THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2022-0145

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

MEMORANDUM OF LAW FOR THE NEW HAMPSHIRE DIRECTOR OF CHARITABLE TRUSTS

The New Hampshire Director of Charitable Trusts files this Memorandum of Law pursuant to Supreme Court Rule 16(4)(b).

Appellants Robert T. Keeler Foundation (the "Foundation") and the fiduciary of the estate of Robert T. Keeler (the "Fiduciary") appeal an order of the 2nd Circuit—Probate Division—Haverhill (*Rappa*, J.). The Probate Court's order denied Appellants' motion to intervene in an application by Dartmouth College pursuant to RSA 292-B:6, III to modify the purpose of an institutional fund created by the Last Will and Testament of Robert T. Keeler (the "Will"). The Office of the Attorney General, Director of Charitable Trusts is a necessary party in such proceedings. RSA 292-B:6, III.

In their appeal, Appellants argue that they should have been permitted to intervene in the Probate Court matter under RSA 292-B:6, contract law, and the common law. As explained below, Appellants do not provide this Court with a basis to disturb the Probate Court's conclusions.

STATEMENT OF THE CASE AND FACTS

Robert T. Keeler (the "Donor") executed his Will on May 14, 1999. Appellants' Appendix ("App.") 31. Pursuant to the Will, the residue of the Donor's estate was to be divided into two equal shares, one of which was to be distributed

> 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. 20. The Donor named his wife, Margaret Keeler, the Executor of his estate. App. 21. Nothing in the Will provides for ongoing monitoring or management of this bequest by either the Executor or the Foundation.

Upon the Donor's death, the Executor worked with Dartmouth to determine the amount of the distribution to Dartmouth under the Will. In 2005, the Executor and Dartmouth signed a Statement of Understanding, confirming the Executor's determination that $1.8 million was the amount necessary to sufficiently upgrade and adequately maintain Dartmouth's golf course, and Dartmouth's acceptance of the gift. App. 34–35. The Executor distributed $1.8 million to Dartmouth, creating a restricted endowment fund called the "Robert T. Keeler 1936 Maintenance Fund" (the "Fund") at Dartmouth, and provided the balance of the residue of the Donor's estate to the Robert T. Keeler Foundation (the "Foundation"). *Id.* Upon completion

of the probate process, the estate was closed, and the Executor was discharged.

Dartmouth used the Fund to pay for upgrades and maintenance of the golf course for approximately 15 years. In 2020, faced with financial difficulties associated with the Covid-19 pandemic, Dartmouth decided to close the golf course, leaving roughly $3.8 million in the Fund. App. 140–49. In light of this decision, Dartmouth determined that the Fund's purpose of upgrading and maintaining the golf course was impracticable. Prior to seeking court approval to use the Fund for other purposes, Dartmouth sought the input of the Attorney General, Director of Charitable Trusts (the "Director") on its proposed use of the Fund. App. 150.

Over the course of roughly six months, the Director and Dartmouth met for at least three videoconferences and exchanged numerous emails about whether Dartmouth's proposed modification would be consistent with the charitable purpose expressed in the Donor's will in accordance with RSA 292-B:6, III. *Id.* As a result of these communications, Dartmouth substantially revised its initial proposal for the use of the Fund. Dartmouth's final proposal, as stated in its Application for Modification, restricted the use of the Fund to the following:

> a. To support the study and design of golf practice area(s) and practice holes, as well as the construction, upkeep, improvement and maintenance of these facilities, that would support Dartmouth's men's and women's varsity golf programs and other physical education and recreation programs run by Dartmouth that relate to golf, and/or for educational and recreational access to golf by Dartmouth students, faculty and staff, including without limitation support for the agronomic and infrastructure needs of these facilities,

inclusive of supplies, equipment purchases and other necessary investments;

b. To support the administrative activities and equipment storage needs for Dartmouth's varsity golf programs and/or other physical education and recreational golf programs run by Dartmouth, including without limitation the upkeep, improvement and potential renovation of the existing clubhouse for these purposes; and

c. To otherwise support Dartmouth's varsity golf programs, and/or other recreational or educational golf programs run by Dartmouth.

App. 2. Dartmouth filed its Application in the Probate Court on August 17, 2021.

