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

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

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

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I. THE APPELLANTS' NOTICE OF APPEAL WAS TIMELY.

Dartmouth College's ("Dartmouth") Application for Modification Pursuant to RSA 292-B:6(III) ("Application") sought to rewrite the terms of Robert T. Keeler's gift to the school. App. at 1-37. The Estate of Robert T. Keeler ("Estate") and the Robert T. Keeler Foundation ("Foundation") (collectively, the "Appellants") sought to intervene to enforce Mr. Keeler's intent in making the gift. App. at 38-46. The Motion to Intervene was denied December 23, 2021 (notice issued December 28, 2021). App. at 61-67. The Appellants' Motion for Reconsideration of this Order was timely filed on January 7, 2022, and ultimately denied on January 20, 2022 (noticed issued January 21, 2022). App. at 78-79. The issue of standing under RSA 292-B:6(III) has never been addressed by this Court and, pursuant to Prob. Div. R. 79, the Appellants filed a Motion for Interlocutory Appeal so pertinent questions of law could be addressed by this Court. App. at 80-93. The Trial Court rendered the interlocutory appeal process moot, however, by both denying the Motion for Interlocutory Appeal and issuing an Order on the Application itself on February 18, 2022 (notice issued same day). App. at 97-99. The Appellants' Notice of Appeal was timely filed on March 18, 2022 – twenty-eight (28) days after the February 18, 2022 denial of their Motion for Interlocutory Appeal.

This Court's *Notice of Docketing and Mandatory E-Filing* dated March 25, 2018 recognizes that the Appellants' Notice of Appeal was filed on March 18, 2022.[1] The Appellants believe that the Clerk of the Court would have

[1] Inexplicably, the Appellee claims the Appellants had not filed their Notice of Appeal until September 12, 2022. Brief of Appellee at 21.

rejected the Notice of Appeal if it was not timely filed. The Trial Court's Notice of Decision denying the Appellants' Motion to Allow Interlocutory Appeal recites that the Appellants had until March 20, 2022 to file a Notice of Appeal to the Supreme Court. App. at 97. At this juncture, with regard to the Motion to Allow Interlocutory Appeal, the Appellants are what Sup. Ct. R. 7(1)(c) refers to as a "newly losing party".

The Appellants' Motions for Reconsideration and for Interlocutory Appeal were both timely filed, post decision motions, which stayed the running of the appeal period. Sup. Ct. R. 7. This is not comparable to an aggrieved party filing successive motions for reconsideration which would not continue to stay the appeal period. Petition of Ellis, 138 N.H. 159, 161-62 (1996). Rather, the Appellants filed a Motion for Reconsideration asserting the Trial Court had overlooked and/or misapprehended points of law and/or fact in its December Order and, once that was denied, asked the Trial Court to sponsor an Interlocutory Appeal to this Court to address issues of general importance in the administration of justice and issues of first impression. See Prime Fin. Grp. v. Masters, 141 N.H. 33, 35 (1996) (appeal timely following two timely filed successive motions: motion for new trial and motion for reconsideration).

Sup. Ct. R. 7(1)(c) expressly contemplates that successive post-decision motions are entirely permissible and stay the running of the appeal period so long as the would-be appellant is, in each instance, the newly losing party. The Estate and Foundation constituted newly losing parties with regard to both their Motion for Reconsideration and their Motion to Allow Interlocutory Appeal. The Court should therefore not dismiss the within appeal for untimeliness.

II. MODIFICATION PURSUANT TO UPMIFA REQUIRES THE APPLICATION OF *CY PRES* PRINCIPLES.

The central-most error of law found in the Trial Court's ruling is to be found in this text: "[t]he 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." App. at 65. It is not possible to arrive at this conclusion unless you pretend the doctrine of *cy pres* and its attendant legal principles are not central to the statute. It is also not possible to arrive at this conclusion unless you assume the trial court has no role in determining the merits of the facts presented in support of an application under the statute. Nor can you arrive at this conclusion unless you substantially misread In re Trust of Eddy, 172 N.H. 266 (2019).

