THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

TRUST DOCKET
6TH CIRCUIT COURT
PROBATE DIVISION

JOHN L. WRIGHT AND WILLIAM C. WRIGHT

v.

JOSEPH MCDONALD, III, ESQ., AS FORMER TRUSTEE OF THE WRIGHT FAMILY 1998 IRREVOCABLE TRUST

317-2020-EQ-00202

DECREE ON PETITIONERS' PETITION TO DECLARE DISTRIBUTION AND/OR DECANTING OF TRUST VOID *AB INITIO*

Before the Court for an adjudication on the merits is a *Petition to Declare Distribution and/or Decanting of Trust Void Ab Initio* (*Petition*) filed by John L. Wright (John) and William C. Wright (Will) (collectively, Petitioners). See Index #1. At issue is whether certain distributions made by the then Trustee of the Wright Family 1998 Irrevocable Trust (1998 Trust), see Stip. Ex. 1, the predominant trust to which the *Petition* relates, and from which distributions were made to the John B. Wright 2007 Irrevocable Trust (2007 Trust), see Stip. Ex. 3, were appropriately undertaken and accomplished. In their *Petition*, the Petitioners allege that they were not. Joseph F. McDonald, III, Esq., the subject and former Trustee, who remains the sole respondent in that capacity (Respondent),[1] opposes grant of the relief the Petitioners request on

[1] Loren Wright was also originally named in the *Petition* as a co-respondent under her then standing as sole Trustee of the John B. Wright 2007 Irrevocable Trust (2007 Trust), into which, as will be referenced and found infra, the assets of the 1998 Trust were later transferred, in the manner more commonly known under the contemporary vernacular of a "decanting." See Stip. Ex. 3. However, as will be later explained, she was discharged as a party in that capacity under a *Stipulation for Approval of Partial Settlement*, see Index #18, previously granted by the Court. See Index #19; Stip. Ex. 21 at 2, ¶4 a.

assertion that the decanted distributions of concern were proper and valid. See Index #13.

More specifically, the Petitioners contend that the distributions of concern were in violation of the terms of the 1998 Trust and the Respondent's fiduciary duty "to administer, invest and manage the trust and distribute [its assets] in good faith, in accordance with its terms and purposes and the interests of [its] beneficiaries . . . ." RSA 564-B:8-801(emphasis added); *Petition* at 5-6, ¶¶ 29-31. They further maintain that the Respondent's actions violated his RSA 564-B:8-803 trustee duty of impartiality to the beneficiaries "in administering, investing, managing, and distributing the [1998 Trust] property, giving due regard to the beneficiaries' respective interests." Id. at 6-7, ¶¶38-41 (emphasis added). In yet deeper support of the foregoing allegations of breached fiduciary duty, the Petitioners cite the mandate of RSA 564-B;1-105(b)(2) specifying that the terms of a trust do not prevail over "the duty of a trustee to act in good faith and in accordance with the terms of the trust, the purposes of the trust and the interests of the beneficiaries[.]" Id., ¶¶28, 38 (emphasis added). Consequently, the Petitioners request damages for breach of trust pursuant to RSA 564-B:10-1002. See id. at 8, ¶55 & at 9, Prayer D. In addition to damages, they seek remedial relief through issuance of an order declaring and setting aside the decanted distributions as void ab initio, see id. at 9-10, and an award of attorneys' fees and costs in accordance with RSA 564-B:10-1004.[2]

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[2] In their *Petition* the Petitioners plead four counts: (1) Set Aside the Distribution from the 1998 Trust to the 2007 Trust for Breach of RSA 564-B:8-801 Duty; (2) Set Aside the Distribution from the 1998 Trust for Breach of RSA 564-B:8-803 Duty; (3) Trustee Process; and (4) Damages for Breach of Trust. Count 3 was waived by the Petitioners due to the partial settlement referenced in the preceding footnote. However, in their prayers for relief C and D, in which they respectively seek a judgement against the

In his *Answer*, the Respondent has countered by asking that the Court dismiss the *Petition* and validate the distributions as consistent with his right, power, and authority as a disinterested Trustee of the 1998 Trust to properly carry out his duties in accordance with its grantor's intentions. See *Answer* at 22, ¶1, Statement of Defenses & Prayers A.

Upon due consideration of the parties' respective submissions, the *Petition* is GRANTED consistent with the findings, law, reasoning, rulings, and orders that follow.

I. Factual Background

A. 1998 Trust

John B. Wright (variously, "J.B." or "Grantor") and Sylvia M. Wright ("Sylvia" or, within applicable 1998 Trust definitional context otherwise, "Grantor's wife" or "Grantor's spouse"), were formerly husband and wife. They married in July of 1985. During their marriage John and Will were born. Over four generations, J.B. and his ascendent family owned, worked in, and operated a closely held corporation known as J. A. Wright & Co. ("Company"), located in Keene, New Hampshire. The Company was in the business of manufacturing and marketing silver and other metal polishing products.

Following a referral by the Company's and their own then personal CPA, on or about March 25, 1998, J.B. and Sylvia procured the legal services of the Respondent. At the time, the Respondent was an attorney practicing trust and estate planning at the Concord, New Hampshire law firm of Cleveland, Waters and Bass. See Stip. Ex. 4. Under his hire the Respondent was charged with evaluating and recommending

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Respondent and damages, they recite "Count III" as the basis for the relief sought. Yet, it is not Count III but Count II to which Prayer C seemingly relates and it is Count IV in the case of Prayer D. The Court construes each as such.

strategies for, as well as otherwise planning and carrying out, a master scheme predominantly focused on and designed to minimize potential federal estate tax liability upon J.B.'s death, principally owing to his then individual ownership of all 100 issued and outstanding shares of the Company's stock. J.B. was not only the Company's sole stockholder, but also its President and CEO. With that in mind, the Respondent was also tasked with proposing business succession options. See id.

After exercising what he called a "comprehensive" measure of diligence in obtaining and assessing needed information concerning J.B. and Sylvia's personal and financial circumstances, the Respondent ultimately recommended that the best manner of accomplishing their objectives was to establish an irrevocable trust.[3] He further proposed that the trust be funded with J.B.'s gradual gifting to it a sufficient number of his Company stock shares as would leave him with a proportionate minority interest relative to control of the Company and its business. Doing that would entitle J.B.'s estate to what the Respondent termed "significant 'minority discounts' which could equal as much as 60% of the percentage of the [Company's] value represented by the stock." Stip. Ex. 5 at 1.[4] The Respondent explained that the gifted stock would escape federal estate taxation upon J.B's. and Sylvia's deaths. Additionally, he informed them that the

[3] From his testimony and documentary evidence introduced, it also is understood that the Respondent recommended that they each establish a revocable trust for assets, at least initially, unrelated to the Company stock and to serve as a pour-over repository on death via wills. See Stip. Ex. 5 at 1-3; Stip. Ex. 6. The revocable trusts themselves, however, were not entered into evidence.