The Fiduciary of the Donor's estate and the Foundation moved to intervene in the Probate Court modification proceeding. App. 38–42. The Probate Court held a hearing on the motion to intervene on December 9, 2021, and denied the motion by order dated December 23, 2021. App. 61–66. In the same Order, the Probate Court granted the Fiduciary and Foundation leave to file an amicus brief in the proceeding. *Id.* Neither did. The Appellants sought reconsideration of the denial on January 7, 2022, App. 68–73, and the Probate Court denied reconsideration on January 20, 2022. App. 78.

Appellants moved for interlocutory appeal on February 4, 2022. App. 80–93. The Probate Court issued an order on February 18, 2022, denying the motion for interlocutory appeal and granting the Application for Modification. App. 97–99. On March 18, 2022, Appellants filed their notice of appeal in this Court to "seek review of the Probate Court's denial of their intervention in the matter." Notice of Appeal, Item 13 at 2.

STANDARD OF REVIEW

This Court will not overturn a trial court's decision on a motion to intervene unless it is "persuaded that the trial court's exercise of discretion is unsustainable." *Lamarche v. MacCarthy*, 158 N.H. 197, 200 (2008). It will "uphold the findings and rulings of the probate court unless unsupported by the evidence or clearly erroneous as a matter of law." *In re Estate of Beaudet*, Case No. 2004–0048, 2004 WL 7318750, at *1 (N.H. Dec. 10, 2004) (quoting *In re Estate of Washburn*, 141 N.H. 658, 659 (1997)) *accord* RSA 567-A:4 ("The findings of fact of the judge of probate are final unless they are so plainly erroneous that such findings could not be reasonably made.").

ARGUMENT

Appellants' appeal is untimely and must be dismissed. If this Court nevertheless entertains Appellant's appeal, the only issue is the denial of Appellants' motion to intervene. Here, the Probate Court properly denied the Fiduciary and Foundation's motion to intervene because neither had "a right involved in the trial" or "a direct and apparent interest therein." *Lamarche*, 158 N.H. at 200. Appellants do not provide this Court with any basis to overturn that denial.

I. THE APPEAL IS UNTIMELY.

The rules of the Supreme Court provide that

> A trial court order denying a motion by a non-party to intervene in a trial court proceeding is treated as a "final decision on the merits" for purposes of appeal. Thus, such an order is immediately appealable to the supreme court. Pursuant to this rule, however, such an appeal is not a mandatory appeal.

> Therefore, a non-party who wishes to appeal the trial court's denial of the non-party's motion to intervene must file an appeal pursuant to Rule 7(1)(B) within the time allowed for appeal under that rule.

N.H. Sup. Ct. R. 3, cmt. Appeals from a trial court's decision on the merits "shall be filed by the moving party within 30 days from the date on the clerk's written notice of the decision on the merits…." N.H. Sup. Ct. R. 7(1)(B); *accord Petition of Rubenzer*, Case No. 2015-0037, 2015 WL 11082611, at *1 (Sept. 24, 2015). "[M]otions for late entry of an appeal document are not favored and shall be granted only upon a showing of exceptional circumstances." N.H. Sup. Ct. R. 21(6); *accord State v. Mottola*, 166 N.H. 173, 175–76 (2014).

In this case, the clerk's written notice of the Probate Court's denial is dated January 21, 2022. App. 79. This constituted a final decision on the merits, which Appellants were required to appeal within 30 days.[1] Instead, they waited nearly two months until March 18, 2022. Appellants did not move for a waiver of the Rule 7(1)(B) deadline, nor make any showing of exceptional circumstances. Their appeal is untimely and must be dismissed.

[1] Although the appeal deadline is stayed by the filing of a motion to reconsider, it is not stayed by the filing of a motion for leave to file interlocutory appeal. *See Riso v. Riso*, 172 N.H. 173, 176 n.2 (2019) ("[S]uccessive post-decision motions…filed by a party that is not a newly-losing party will not stay the running of the appeal period.") (quoting N.H. Sup. Ct. R. 7).

II. APPELLANTS DO NOT MEET THE STANDARD FOR INTERVENTION.

If this Court entertains Appellants' untimely appeal, the sole issue is whether the Probate Court should have allowed Appellants to intervene.[2] "A 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." *Lamarche*, 158 N.H. at 200 (citing *Snyder v. N.H. Savings Bank*, 134 N.H. 32, 35 (1991)). Neither the Fiduciary nor the Foundation has such an interest.