In Eddy, this Court recognized the doctrine of special interest standing in matters involving charitable trusts. Eddy, 172 N.H. at 274. Nothing in RSA 292-B *et. seq.* suggests special interest standing would not also apply to this statutory scheme. Particularly when parties, such as the Estate and Foundation, "are acting for the benefit" of the charitable purpose. Eddy, 172 N.H. at 274.

The Appellee's Brief does not attempt to explain or excuse Dartmouth's failure to even allege that the restrictions on the use of the fund had become "unlawful, impracticable, impossible to achieve or wasteful" as required by the statute. Although Attorney Holmes fully acknowledged at the hearing on the Motion to Intervene that a merits hearing must be conducted, Transcript at 4, no such merits hearing ever occurred.

At the Motion to Intervene hearing, Attorney Holmes presented to counsel for the Appellants, Danielle Gaudreau, a large binder of documents, which she had no time to review. His exact words at the hearing were: "I

have provided well before the hearing a copy of that [binder] to Counsel." Transcript at 12. Attorney Holmes thought better of that representation and changed his claim in the Appellee's Brief about when the documents were provided to be: "[t]hese and other documents were contained in a binder entitled 'Supporting Authority and Exhibits of Dartmouth College' App. at 100-70 (sic) copies of undersigned provided to all counsel in the courthouse lobby before the hearing." Appellee's Brief, Footnote 8 at 21. It is now admitted that delivery of the 70-page binder was an ambush upon Appellants' counsel at the hearing, part of a series of Appellee's procedural missteps.

Very little of the materials in the binder were ever mentioned or referred to by Attorney Holmes during the course of the hearing, with the exception of cited case precedent. The Transcript reveals that Attorney Holmes never once asked that the binder be admitted into evidence as a full exhibit. Unbeknownst to the parties, the Court *sua sponte* marked this as Exhibit 1 and deemed it (tacitly without alerting the parties and counsel) a full exhibit accepted, apparently, for the truth of the matters stated therein. This was learned for the first time when reading the Trial Court's Order. App. at 67. The Appellants never objected to this as a full exhibit because it was never submitted as such; had Attorney Holmes purported to tender these as full exhibits to prove the truth of the matters stated, Attorney Gaudreau would have certainly objected.

Text at pages 13, 14, 20 and 21 of the Appellee's Brief, highlights what is Tab G of Exhibit 1, an email entitled "Important Message about Athletics" from Dartmouth President Philip J. Hanlon to the Dartmouth community discussing the closure of HCC and the varsity team programs, App at 137-38." The Transcript reveals that Attorney Holmes never even mentioned this

document in open court, much less asked that it be admitted into evidence. To characterize this as an exhibit that was tendered as such and accepted by Attorney Gaudreau without objection completely mischaracterizes the hearing. Tab H was referred to glancingly in the vaguest of terms (Transcript at 17). Neither the Court nor Attorney Gaudreau could have discerned what was actually in Tab H from the brief and perfunctory statements made by Attorney Holmes at the time. Transcript at 17. Nonetheless, Tab H is given high importance at the Appellee's Brief at 15 and 21 as it references the Appendix at 140-49.

The Appellee is attempting to fashion a factual record that was never established at the hearing on the Motion to Intervene. The Appellee claims in its Brief at 20 that the Attorney General had, among other things, "[r]eviewed the financial change of circumstances at Dartmouth leading to closure of HCC;... and [d]etermined that the change of circumstances 'meets the definition of impracticable under either common law, either the Cy Pres statute or under the applicable statue, which is UPMIFA".

The state of the record supports the conclusion that all the Attorney General did was read Dartmouth's news releases and take Dartmouth at its word without the slightest fact-checking or further inquiry. As an example of information the Attorney General apparently lacked, missing from the documents provided to the Attorney General by the Appellee was the original draft Statement of Understanding ("SOU") between the Estate and Dartmouth showing the critical text that was deleted from that document with Dartmouth's full agreement.