[4] In his testimony, the Respondent estimated that the minority interest discount attributable to the eliminated voting control over Company affairs could be as much as 30 to 35 percent based on the valuation metrics of an appraisal done of the Company at the time in conjunction with J.B.'s proposed gifting of his majority interest stock shares to the 1998 Trust. He further proffered that if one factored in on top of that, a lack of marketability discount owing to what the Court understands to be the diminished attraction the lack of control would have on the purchase value of the remaining minority interest, it could reach a cumulative discount of up to 45 to 50 percent.

gifted transfer of stock would "produce a [f]ederal transfer tax 'value freezing' benefit: The portion of the [Company's] future appreciation attributable to the gifted shares will accrue to the irrevocable trust, and not your taxable estates." Id.

In further establishing the contextual, if not necessary, contours of the litigated merits, the Court observes that the Respondent apprised J.B. and Sylvia that he had included a provision in the draft of the proposed irrevocable trust he presented to them, that empowered a disinterested trustee to make direct spousal distributions to Sylvia that would afford non-tax, indirect access by J.B. to the extent they might be available for household or other shared use.[5] See id. at 2, (bullet 2). Notably, he followed that with cautionary advice that J.B.'s ability to have such non-tax indirect access would "be available for so long as Sylvia lives. If she predeceases J.B., J.B. must understand that he cannot receive direct distributions from the trust without having the property included in his estate for estate tax purposes." Id.

The foregoing proposals, among others, were incorporated into the 1998 Trust, which was later established on December 2, 1998. See Stip. Ex. 1.[6] In it, J.B. as Grantor named Sylvia the initial Trustee, and included her within a class of designated beneficiaries consisting of herself, John, Will, and such other of his "issue living from time to time." Id. at 5, art. II, sec. I, para. B., subpara. 1., sub-subpara. b. (in its entirety,

[5] The Respondent testified that that provision categorized the 1998 Trust as a Spousal Lifetime Access Trust (SLAT), to be further discussed later, infra.

[6] After the Respondent was originally retained to represent J.B. and Sylvia, he left the Cleveland, Waters and Bass law firm, along with another attorney. Both then jointly opened their own Concord law firm of McDonald and Kanyuk. J.B. and Sylvia followed him to his new firm, where the final iteration of the 1998 Trust and other documentation concerning new or superseding estate, trust, proxy decision-making, advance-care planning, and further customary, similar affairs were prepared by the Respondent for their execution.

"distributee trust provision"). He also specified that Sylvia would be variously referenced in the trust agreement as "the 'Grantor's wife,' and sometimes also referred to as the 'Grantor's spouse'"; and that his then living children, John and Will, would constitute those fitting the designation of "the Grantor's children."[7] See Stip. Ex.1, [Preamble].

During the life of the Grantor the 1998 Trust was fashioned to consist of two separate funds, one designated as a "GST Exempt Fund" and the other as a "GST Taxable Fund." See id. at 4, art. II, sec. I, para. A. The Trustee was directed, in pertinent part, to hold each fund in a separate "single[-]family trust"[8] and was conferred discretion[9] to distribute "to or for the benefit of such one or more persons as the Trustee may, in its sole and absolute discretion, select out of a class composed of the Grantor's wife and the Grantor's issue living from time to time[.]"[10] Id. at 5, para. B. 1. b. (emphasis added)[11]

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[7] At the time the1998 Trust was established, John was 11 and Will was 10 years of age, having been born a year and four months apart.

[8] Though the two separate funds were each also to constitute a "single[-]family trust]," see id. para. B., only the separate GST Exempt Fund single[-]family trust came to be endowed. Accordingly, all references to the 1998 Trust are to the single[-]family trust of the GST Exempt Fund. See Index #13 at 2, n.2.

[9] The discretion conferred upon the Trustee was made exercisable subject to certain stated conditions of no importance or applicability to a ruling on the merits.

[10] The trust agreement definitionally specifies that "where the context of the reference is to a child or children of the Grantor, [it] shall mean any child or children of the Grantor whether legally adopted or naturally born before or after the date of this Agreement." And "where the context of the reference is to a child or children of a person other than the Grantor, 'descendants' and 'issue' shall include a child or children, or the lineal descendants of the designated parent whether legally adopted or naturally born before or after the date of this Agreement." Id. at 1-2, Art. I, C.

[11] In his testimony the Respondent maintained that, though not expressly stated, the foregoing references to "Grantor's wife" and Grantor's spouse" throughout the 1998 Trust signified an open class of persons constituting whomever J.B. might be married to at the time a distribution might to be made, a right might be exercised, or some other trust-related event might occur. The Petitioners, on the other hand, averred that that proposition was untenable under the express terms of the 1998 Trust. The same claims were

Though the 1998 Trust itself was irrevocable and not alterable or amendable by its Grantor, see id. at 58, art. X, in exercising the foregoing discretionary distribution authority its Trustee was also conferred the prerogative of making the distributions to one or more other trusts "created by the Grantor for the benefit of such one or more (but not necessarily all) of such [1998 Trust] beneficiaries." (Emphasis added.) That authority was conditioned on its not being inconsistent with avoidance of specified occurrences that might trigger infliction of adverse federal transfer or estate tax consequences on the Grantor or on his estate upon his death. See id. (emphasis added).[12]

So far as it is or may be otherwise pertinent to the controversy on the merits at the center of this litigation, Article II, Section I, paragraph B., subparagraphs 3. a.-b. purport to confer on the Trustee potential exoneration against risk of otherwise being held accountable in relation to making discretionary distributions from the 1998 Trust. In relevant part it states:

> a. In granting the Trustee powers and discretions . . . it is the Grantor's objective to provide the flexibility for the Trustee, in its absolute discretion . . . to distribute the property of the [1998 Trust] (i) outright to one or more of the Grantor's wife and issue, or (ii) to a new trust or trusts which, in the Trustee's sole, uncontrolled judgment may best serve the Grantor's overriding objectives to protect and preserve the trust property and achieve the tax and non-tax objectives for the Grantor's family, both as of the date of the Grantor's execution of this Trust Agreement and in the future, without disturbing any federal transfer tax favored attributes of

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made by the parties regarding an earlier pre-merits *Motion to Dismiss* and accompanying supportive *Memorandum of Law*, see Index ##25, 26, filed by the Respondent, that was denied. See Index #44.