The Donor's will divided the residue of his estate into two equal shares for distribution at the time of his death. App. 20. The Executor's role was to determine the further division of one of those shares, allotting some portion to the Fund at Dartmouth and the rest to the Foundation. *Id.* As a result, $1.8 million was distributed to the Foundation. App. 34–35. The Will reserved no rights to the Executor to remain involved in the Fund in any capacity after the distribution. Thus, the completion of the distribution in 2005 ended the Executor's involvement with the Fund. The Foundation never had an interest in the Fund or control over the distribution of the residue, as this distribution was reserved to the sole discretion of the Executor. App. 20.

The 2005 Statement of Understanding further supports this interpretation. Although Appellants characterize the Statement as a

[2] Although Appellants devote roughly eight pages of their brief (pp 37–44) to challenging the merits of the Probate Court's decision to grant the Application for Modification, the only issue on appeal is the denial of Appellants' motion to intervene. If Appellants are successful, the sole remedy available to them in this appeal is a remand with instructions to the Probate Court that one or both Appellants be allowed to intervene.

contract,[3] it merely sets forth the determined amount of the distribution to the Fund ($1.8 million) and relays to Dartmouth the terms of the Donor's Will. The signing of the Statement and distribution to the Fund mark the end of the Executor's involvement. The Foundation, appropriately, is not a party to the Statement. This underscores the Foundation's lack of any interest in the distribution to the Fund.

Smithers v. St. Luke's-Roosevelt Hospital Center, 281 A.D.2d 127 (N.Y. App. Div. 1st 2001), a case upon which Appellants rely heavily, illustrates this principle. In *Smithers*, the donor negotiated and completed an *inter vivos* gift to a hospital for the construction of an alcoholism treatment facility. 281 A.D.2d at 130. His agreement with the hospital included a reserved right by the donor to veto the hospital's project plans and staff appointments. *Id.* at 139. After his death, his executor sought to enforce these reserved rights in the agreement. *Id.* at 132. The *Smithers* court granted the executor standing to exercise the reserved rights. *Id.* at 140. No such rights were reserved here.

The Probate Court correctly concluded that neither the Fiduciary (acting as the executor of the reopened estate) nor the Foundation had an interest sufficient to intervene and become parties in this matter.[4]

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[3] Unlike a contract, there was no bargained-for agreement, no consideration, and no quid pro quo. At best, the Statement is a receipt by which the Executor and Dartmouth memorialized the amount of the gift. *See Matter of Lindmark Endowment for Corp.-Bus. Ethics Fund*, No. A19-0229, 2019 WL 5546205, at *4–5 (Minn. Ct. App. Oct. 28, 2019) (analyzing attributes of endowment and concluding that it created an UPMIFA institutional fund and not a contract).

[4] The appropriate method for non-parties to be heard in a matter in which they have no interest is as amici. The Appellants here were granted the opportunity to participate as amici but chose not to do so.

III. RSA 292-B:6, III PROVIDES NO BASIS FOR APPELLANTS TO INTERVENE.

The plain text of the Will is dispositive in this case. Further support for the Probate Court's decision is found in the Uniform Prudent Management of Institutional Funds Act ("UPMIFA") (codified as RSA Chapter 292-B:2). The Donor's gift to Dartmouth created a "fund held by an institution exclusively for charitable purposes," making it an "Institutional Fund" as that term is defined in UPMIFA. RSA 292-B:2, V. In accordance with UPMIFA, Dartmouth is required to use the Fund subject to the restrictions placed upon it in the Donor's Will. In this case, the Fund was restricted to upgrading and maintaining Dartmouth's golf course. App. 34.

UPMIFA provides two means by which the holder of an institutional fund may obtain permission to modify the fund's purpose. First, the institution may obtain written consent from the donor to modify the purpose, provided that the modification is for a charitable purpose of the institution. [5] RSA 292-B:6, I. Here, the donor is deceased, and this option is not available. In the absence of donor consent, however, the holder of the fund may seek permission from the probate court to modify the fund's purpose. RSA 292-B:6, III. Specifically,

> 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

[5] This provision was structured to avoid a federal tax problem for the donor. A "gift to the institution is a completed gift for tax purposes," and the donor therefore "has no retained interest in the fund." UPMIFA §6 cmt.

> 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.

Id.