The Trial Court's ruling stands for the proposition that any involvement of the Attorney General is sufficient protection for the donor; and the donor's representative simply shall not be heard – ever. If the facts

in this case are not strong enough to support donor standing, how much more egregious would the facts have to be for that to be allowed? The Court should rule that New Hampshire adopt the proposition that the Attorney General is not entitled to exclusive standing in the face of insufficient action. See Smithers v. St. Luke's-Roosevelt Hosp. Ctr., 281 A.D.2d 127, 137 (2001).

The legislative history on RSA 292-B on the subject of the classic *cy pres* situations (such as RSA 292-B:6(III)) is starkly clear on the point. App. at 227, 266 and 269-70. The predecessor statute to UPMIFA, known as UMIFA, was unclear about the full application of traditional *cy pres* principles and necessary corollaries. App. at 227. Under UPMIFA, common law *cy pres* is to be considered fully grafted into the statute, including the concept that the Court must determine that the claim of impracticality or impossibility is supported by the factual record - that never happened here. Protection of the donor's intent was to be enhanced, not diminished or abandoned altogether. The Attorney General's allowance of the modification on such a weak showing, without an independent review of Dartmouth's proffered justifications, which are easily rebuttable, indicates a gross insufficiency of advocacy for the donor's intention and a departure from the legislative intent of UPMIFA.

Even if the restrictions were found to be impractical, impossible, or wasteful, before application of *cy pres*, there must be a finding that the donor under the charitable instrument had a general charitable intent. Kolb v. City of Storm Lake, 736 N.W.2d 546, 558 (2007). In the present matter, the Trial Court did not make any findings of whether the donor, Mr. Keeler, had any charitable intent to any cause beyond strictly the golf course, itself.

Dartmouth also does not argue that Mr. Keeler had a general charitable intent, but rather focuses on whether the modification it seeks is

at least tangentially related to the practice of golf, as if the incantation of the word "golf" somehow implies a general intent. Mr. Keeler did not, in fact, have a general charitable intent. His intent was not to support "golf at Dartmouth", his intent was to support a specific asset of Dartmouth's – the golf course at the Hanover Country Club ("HCC"). Absent a finding of a more general charitable intent, the fund should revert to the donor's successors. Evans v. Abney, 396 U.S. 435, 440 (1970).

Compare this matter to the Kolb case in which the gift restrictions could be modified under *cy pres* principles because the trial court found, preliminarily, an ongoing general charitable intent that was preserved. Kolb, 736 N.W. at 548. Modification for an entirely alternative purpose, not within an express broader general scope, however, is not a proper application of *cy pres*.

New Hampshire requires the finding of a general charitable intent before applying *cy pres*. In re Certain Scholarship Funds. 133 NH 227 (1990). In the Scholarship case, the Court trial court treated its finding of a general charitable intent as the *sine qua non* to applying *cy pres*. The Trial Court in this case permitted the complete subversion of Mr. Keeler's primary (and exclusive) intent – supporting the HCC golf course.

The lack of a general charitable intent precludes the availability of *cy pres* relief. Evans, 396 U.S. at 441. In the event that the purpose of the gift fails, the assets revert back to the donor or its successors. Op. of Justices, 101 N.H. 531, 533 (1957). There is no need for the gift instrument to include a right of reverter. Evans, 396 U.S. at 440. While the absence of a stated right of reverter may lend support to a finding of general charitable intent, that is not the sole factor to be considered. In the present case, the Estate negotiated out a release provision which would have permitted Dartmouth to

divert the funds to a purpose other than the golf course.[2] The removal of this provision demonstrates compellingly that the gift was limited to the specific purpose stated.

III. THE TRIAL COURT'S OFFER THAT THE APPELLANTS BE PERMITTED TO SUBMIT AN AMICUS BRIEF WAS AN INSUFFICIENT AND HOLLOW GESTURE AND THE APPELLANTS PROPERLY DECLINED THE OFFER.

An opportunity for the Appellants to submit an amicus brief was an insufficient and hollow offer. An amicus brief has utility and significance only to the extent that a sufficient factual record was developed upon which the amicus brief could operate. No discovery had been conducted by the Attorney General and no factual record was ever created, even for the merits ruling. The amicus offer provided no opportunity to conduct discovery or introduce evidence on the underlying issues.