[12] The trust or trusts receiving such a distribution are parenthetically designated a "distributee trust or trusts" in the distributee trust provision; however, from a procedural standpoint such distributions are tantamount to what has since come to be codified and tagged under the rubric of a "decanting," pursuant to RSA 564-B:4-418 of New Hampshire's modified version of the Uniform Trust Code. See RSA ch. 564-B (New Hampshire Trust Code) (NHTC).

> the trust property. . . Nothing in this subparagraph a., the previous subparagraphs of this paragraph B., or in this Agreement in general shall be construed as limiting or controlling in any way (i) the discretion of the Trustee which in all respects shall be sole, absolute and uncontrolled (except, of course any constraints imposed by the Trustee's legal fiduciary duties) . . . .
>
> b. The grantor desires that the Trustee will exercise its powers and discretions . . . in appropriate circumstances without fear of liability or surcharge for doing so. Accordingly, in all respects these powers and discretions shall be absolute, and their exercise by the Trustee shall not be subject to question by any person beneficially interested in the subject trust estate unless such a person can prove by affirmative evidence that the Trustee was acting in bad faith.

Id. at 8-9, (emphases added).

B. Divorce

After a separation that began in May 2001, J.B. instituted a divorce action against Sylvia.[13] Its genesis and at what point clouds of marital disharmony first appeared, were not disclosed. However, that the ensuing marital proceedings turned and remained highly acrimonious, was not a matter of dispute. Nonetheless, the divorce was ultimately resolved pursuant to a Permanent Stipulation that was approved and incorporated by reference as part of the Divorce Decree issued by the Cheshire County Superior Court on March 2, 2004 (Sullivan, J.). See Stip. Ex. 25. At the time of the separation John was 13 and Will was 12.

Between the December 2, 1998, establishment of the 1998 Trust and, presumably, the initiation of the divorce action, J.B. and Sylvia came to individually own 35 and 40 shares of the Company stock, respectively. See Stip. Ex. 25 at 7, para. 16.

[13] The date the divorce petition was filed, and proceedings commenced, was also not made a matter of record; however, it was not disputed that the proceedings lasted an estimated three years, culminating on March 4, 2004.

A.[14] Under the referenced Permanent Stipulation, 2.5 of the shares held by Sylvia were awarded and transferred to J.B. to equalize their respective ownerships of the Company stock in advance of the Company's agreed upon redemption of Sylvia's then remaining 37.5 shares. See id.

In accordance with the terms of the 1998 Trust, upon the initiation of the divorce action, all rights, powers, and other interests that Sylvia had under the Trust were suspended pending its finalization. On finalization they were terminated with the same effect as though she had died. Her status as Trustee and designation as one of the three beneficiaries at the time the 1998 Trust was established stood foremost among those rights, powers, and interests effected. See Stip. Ex.1 at 28-29, art. II, sec. II, para. C.; id. at 6, art. II, sec. B, para. 2 a.[15] With the elimination of Sylvia, John and Will were left as the only 1998 Trust beneficiaries. John was 17, and Will was either 15 or 16, years of age at the time.[16] See Stip. Ex. 8 at 2, para. A. 3.

So far as the record credibly reflects, at least until the divorce action was instituted, the 1998 Trust had remained unchanged. However, on March 6, 2002, while the divorce proceedings were still pending, the Respondent forwarded J.B. a letter. The letter opened with:

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[14] The Court's understanding is that 20 shares were owned by the 1998 Trust under J.B.'s initial gifting following the Trust's establishment. Unchallenged testimony was further given that an additional 5 shares were gifted to the Trust later.

[15] In testimony on the merits and in preceding offers of proof and argument on motions proffered and addressed earlier in the litigation, these cited terms of the 1998 Trust were referenced as "Cesser provisions."

[16] J.B. testified that Will was 16 at the time of the finalization of the Wrights' divorce, while the Respondent's March 24, 2004, letter to J.B. recites Will's age as 15. That said, as earlier mentioned, uncontradicted testimony established that John and Will were born a year and four months apart.

> As we discussed, I am enclosing documents which confirm Sylvia's removal as Trustee of the irrevocable [1998 Trust], [J.B.'s] appointment of Bill Walker as successor Trustee and his acceptance of the trusteeship; revoke any nomination of Sylvia to serve in a fiduciary capacity either as your property management or health care agent, your executor or the trustee of your revocable trust, and eliminate, effective on the entry of a decree of divorce, any beneficial interests Sylvia had under your revocable trust, which, upon your death or incapacity, will be interpreted and administered as if Sylvia had previously died.

Stip. Ex. 19 at 1. The enclosed documents were not produced for entry into the record. While the Respondent testified that he did not recall the documents ever being executed, a read of the proactive flavor of the entire text of the letter leads the Court to believe that it is more probable than not that they, or at the very least some, were executed.[17]

Though the Respondent did not directly represent J.B.'s interests in the Wrights' divorce itself, at some unspecified point he ceased representing the interests of Sylvia concerning her estate, trust, and other pre- and post-planning matters, in the manner he had before the separation occurred and the divorce action was begun. He did, however, in contrast, proceed to represent, advise, and carry out on behalf of J.B., his continuing estate, trust, and other related personal and Company concerns, interests and needs. See Stip. Ex. 18.

In the same March 6, 2002, earlier referenced letter, which he copied to J.B.'s divorce attorney, the Respondent expressed concern over his "ethical obligations given [his] prior representation of both [J.B.] and Sylvia." Stip. Ex. 19 at 1-2. More specifically, he stated that: "The lawyers' rules of professional responsibility strongly

[17] Indeed, the cover page of the 1998 Trust bears an interlineation of Sylvia's name as Trustee and a recital of "changed to William Walker on 7/18/01," that the Respondent recognized as the product of his paralegal's handwriting.

urge (if not require) me to secure from Sylvia a waiver of any conflicts of interest which might otherwise disable me from providing separate representation to you, given the obvious adversity of your interests under these circumstances." Id.[18] He followed that statement with, "You felt uncomfortable broaching this issue with Sylvia or her attorney at this time." Id. In apparent deference to J.B.'s discomfort over approaching Sylvia concerning the subject himself, the Respondent stated that he would discuss with J.B.'s divorce attorney "the possibility of his firm serving as interim estate planning counsel for you so that one of the estate planners from his office can review the enclosures and my advice outlined in this letter and make any changes they and you deem necessary." Id. However, in response to a follow-up query posed by the Petitioners' counsel, the Respondent testified that neither the consultation with J.B.'s divorce attorney, nor the referenced potential referral for interim estate planning purposes, occurred. See id. at 1-2. The Court deduces from the foregoing that the Respondent elected to defer to J.B.'s preferred avoidance of any further address of the matter rather than hold fast to his own sense of what the governing "rules of professional [conduct] strongly urge[d] (if not require[d]) [of him]."[19] Id.