RSA 292-B:6, III does not provide for notice to the donor or any representative thereof, nor to any other charities. This is by design; the UPMIFA drafting committee "decided not to require notification of donors" in this section of the statute because the analogous trust law rules of deviation and *cy pres* "do not require donor notification and instead depend on the court and the attorney general to protect donor intent and the public's interest in charitable assets." UPMIFA §6 cmt. This legislative intent of the UPMIFA drafters became the legislative intent of the New Hampshire legislature once it enacted UPMIFA. *See Halifax-AM. Energy Co. v. Provider Power, LLC*, 170 N.H. 569, 587 (2018). Thus, it was the intent of the legislature that donors not be automatically involved in modification applications under RSA 292-B:6, III.

In addition, this Court has adopted the "familiar axiom of statutory construction *expressio unius est exclusio alterius*: Normally the expression of one thing in a statute implies the exclusion of another." *In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 251 (2011) (italics in original) (quoting *St. Joseph Hosp. of Nashua v. Rizzo*, 141 N.H. 9, 11–12 (1996)). This Court has further held that "[t]his principle 'is strengthened where a thing is provided in one part of the statute and omitted in another.'" *State v. Mayo*, 167 N.H. 443, 452 (2015) (quoting *State v. Etienne*, 163 N.H. 57, 73 (2011)). If the legislature had intended for the donor or his representative to

participate in RSA 292-B:6, III modifications, the statute would have provided the donor with notice and an opportunity to be heard. It did not. It did, however, provide for notice and an opportunity to be heard by the Attorney General. Moreover, it provided for donor involvement with modifications in another section of the statute: namely, RSA 292-B:6, I. Under *expresio unius*, this means that the legislature intended for donors to be involved only in RSA 292-B:6, I modifications, and for the Attorney General to be involved in RSA 292-B:6, III modifications.

Other state courts analyzing analogous issues have reached the same conclusion. *See Matter of Lindmark Endowment for Corp.-Bus. Ethics Fund*, No. A19-0229, 2019 WL 5546205, at *8–10 (Minn. Ct. App. Oct. 28, 2019) (finding that donor lacked standing to oppose institutional fund modification under Minnesota's UPMIFA); *Hardt v. Vitae Found., Inc.*, 302 S.W.3d 133, 138–39 (Mo. Ct. App. 2009) (noting that "the drafters of UPMIFA reportedly considered an amendment granting standing to donors, and yet the amendment is absent from the final version adopted by the drafting committee" and concluding that Missouri's UPMIFA did not grant donors standing to enforce the terms of their gift to an institutional fund); *cf. Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 243 Conn. 1, 11–15 (1997) (providing extensive history of the drafting of UMIFA—the predecessor statute to UPMIFA—and concluding that it did not confer standing on donors to enforce the terms of their gifts to institutional funds); *Siebach v. Brigham Young Univ.*, 361 P.3d 130, 136–37 (Utah 2015) (concluding that UPMIFA's silence on donor standing to enforce terms of gift to institutional fund meant that common law rule of donor standing applied and donor therefore lacked standing).

In this case, Appellants do not belong to any class of parties with an interest in this RSA 292-B:6, III application for modification. Although the Fiduciary may purport to seek standing as the "donor," the Donor in this case is long deceased. Even if the Donor were still alive, and even if the Donor's Executor or Fiduciary could stand in his shoes, RSA 292-B:6 would provide no basis for intervention where such involvement is precluded by the plain text of the Will. There is even less support under RSA 292-B:6 for the Foundation's claim to an interest. No provision of UPMIFA grants an entity an interest to challenge the administration of another entity's institutional fund simply because both entities received donations from the same donor in the past. The Probate Court properly concluded that UPMIFA does not provide a basis for either the Fiduciary or the Foundation to intervene.

IV. APPELLANTS HAVE NO COMMON LAW INTEREST IN THE MODIFICATION APPLICATION.

Although the Will provides no basis for Appellants to intervene, Appellants argue that they have "special interest standing" under the common law to intervene in the application for modification proceeding. This court has adopted a five-factor test to determine circumstances in which potential beneficiaries of a trust may establish standing to intervene. *See In re Trust of Mary Baker Eddy*, 172 N.H. 266 (2019). Neither Appellant satisfies these factors.