Assistant Attorney General Donovan of the Division of Charitable Trusts did not take an explicit position against the Estate and Foundation being allowed to intervene. Instead, he proposed a middle ground to the Court whereby the Estate and Foundation could file an amicus brief and submit documentary support for their arguments. Transcript at 12. That is

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[2] The provision excised from the SOU in the negotiation process read as follows: "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 rejected version of the SOU appears at App. at 45, the final version of the SOU appears at App. at 34.

not how the Trial Court ruled. There was permission for an amicus brief, but no opportunity to add to the factual record. App. at 66.

As to the donor's intent and the nature of the agreement reached by the Estate and Dartmouth, the Trial Court declined the Appellants any opportunity to present evidence about the parties negotiations in the creation of the SOU. Had the Trial Court conducted a merits hearing on the Application, this would have impacted the Trial Court's findings including, *inter alia*, whether there was a general charitable intent or if Mr. Keeler's purpose was to benefit a specific object. Kolb, 736 N.W.2d at 558.

Discovery on the impossibility/impracticability element would have lead to the revelation that the plan to develop the golf course into student housing goes back at least to 2019. Amanda Zhou, *Dartmouth is Revising the 17-year-old Master Plan that Guides Expansion Projects*, VALLEY NEWS, (Apr. 21, 2019, 10:49 PM), https://www.vnews.com/Dartmouth-develops-master-plan-24722745. There would also have been an opportunity for the introduction of evidence on an apparent offer from an alumni group called "Friends of Dartmouth Golf" to provide the school with over $22,000,000.00 in funds to support the golf program. Jim Nugent, *Dartmouth Golf Elimination a Sad and Shocking Story (updated)*, GLOBAL GOLF POST (Jan. 30, 2021), https://www.globalgolfpost.com/more/dartmouth-golf-elimination-a-sad-and-shocking-story-2-2/. This fact finding should have been conducted in order for the Trial Court to determine whether the destruction of the golf course was due to actual impracticality or was a mere business decision. Instead, the Trial Court accepted, without any supporting evidence, Dartmouth's allegations of financial woes only vaguely adumbrated in its Application.

IV. THE APPELLANTS SHOULD HAVE BEEN PERMITTED TO DEVELOP THEIR CONTRACT CLAIM.

The Appellants specifically alerted the Trial Court to their claim that the SOU should be considered a contract between the Estate and Dartmouth. App. at 70-72. They were, ultimately, unable to set forth their case in the first instance, despite credible documentation of contractual negotiations between the parties as recited above. Mr. Keeler's Will specifically provides that funds for Dartmouth were for a specific and particular purpose (the HCC golf course) and any funds not applied to the golf course were to be distributed to the Foundation as a contingent donee. App. at 45-46. These facts support a finding for a conditional contract. L.B. Research & Education Foundation v. UCLA Foundation, 130 Cal. App. 4th 171, 178-9 (2005). "[I]f the donor clearly manifests an intention to make a conditional gift, that intention will be honored." Id. 178. L.B. Research is analogous to the present set of facts. The writings creating a gift to the UCLA Foundation, as do the Will and SOU here, showed "an intent to provide that if the fund were not used for the designated purposes it should revert to a contingent donee, and that L.B. Research intended to impose an enforceable obligation on the UCLA Foundation to devote the fund to the stated purposes on the stated conditions." Id. at 179.

It was a plain error of the Trial Court to impede the Appellants from raising this argument as a full party in the case. The Appellants' contract claim constitutes an alternate theory of relief that presented a colorable claim which the Trial Court merely dismissed out of hand.

CONCLUSION

The Appellants incorporate by reference the requested relief articulated in their opening brief. Appellants Brief at 45.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 2,974 words, exclusive of any pages containing the table of contents and table of authorities, which is fewer than the 3,000-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

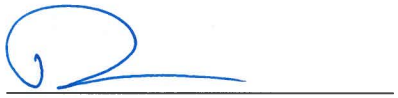
CERTIFICATION OF SERVICE

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 Reply 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, Michael R. Haley, Esquire, and Thomas J. Donovan, Esquire, counsel for Director of Charitable Trusts Division of the New Hampshire Attorney General's Office

Date: November 1, 2022



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