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[18] See N.H. R. PROF. COND. 1.9 [Duties to Former Clients].

[19]The Court pauses here to observe that the record lacks clarity, detail, and documentation of how many, the duration of, and communicative gist relating to, the communications had between the two attorneys. What the Court understands to have been all the Respondent's post-Cleveland, Waters and Bass departure billings rendered for payment between 2000 and 2006, are bereft of telling entries pertaining to specification of the nature of communications, particularized services rendered, or activities undertaken, not only with J.B.'s divorce counsel, but in other instances even those with J.B. himself. Compare, e.g., Stip. Ex. 18, c Stip. Ex. 2, 3, 8, 10, 19 (billings not reflecting certain work undertaken or time spent rendering the service within the period reflected in the related exhibit). That the Respondent's conduct regarding his consultations with J.B.'s divorce attorney constituted an ethical violation of an attorney's duty(ies) to a former client under the New Hampshire Rules of Professional Conduct has not been alleged by the Petitioners. As such, the Court does not apprehend that it is tasked with or otherwise has cause to enter any factual ruling on the issue within the scope of the case before it.

C. Post-Divorce Concerns

The Respondent continued to address J.B.'s estate and trust planning needs after the Wrights' divorce was finalized. In a letter to J.B. dated March 24, 2004, see Stip. Ex. 8, 20 days after the divorce decree issued, see Stip. Ex. 25, the Respondent enclosed copies of certain documentation J.B. had signed in the Respondent's law office "earlier [that] week." [20]

The letter then topically proceeded to focus attention on (1) "several notable features" of certain provisions in the Permanent Stipulation incorporated into the Wrights' Divorce Decree of real or potential financial consequence, see Stip. Ex. 8 at 1-2, para. A., (2) followed by a list of J.B.'s objectives going forward, post-divorce, see id. at 2-3, para. B., and (3), J.B.'s options. See Id. at 3-7, para. C.

In relation to the notable features of the Permanent Stipulation posing significant financial consequence, the Respondent referenced aspects of the property settlement concerning, inter alia: (1) awards of real and personal property lying outside of, as well as and within the sphere of the Company; (2) alimony; (3) child support; (4) educational and medical expense; (5) redemption by the Company of Sylvia's Company stock, while at the same time also continuing to pay down the cost of its earlier redemption of the stock formerly owned by J.B.'s parents; and (6) the challenge posed by "the

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[20] According to J.B., the letter was preceded by a generalized conversation he had with the Respondent about the status of matters in his life at that time. The letter itself indicates that the copied documentation enclosed pertained to changes made to other prior estate, trust, premortem or postmortem planning matters that did not include changes to the 1998 Trust, seemingly at least not beyond "eliminat[ing] the rights, powers and interests Sylvia had under [J.B.'s] prior documents." As indicated earlier they had been initially suspended upon J.B.'s filing for the divorce, see Stip. Ex. 19 at 1, and had been since terminated on its finalization. See Stip. Ex. 8 at 3-4, para. C,. subpara. 1.

[C]ompany's gradual loss of pricing power over the last several years, and the effect [that] may continue to have on the [C]ompany's mid[-] to long-term profitability . . . ." through potential loss of either one or both of its two major retail "distribution channels," Walmart and Kroger. Id. at 1-2, para. A., subpara. 4.

Among other issues included in the letter were a recitation of certain objectives related to J.B.'s diminished post-divorce net worth that was described as largely "illiquid and precarious given the [C]ompany's uncertain prospects"; John's and Will's future inheritances and the unlikelihood that either of them would succeed to fifth generation ownership and/or management of the Company; and, so far as pertinent to the merits of the controversy before the Court, the most significant objective is set out in the letter's numbered subparagraph 3., captioned "Possible Second Family." See id.at 2-3, para. B., subparas. 1-3. In subparagraph 3, the Respondent hypothesizes over J.B.'s potential remarriage to a spouse who may have children, offering the opportunity for him to beneficially share his wealth with an expanded blended family, while comforted "know[ing] that [he could] access the irrevocable trust property directly or indirectly if the business loses its external factors."[21] Id., subpara. 3 (emphasis added).

Finally, the Respondent sets out options available to J.B. He first mentions something that had already been addressed — change of the estate planning documents, copies of which he had enclosed and referenced in the first paragraph of

[21] The Court presumes the Respondent is referring to the SLAT aspects of the 1998 Trust but is uncertain. First, based on the Respondent's trial testimony, if J.B. were to secure the favorable shelter from imposed estate tax intended, he could not receive direct distributive access. Secondly, if J.B. was to gain indirect access it would be only through shared accommodation conferred upon remarriage to a future wife who would qualify to become a beneficiary under the 1998 Trust or an efficacious distributee trust. So, if he were to remain unmarried, as he was at that time, his receipt of direct distributions would presumably be at the expense of the loss of those federal tax advantages.

the letter and further referred to in footnote 20, supra. Id. at 3-4, para. C, subpara. 1. So far as having relationship to what strikes the Court as a most, if not the most, critical issue lighting the way to a resolution of the merits, is set out in paragraph C, subparagraph a. ii. In it, the Respondent endeavors to allay concerns J.B. had voiced to him over the prospect "that over 41% of the [C]ompany's equity and any dividends paid would be inaccessible to [him] and to a second family." He further references J.B. having "assumed that [his] sons' beneficial interests in the [1998 Trust] were locked in." He then instructs J.B. to read the distributee trust provision from "the sentence beginning with the words '[a]ny distribution' which begins in the middle of page 5, and the balance of the provision in which that sentence appears which carries over to page 6."[22] Interestingly, in the letter, the Respondent represents to J.B. that the distributee trust provision recited in pages 5 through 8 of the 1998 Trust affords a trustee

> the ability to distribute all or a portion of the [1998 Trust] shares [of the Company stock] or other assets to a new "distributee trust" you might create. The distributee trust could have beneficiaries different from the beneficiaries of the [1998 Trust]. The only condition to the exercise of this power is that you have no beneficial interest in it or estate taxable power over the distributee trust.

Stip. Ex. 8 at 5, para. C., subpara. 2.a. ii. (emphasis added). The Court finds nothing in the distributee trust provision or any other provisions contained in the 1998 Trust that say or imply that the created distributee trust can have beneficiaries different than "one or more (but not necessarily all)" of those "select[ed] out of a class composed of the Grantor's wife and the Grantor's issue living from time to time[,]" as they are

[22] The Respondent further instructs J.B. to "[t]hen read all of Paragraph 2. Which begins at . . . page 6 and ends at the top of page 8." However, that paragraph and all its subparagraphs relate to the exercise of powers of appointment, which were not used and are irrelevant to the merits of the controversy before the Court.

unambiguously defined in the 1998 Trust's preamble paragraph and its ARTICLE I [DEFINITIONS AND GUIDELINES], paragraph C.