First, *Mary Baker Eddy* adopts a test by which a potential trust *beneficiary* may have standing to bring suit to enforce a trust. 172 N.H. at 274. Unlike a potential beneficiary who may have an ongoing interest in the trust corpus or its correct disposition, the Foundation has never had an

interest in the Fund, and the Executor's interest in the Fund terminated in 2005 upon the completion of the distribution of the residue.

Even if this Court expanded the *Mary Baker Eddy* special interest standing beyond potential trust beneficiaries, Appellants would nevertheless lack standing. *Mary Baker Eddy* requires a Court to balance five factors: (1) the extraordinary nature of the acts complained of and the remedy 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) subjective factors and social desirability.

Appellants have alleged no facts supporting a finding in their favor with respect to the "bad faith" and "subjective factors" prongs of the test. They argue only that these factors are satisfied because Appellants dislike the result of the modification. In addition, neither Appellant belongs to a benefitted class or potential benefitted class. Appellants arguments with respect to the other two prongs fare no better.

A. Extraordinary Nature of the Acts Complained of and Remedy Sought

The appellants in *Mary Baker Eddy* alleged that the trustees had engaged in self-dealing. 172 N.H. at 276. The appellants in *Schalkenbach Foundation v. Lincoln*, 91 P.3d 1019, 1027 (Ariz. Ct. App. 2004) (a case which the *Mary Baker Eddy* Court cites favorably) alleged that trustees had systematically diverted funds from their approved purpose to improper uses. But the courts in both cases nonetheless found that the appellants had not identified acts of "extraordinary nature."

In this case, there are no acts at issue even approaching those already found not to be "extraordinary" in *Mary Baker Eddy* and *Schakenbach*.

Dartmouth applied for and received court approval to modestly modify the purpose of the Fund following a process laid out in statute. There is no allegation that Dartmouth diverted the Fund proceeds to improper purposes or engaged in improper management of the Fund.

In contrast, the relief Appellants seek is extraordinary. Not only do they seek to vacate the approved modification; they also seek to bar the Director from participating in the Probate Court proceeding. Brief at 45. It is extraordinary to strip the Director of a statutory and common law right to participate. RSA 292-B:6, III ("[T]he attorney general must be given an opportunity to be heard."); *Attorney General v. Rochester Trust Co*., 115 N.H. 74, 76 (1975) (holding that the Attorney General is a necessary party in the enforcement of charitable trusts).

B. Attorney General's Availability and Effectiveness

The Director was actively involved in the modification application from nearly six months before it was filed. App. 150–62. Contrary to Appellants' unsupported assertions in their brief, the Director's involvement resulted in substantial changes to Dartmouth's plans for the Fund balance. With the Director's input, the Fund's purpose will be modified only slightly. Although it will no longer fund a now-closed golf course, it will continue to support golf at Dartmouth in numerous ways, consistent with the Donor's original intent.

Appellant's brief appears to argue that the Director should have engaged in a deep review of the golf course's finances to determine whether the operation of the golf course had become impracticable. That is not the Director's role in this case. The question is not whether operation of the golf course is impossible or impracticable. Rather, it is whether the

purpose of the Fund had become impossible or impracticable. There can be no doubt that it is impracticable and impossible to operate a fund, the sole purpose of which is to upgrade and maintain a golf course that has closed.

In short, special interest standing is not available to the Fiduciary or the Foundation.

CONCLUSION

For the foregoing reasons, the Attorney General, Director of Charitable Trusts respectfully requests that this Honorable Court affirm the judgment below. In filing this Memorandum of Law, it is the Director's position that oral argument is not necessary. If this Court should order oral argument, Michael R. Haley will argue on behalf of the Director.

Respectfully Submitted,

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October 7, 2022

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CERTIFICATE OF COMPLIANCE

I, Michael R. Haley, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this memorandum contains approximately 3,920 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

October 7, 2022 *<u>/s/ Michael R. Haley</u>*
Michael R. Haley

CERTIFICATE OF SERVICE

I, Michael R. Haley, hereby certify that I am filing this memorandum of law electronically and that a copy is being served on all other parties or their counsel, in accordance with the rules of the Supreme Court, as follows: I am serving registered e-filers through the court's electronic filing system; I am serving or have served all other parties by mailing or hand-delivering a copy to them..

October 7, 2022 *<u>/s/ Michael R. Haley</u>*
Michael R. Haley