on the Motion to Intervene. However, noted that a potential middle ground would be to deny intervention but to allow the proposed interveners to file an amicus brief. *See, In re Trust of Mary Baker Eddy, Id.*

Attorney Holmes asserted that the interveners have the burden of proof to establish standing. He argued that their claim is deficient both legally and factually. He noted that Robert T. Keeler was an alumni of Dartmouth College. In his Will he provided for a gift to be made to the college. The amount of the gift was to be determined by his executor. The balance of the estate assets not used to fund that gift were to go to the Foundation.

Attorney Holmes argued that Statement of Understanding, which was signed by Margaret P. Wheeler as executor of the Estate of Robert T. Keeler and by Dartmouth College, is dispositive of all issues presently before the Court. ***Exhibit 1,*** Tab A He noted that neither the executor nor the Foundation reserved any rights or powers over the funds gifted to the college in the Agreement. He noted that Director Donovan advised the Court that his department views the funds transferred to the college pursuant to the Agreement as a completed gift. The executor did not retain any rights with respect to the funds gifted to the college. Attorney Holmes argued neither the executor nor the Foundation are beneficiaries of the gift.

Attorney Holmes argued that Dartmouth College is not a trust under the trust code. It is a voluntary corporation as defined in RSA 292. He argued that no trust was created by the Agreement. The funds transferred to the college pursuant to the Agreement were a "gift instrument" as defined by RSA 292-B. He argued that neither the executor nor the Foundation are beneficiaries of any trust. He argued that the Agreement was a "gift instrument" as defined by RSA 292-B.

Attorney Holmes argued that our codification of UPMIFA tracts the uniform law. ***Exhibit 1,*** Tab B He argued that the New Hampshire Supreme Court has held that in such circumstances the New Hampshire statute shall be interpreted consistent with the intent of the uniform law. He directed the Court to a note in the uniform law which indicates that the Drafting Committee intentionally omitted the requirement for any prior notice to be given to the donor in cases where there is a proposed modification of the purpose of the gift. *Id.*, p. 3 Enforcement of the donor's intent under the statute is delegated to the Attorney General.

Attorney Holmes argued that this is not a case under the Uniform Trust Code, but noted that even if it was, notice to the donor would not be required under the facts of this case, citing *Hardt v. Vitae Foundation, Inc.*, 302 S.W. 3d 133 (Miss. App. 2009) That case also expressly held that a donor has no standing to enforce gift restrictions under UPMIFA. ***Exhibit 1,*** Tab C

Attorney Holmes noted that cases in other jurisdictions have consistently held that the donor has no standing to enforce restrictions on charitable gifts under UPMIFA, citing an unpublished opinion from Minnesota (***Exhibit 1,*** Tab D) and two cases based on prior versions of the law, UMIFA. ***Exhibit 1,*** Tab E and Tab F

Attorney Holmes argued that there is nothing in the Agreement which could be interpreted as the retention of a right of reverter or power to redirect the funds by the donor.

Attorney Holmes argued that he viewed the claim by the Second Church in the *Mary Baker Eddy* case was much more compelling than the claim by the interveners in this matter. The Second Church was an actual beneficiary. Even so, the N.H. Supreme Court held that the Second Church did not have standing to intervene based on a five factor test articulated in that decision. Attorney Holmes argued that the five factor test is not required in the case before this Court, but even if it was the interveners would fail.

Under the five factor test applied in the *Mary Baker Eddy* case, the first factor addresses the nature of the act complained of and the remedy sought from the point of view of the entity seeking standing.

Attorney Holmes argued that this case Dartmouth is seeking a statutory right to ask the Court to approve modifications of the restrictions on the gift with the input and oversight of the Attorney General based on very difficult decisions necessitated by severe financial conditions at the college. ***Exhibit 1***, Tab G and Tab H

Attorney Holmes noted that the remedy the interveners are seeking is return of the funds. He argued that they are not entitled to that remedy.

The second factor in the test was the Attorney General's availability and effectiveness. Attorney Holmes presented records of the significant and meaningful involvement of the Attorney General in this case. ***Exhibit 1***, Tab I Not only were the Director and Assistant Director personally present at the hearing the records chronical their involvement and oversight.

The third factor of the test is the presence of bad faith. Attorney Holmes argued that there has been no bad faith. Although the interveners complained of some delayed response by the college the fact was that the college was waiting for the regulators to opine on the nature of the gift. Once they concluded that the gift was a completed gift that information was shared with the interveners in a timely manner. ***Exhibit 1***, Tab J

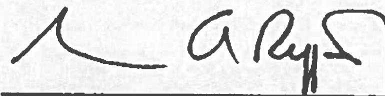
The final factors in the test relate to the benefitted class, its relationship to the community as well as subjective factors and social desirability. Attorney Holmes noted that the benefitted class is the college and the college community. He argued that Dartmouth is a "conscientious and careful steward" of its resources supporting the enrichment of the students and the community.

Based on the law and arguments presented this Court finds that neither Peter P. Mithoefer as fiduciary for the Estate of Robert F. Keeler nor the Robert F. Keeler Foundation have standing to participate as a party in this case. The Court agrees with the position of both the Petitioner and the Director of Charitable Trust in that funds delivered to Dartmouth College pursuant to the <u>Statement of Understanding</u> constituted a completed gift. The provision in the <u>Will</u> relied upon by the interveners, which provided that estate funds in excess of those determined by the executor to be necessary for the upgrade and maintenance of the Hanover Country Club would be distributed to the Foundation was fully executed through the <u>Statement of Understanding</u>. The amount of the gift was determined. The gift was delivered and received. The balance of the funds in the estate were presumably disbursed to the Foundation. At that point the donor's claim to the gifted funds was extinguished. There were no rights of reverter or residual claims of any nature retained by the donor, either in the <u>Will</u> or in the <u>Agreement</u>. The controlling statute, RSA 292-B et. seq. does not confer any residual rights on the donor and does not create a right to participate in this case as a party.

The Court orders the following:

1. The Motion to Intervene (Index #11) filed by Peter P. Mithoefer as fiduciary for the Estate of Robert F. Keeler and the Robert F. Keeler Foundation is DENIED.
2. Notwithstanding the above the Court grants Peter P. Mithoefer as fiduciary for the Estate of Robert F. Keeler and/or the Robert F. Keeler Foundation leave to file an *amicus* brief with respect to the proposed modification of the Robert T. Keeler 1936 Maintenance Fund, to be filed within thirty (30) days of the Clerk's notice of this order.

Ordered by the Court:



December 23, 2021
Date

Judge Thomas A. Rappa, Jr.

(250)