Beyond the foregoing, the Respondent also informed J.B. that "[t]he distributee trust option gives you the ability to shift some portion of the distributee trust's assets to beneficiaries other than Will and John." Id. at 6, para. C. subpara. 2. a., iv. (emphasis added). That said, the Respondent acknowledged in his testimony, that upon J.B.'s divorce from Sylvia, John and Will were left as the sole beneficiaries of the 1998 Trust.[23] Yet, in the letter he counselled J.B. that:

> You can also build into the irrevocable [distributee] trust language stating your desire that any discretions over distributions to Will and John be exercised judiciously, limiting distributions to those which would serve serious and worthy purposes, not those which are frivolous, extravagant or wasteful. You could amend your revocable trust to require the distribution of all your remaining property to the new distributee trust which will provide for a split of your wealth between John, Will and other beneficiaries. In my opinion, neither Will, John, nor Sylvia on their behalf could successfully challenge this change in John's and Will's inheritances because neither the terms of the stipulation nor the law of trusts preclude[s] you or the Trustee from exercising the rights and powers you have to change the nature and extent of your sons' expectanc[ies]. Neither . . . Will nor John ha[s] any vested beneficial interest in the irrevocable [1998 Trust] or your assets outside the trust which can not be limited or even eliminated.

Id. at 6-7, (emphases added). While the beneficial interests of John and Will under the 1998 Trust are dependent and conditioned on the receipt of distributions made to them by the Trustee in the proper exercise of the Trustee's discretion, as the Court reads and understands the distributee trust provision of the 1998 Trust, the elimination

[23] That that was so also seems to be conceded under the Respondent's March 24, 2004, post-divorce letter's notation to J.B. that: "Now your revocable trust simply provides that after the payment of debts and expenses your remaining revocable trust property is to be distributed upon your death to the [1998 Trust] to be held for John and Will under the terms of that document." Id. at 4, para. C., sub-para. 1.

of either or both as a beneficiary or beneficiaries entitled to receipt of properly executed discretionary distribution(s) is neither specified nor seemingly implied. It matters not whether their interests are of a nature that is future and contingent rather than present and vested. See RSA 564-B1-103 (2)(A).

At the same time, or about the same time that plans were being made to establish a new distributee trust to receive the assets of the 1998 Trust, marketing and negotiations were in the works for selling the Company, including liquidating its stock and assorted assets. A sale was ultimately closed on June 1, 2006.

D. Events, Preparations, and Actions Incident to 2007 Trust

1. Resignation, Appointment, and Acceptance of Trustee

On January 31, 2004, almost two months before his receipt of the Respondent's letter of March 24, 2004, J.B. met a woman who would, on January 31, 2009, become his second wife, Loren B. Wright (Loren). On March 20, 2006, a little less than three years before the marriage, the Respondent drafted a "Resignation, Appointments [*sic*] and Acceptance of Trustee" that was executed by William C. Walker and J.B. on March 17, 2006, and by the Respondent on March 20, 2006, three days later. In that document: (1) Walker resigned as then Trustee of the 1998 Trust; (2) as Grantor, J.B. nominated the Respondent to serve as successor Trustee; and (3) the Respondent accepted duty to serve in that capacity. See Stip. Ex. 2. All those acts were done in anticipation of the Respondent's preparation for and execution of an amendment to the 1998 Trust accommodating its eventual distribution of all its assets to a new distributee trust drafted by the Respondent for J.B.'s execution as its Grantor.

When asked by the Petitioners' legal counsel for the reason Walker resigned and he had stepped in to replace him, the Respondent testified that in undertakings such as those contemplated (amending the 1998 Trust and decanting all its assets into a new distributee trust), it was his standard practice not to have a lay trustee "wade into those waters." He went on to offer that "as an experienced professional, knowledgeable in the law, practicing in estate and trust work, and familiar with what might be safe and/or extremely risky, he was in a far better position to make that assessment and determination." He further stated that he suggested to Walker that he might want to resign, in avoidance of going "out on a limb that he did not understand," and that because he, as an attorney working for a firm having insurance coverage against professional liability attributable to possible defaults and/or breaches of fiduciary duty, it would be "a much more tenable situation for me to succeed as trustee, than to have a lay person do the sorts of things we were contemplating asking a disinterested trustee if he was comfortable doing."

Following an additional circumlocutory response to a rather straightforward question posed by the Petitioners' attorney — Whether he was acting as J.B.'s attorney at the time he prepared the Resignation, Appointments [sic] and Acceptance of Trustee? — the Respondent, after discernable hesitance, eventually answered that he was.

2. Trustee's Amendment

To the extent the Court can discern, next, an undated Trustee's Amendment to Irrevocable Trust Agreement (Trustee's Amendment) was executed by the Respondent purporting to act as a disinterested Trustee of the 1998 Trust. See Stip. Ex. 11,

I. RECITALS, para. A. That document was purposed to modify the distributee trust provision of the 1998 Trust. Whether, as here, an attorney representing a client-grantor of an irrevocable trust, vested in addressing a desire or concern of the client-grantor through suggested options, offered recommendations or other manner of counselling and rendition of legal services, can be considered, or qualify to serve as a "disinterested trustee" seems doubtful — at least within the context of the usual fiducial independence and impartiality that the two words together conjure. This is perhaps especially so when the trustee's service is provided by the attorney and may be designed to address and/or remedy a defect born of the attorney's advice and trust drafting.

While courts customarily interpret the uncertain meaning of words or phrases in a statute or legal document by attributing to them their plain, common, or ordinary meaning, when it is defined, there is no uncertainty calling for that resort. See, e.g., Appeal of Ashland Elec. Dept. 141 N.H.336, 341 (1996) (giving undefined language in a statute its plain and ordinary meaning). Such is the case here. The 1998 Trust defines the term by adopting and incorporating its meaning under the Internal Revenue Code section 672(c). It describes a "disinterested Trustee" as "(i) an individual who is not a beneficiary of the subject trust and who is not a person "related or subordinate to any such beneficiary as defined in [the] Code §672(c), ..."[24] Stip. Ex. 1 at 55-56, art. VIII, para. B, subpara 3. Accordingly, in the first recital of the Trustee's Amendment the Respondent refers to himself as "a 'disinterested Trustee' as defined in subparagraph B.

[24] Internal Revenue Code section 672(c) does not actually define "disinterested trustee" but rather "independent trustee"; however, other than in name, the qualifications for service appear be the same based on the Court's reading of the Internal Revenue Code provisions and the recital in the Trustee's Amendment. Furthermore, the Petitioners have alleged no contrary assertion.

3. of ARTICLE VIII of the Trust Agreement because he is . . . an individual who is not a beneficiary of the subject trust and who is not a person 'related or subordinate to' any such beneficiary as defined in . . . §672(c). . . of the Internal Revenue Code of 1986, as amended." Stip. Ex. 11 at 1, I. Recitals, para. A. That section of the Internal Revenue Code defines a "related or subordinate party,"

> as a nonadverse party who is the grantor's spouse if living with the grantor; the grantor's father, mother, issue, brother or sister; an employee of the grantor; a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; or a subordinate employee of a corporation in which the grantor is an executive.

26 U.S.C.A. §672(c) (1)-(2). Though the Respondent clearly is seen to be a nonadverse party, that alone does not disqualify him from acting as a disinterested trustee given that he is not a spouse, named relative, or employee of the kinds described under Internal Revenue section 672(c) as a related or subordinate party.

The Trustee's Amendment represents the vehicle for the Respondent's change of the beneficiaries under the 1998 Trust's post-divorce distributee trust provision from its designation of a "class composed of the Grantor's issue living from time to time" to the establishment of a new distributee trust, to be funded with all assets of the 1998 Trust, articulating an altered and, in part, different class of beneficiaries."[25]

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[25] As previously indicated under footnote 11, supra, in the preamble paragraph of the 1998 Trust, as originally written, the terms "Grantor's wife" and "Grantor's spouse" are both expressly defined as meaning Sylvia, alone; and the full class of designated distributee beneficiaries were stated to be "composed of the Grantor's wife and the Grantor's issue living from time to time[.]" In the second recital the Respondent eliminated reference to the "Grantor's wife" from the stated class of distributee beneficiaries in recognition of the Wrights' divorce and inserted the immediately following parenthetical comment: "(Sylvia's beneficial interest was eliminated upon her divorce from the Grantor)." Stip. Ex. 11 at 1, sec. I Recitals, para. B. It also seemingly runs against Respondent's confusingly continued testimonial claim on the merits that "Grantor's wife" or "Grantor's spouse" constituted its own class that conferred upon anyone to whom the Grantor was married at any given time those powers, rights, interests, and/or fiducial or beneficial capacities, due the person bearing those designations under the terms of the 1998

In the second recital, the Respondent ventures to establish the basis for undertaking the amendment. He first references provisions in the 1998 Trust pertaining to an identification of the then class of designated beneficiaries. He follows that by those provisions related to the creation and distribution of assets to one or more distributee trusts under the distributee trust provision. Next, he references in partially paraphrased and abbreviated fashion, Article II, Section I, paragraph B. subparagraph 3.a.'s recital of the Grantor's stated objective in providing the Trustee with flexibility, which the Court more fully quotes in salient part below:

> In granting the Trustee powers and discretions described in [the distributee trust provision] and in creating the powers of appointment described in subparagraph 2 of this [p]aragraph, it is the Grantor's objective to provide the flexibility for the Trustee, in its absolute discretion and not at the behest of the Grantor, to distribute the property of the [1998 Trust] (i) outright to one or more of the Grantor's wife and issue, or (ii) to a new trust or trusts which, in the Trustee's sole, uncontrolled judgment, may best serve the Grantor's overriding objectives to protect and preserve the trust property and achieve the tax and non-tax objectives for the Grantor's family, both as of the date [of] the Grantor's execution of this Trust Agreement and in the future, without disturbing any federal transfer tax favored attributes of the trust property.

Stip. Ex. 1 at 8 (emphasis added). While the Respondent proffered that the emphasized foregoing reference to "the Grantor's family, both as of the date [of] the grantor's execution of this Trust Agreement and in the future" supports his claim that, as written, the 1998 Trust's use of the words "Grantor's wife" and "Grantor's spouse" were intended to include any future person to whom he might be married after Sylvia's death or their divorce, the Court remains unpersuaded. The contention ignores the greater context of the subparagraph's focus on "the Grantor's overriding objectives to protect and

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Trust. Were that the case there would have been no need to incorporate the floating spouse definition in the uncaptioned introductory paragraph of the 2007 Trust.

preserve the trust property and achieve the tax and non-tax objectives, . . . without disturbing any federal transfer tax favored attributes of the trust property." It does not say, and it is not read as suggesting, anything of affording the Grantor's family the benefit of indirect SLAT access to former trust property that has been distributed out of the trust. Rather, it is this Court's sense that the phrase "in the future" pertains to the objective of affording the Trustee flexibility to proactively address not reasonably contemplated, anticipated, or knowable tax and non-tax related matters occurring after the December 2, 1998, execution date of the Trust that might, or would, better serve those objectives. However, even if that were not the case, the Respondent's thesis further disregards the introductory paragraph's recital that: "The name of the Grantor's wife is SYLVIA WRIGHT ("the Grantor's wife[,]" sometimes also referred to as the "Grantor's spouse[.]") It is also seen as more intentioned and consistent with any prospective addition of other members to the class of "the Grantor's issue living from time to time" born or adopted after the Trust was established, than to any person married to the Grantor over the breadth of later time. This is especially so given the clearly expressed and unambiguous designation of Sylvia alone as the "Grantor's wife" and "Grantor's spouse" in the introductory preamble to the 1998 Trust.

In the following, third recital, the Respondent next cites, in selective part only, ARTICLE V, paragraph K of the 1998 Trust's grant of authority for a "disinterested trustee to amend [its] trust provisions . . . in [that trustee's] sole and absolute discretion . . . for any . . . reason," as though those last three words of the targeted quote stand free from any contextual link or connection to the other particularized reasons recited in the paragraph that are omitted. Stip. Ex. 11, para. C. (emphasis

added). In short, the language he quotes only references: the "sole and absolute discretion," as the facilitator; "for any . . . reason," as the cause; and "final and binding on all beneficiaries;" as the effect, forming the sole criteria for the disinterested Trustee's exercise of his authority to amend the 1998 Trust. However, the paragraph, as fully stated, sets forth among a listing of other powers bestowed on a trustee, authority:

> To terminate or amend any trusts hereunder if the disinterested Trustee of such trust determines, in his sole and absolute discretion, that the continuation of the trust in its original form would be unduly burdensome, uneconomical and inefficient, or otherwise unwise because of the modest nature or value of the assets in the trust, or tax or other legislative changes which make continuation of the trust [in] its current form inadvisable, or for any <u>other</u> reason. The disinterested Trustee's exercise of this discretion to amend or terminate a trust hereunder shall be final and binding on all beneficiaries of such trust.

Stip. Ex. 1 at 40, art. V, sec. TRUSTEES' POWERS, para. K. (emphasis added).

Under questioning by the Petitioners' attorney, the Respondent would not concede that the "or for any other reason" expression in paragraph K was in any way limited, restricted, or tethered to the preceding, more specific and particularize bases for the exercise of the Trustee's determination to amend or terminate the trust — namely, those that would render "the continuation of the trust in its original form . . . unduly burdensome, uneconomical and inefficient, or otherwise unwise because of the modest nature or value of the assets of the trust, or tax or other legislative changes which make continuation of the trust [in] its current form inadvisable[.]"

In the final, fourth recital of the Trustee's Amendment, the Respondent introduces his wish,

> to exercise such amendment power to <u>clarify</u> the extent of the Trustee's discretion to decant all the [1998 Trust] assets into a distributee trust over

> which the Grantor has retained no federal estate taxable powers or interests, which such trust will have beneficiaries different from the beneficiaries of the [1998 Trust] if they are members of the Grantor's family.

Stip. Ex. 11 at 2, I. Recitals, para. D. (emphases added).

Declaring himself as acting in the capacity of a disinterested Trustee, the Respondent then proceeded to amend the distributive trust provision of the 1998 Trust, in relevant part,

> to state more clearly the Grantor's objective that the Trustee is empowered to decant the assets of the single[-]family trust into a new irrevocable trust created by the Grantor . . . [that] may have current and future beneficiaries other than all of the Grantor's descendants who are eligible discretionary beneficiaries of the single[-]family trust provided that one or more of the Grantor's descendants are beneficiaries of the distributee trust, and only members of the Grantor's family who are not descendants of the Grantor may also be beneficiaries of the new trust. For these purposes, 'members of the Grantor's family' shall include (i) the grantor, . . . (ii) the grantor's descendants, and (iii) any person to whom the Grantor may legally be married in the future.

Id., sec. II AMENDMENT (emphases added).

3. 2007 Trust and Trustee's Memorandum

Following his March 20, 2006, appointment as successor Trustee of the 1998 Trust, and the June 1, 2006, sale of the Company and its business assets, the Respondent sent a letter to J.B. dated August 2, 2007. In it he included a proposed "draft 'distributee trust,' which [he stated] includes the provisions we talked about, . . . and a Trustee's Memorandum [he was] proposing to evidence exercise of [his] discretion to distribute the assets from the existing [1998 Trust] to the new [distributee] 2007 Trust]." Stip. Ex. 10. (N.B.: the exhibit does not include copies of the enclosed drafted documents.)

Just over a month later, on September 6, 2007, acting as Trustee of both the 1998 Trust and the 2007 Trust, the Respondent signed a (presumably unchanged) original version of the proposed draft Trustee's Memorandum referenced and enclosed in the August 2 letter to J.B. The signed version is sub-captioned, "*Distribution of Trust Principal to John B. Wright 2007 Irrevocable Trust & Termination of the Wright Family 1998 Irrevocable Trust.*" See Stip. Ex. 12. (Appended as Exhibit "A" is an executed copy of the 1998 Trust, and as Exhibit "B," a copy of the 2007 Trust executed by J.B. as Grantor on August 31, 2007, and by the Respondent as Trustee on September 4, 2007.)

The Respondent begins paragraph 2 of the memorandum, by stating, without quotation, that: "ARTICLE II, Section I, [p]aragraph B.1.a. of the 1998 Trust Agreement provides that the Trustee may, in its sole and absolute discretion, distribute any amount (including all) of the income or principal from the Trust to or for the benefit of the beneficiaries[,] who are all of the Grantor's issue." However, that statement is true in paraphrase only of the Trustee's discretion and distribution amounts that are recited in paragraph B., subparagraph 1, alone. It is not accurate with respect to sub-subparagraph a., which only references and is limited to the Trustee's payment of "the annual premiums on any insurance policy or policies owned by the trust[.]" It says nothing of that which the Respondent details. The memorandum then refers to, but does not quote verbatim, the distributee trust provision as "further provid[ing] that any such discretionary distributions may be made to a 'distributee trust' created by the Grantor, being administered 'for any one or more, but not necessarily all, of the beneficiary or

beneficiaries hereunder . . . ."[26] (Emphasis added.) The distributee trust provision does, in material part, specify that the recited discretionary distributions "may be made to a trust or trusts (a 'distributee trust or trusts') being administered under another trust agreement created by the Grantor for the benefit of such one or more (but not necessarily all) of such beneficiaries." (Emphasis added.) As earlier stated, those beneficiaries that it references originally consisted of a class made up of Sylvia, as J.B.'s wife and John and Will, as J.B.'s issue then living. After the divorce, the class was reduced to John and Will, only, barring the later birth or adoption of other issue.[27] (Emphases added). Depending on whether the Trustee's Amendment was efficacious or not, that remained so from the finalization of the divorce on March 2, 2004, through to January 31, 2009, when Loren became J.B.'s wife.

So far as otherwise pertinent to the merits, the Court observes that while in paragraphs 2. and 3. of the Trustee's Memorandum the Respondent alludes to the distributee trust provision of the 1998 Trust as authority to make the decanting to the 2007 Trust, neither they nor any other content of the Trustee's Memorandum refer to the Trustee's Amendment. It also was not included as an accompanying sub-exhibit with the four others that were. Yet, without it there could be no such decanting to a distributee trust having any other than "one or more (but not necessarily all) of 1998 Trust discretionary beneficiaries beyond John and/or Will. Curiously, the Respondent had no explanation in response to a query posed by the Petitioners' attorney asking

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[26] While some of the preceding quotes and other language in paragraph 2 of the Trustee's Memorandum are not entirely accurate, the Court's understanding is that the substance of what has been factually stated is not a significant matter of dispute between the parties.

[27] The Court understands that no other issue were born or adopted before the 1998 Trust was terminated.

why the Trustee's Memorandum makes no mention of or reference to the need for, and the part played by, the Trustee's Amendment in rendering support for the decanting of the 1998 Trust's assets into the 2007 Trust, with its more expansive and divergent class designation of discretionary beneficiaries.

In pertinent part, the Respondent goes on to state that he, as "Trustee now wishes to exercise his discretion and distribute to the 2007 Trust all assets held by the 1998 Trust . . . thereby terminating the 1998 Trust, effective as of the [September 6, 2007] date written below." Stip. Ex. 12 at 1, para. 3. (emphasis added).

Accompanying the Trustee's Memorandum is a written specification of the existing assets of the parent 1998 Trust, captioned Exhibit C. It lists an investment account, a real estate limited liability company, and three life insurance policies (naming Thomas P. Wright as the insured)[28] having a cumulative value of $4,846,215.67. Also accompanying the Trustee's Memorandum as Exhibit "D.," is a written, unsigned letter of assurances addressed to the Respondent in his capacity of Trustee, prepared by his McDonald & Kanyuk, PLLC law firm. It is dated August 24, 2007, and states:

> This firm is estate planning counsel to J.B. Wright, Grantor of the [1998 Trust]. We prepared the 2007 Trust into which Joseph F. McDonald, III proposes as Trustee to distribute all of the life insurance policies currently held in the 1998 Trust under authority granted to Joseph F. McDonald, III under Paragraph B.1.a. of Section I, ARTICLE II of the 1998 Trust Agreement.[29] Such Paragraph allows Joseph F. McDonald, III as Trustee to make the transfer if he determines that the Grantor has retained no

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[28] Thomas P. Wright is understood to have been J.B.'s father, and the policies of insurance were part of a plan for paying for the redemption of shares of stock he owned in the Company.

[29] Again, subparagraph a. of the cited article, section, and paragraph fails to endow the Trustee with distribution authority recited. It is the second subparagraph, b., that gives the Trustee authority to distribute to a new distributee Trust, subject to its requirement that it be for the benefit on one or more (but not necessarily all) such beneficiaries [of the 1998 Trust]."

> powers over or interest in the 2007 Trust which would cause its assets to be included in the Grantor' gross estate for federal estate tax purposes.
>
> This letter will provide the Trustee with our assurances that we have prepared the 2007 Trust Agreement to avoid giving the Grantor any such powers or interests. We are providing these assurances at Mr. Wright's request and have no attorney-client relationship with the Trustee in this matter. This letter is not a legal opinion.

Id. The typewritten name below the writer's signature line, is that of the Respondent's law partner, Amy K. Kanyuk.[30]

In the uncaptioned introductory paragraph of the 2007 Trust, the actual date of the agreement between J.B. as Grantor and the Respondent as Trustee is left blank. The month of August and year of 2007, however, are recited. As formerly indicated, its signature page, 39, reflects the signatures of J.B. as Grantor and the Respondent as Trustee. In addition, it bears the signatures of witnesses to each of their signatures, and notarized acknowledgements of J.B., as Grantor and the Respondent, as Trustee, in New Hampshire. The signatures of J.B. and the Respondent, and their acknowledgments, are respectively dated August 31, 2007, and September 4, 2007.[31] See Stip. Ex.3 at 1, 39.

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[30] The writer's and typist's initials on the lower left of the letter, below the signature line and typewritten name of the writer, are "AKK/ndm," from which the Court draws confirmation that the letter was prepared by and was intended to be, or ultimately was, signed by Attorney Amy K. Kanyuk, on behalf of the law firm. The Court presumes that the letter was in furtherance of the provision Article II, Section I, paragraph 3, subparagraph b of the 1998 Trust at page 9 in relation to a trustee' entitlement to rely on a written opinion of the attorney who might have occasion to draft a distributee trust as to its propriety in not promoting adverse federal tax consequences for its grantor. See Stip. Ex.. 12 at 1, para. 3.

Why the letter only references the decanting of life insurance policies, while the Trust Memorandum itself is accompanied by an Exhibit "C" that reports other 1998 Trust assets that were to be decanted into the 2007 Trust, see id., was not explained.

[31] Again, as previously indicated, the Court construes the 2007 Trust as executed on September 4, when the last party to the agreement signed and acknowledged it. In doing so, it disregards the omitted recital of the numerical day of the month and the page 39 testimonium clause's recital of the parties having signed "on the day and year first above written."

The introductory paragraph then, after identification of the Grantor and Trustee, notably states:

> The Grantor is now unmarried, but anticipates that he may be married in the future, and wishes to make provisions herein for any future wife in the event of such marriage. Accordingly, references to the "Grantor's wife" shall mean the person to whom the Grantor may be married at any time reference is being interpreted and applied, subject to the terms and conditions of Section VII of Article II hereof. Stip. Ex. 3 at 1 (emphasis added).[32] As in the 1998 Trust, John and Will are identified as J.B.'s then living children and are included and referenced in the document as "(the 'Grantor's children')."

Id.

The beneficiaries expressly entitled to receive discretionary distributions of income and principal from the Trustee during the lives of the Grantor and any Grantor's wife, as redefined, are those falling within a "class composed of the [then, if any] Grantor's wife[33] and the Grantor's living issue." Id. at 6, art. II, sec. III, para. A., subpara.1 a. "Issue," along with "child," "children," and "descendants," are all defined as "includ[ing] a child or children, or the lineal descendants, as the case may be, of the designated parent whether legally adopted or naturally born before or after the date of this Agreement." Id. at 1, art. I [DEFINITIONS AND GUIDELINES], B.

The Respondent decanted all the assets of the 1998 Trust into the 2007 Trust, largely consistent with the scheme outlined in the Trustee's Memorandum, triggering the

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[32] The emphasized language is in trust parlance known as a "floating spouse" provision, as distinct from the alternative option of the naming the grantor's spouse, as was done in the original version of the 1998 Trust's designation of Sylvia as the Grantor's wife and the Grantor's spouse.

[33] J.B. was unmarried at the time the 2007 Trust came into existence; however, the Court's sense, drawn from the record, is that his then prevailing sentiments rested somewhere between interest in and commitment to remarriage regarding his ongoing relationship with Loren. Accordingly, depending on the efficacy of the Trustee's Amendment to the 1998 Trust, upon their January 31, 2009, marriage, Loren assumed status as the "Grantor's wife" for purposes of the 2007 Trust.

process for the 1998 Trust's eventual termination. After (1) the Company, its associated property and assets had been sold; (2) the Trustee's Amendment to the 1998 Trust had been carried out; (3) the 2007 Trust had been created; (4) the assets of the 1998 Trust had been decanted into the 2007 Trust; and (5) the Respondent rendered a final accounting for the 1998 Trust. See Stip. Ex. 14. The Respondent's testimony was that the 1998 Trust was accordingly terminated and he then resigned as Trustee of the 2007 Trust on an undisclosed date in 2008.[34] The Respondent's testimony concerning when he resigned as Trustee of the 2007 Trust is contradicted by an memorandum admitted into evidence prepared by an associate or assistant of the McDonald & Kanyuk law firm regarding the prospect of Loren, as then current Trustee of the 2007 Trust, further decanting its asset to another trust of which J.B. would be a discretionary beneficiary. In the memo the writer, as a matter of background, states: "On August 10, 2010, you resigned as Trustee of the [2007 Trust] and J.[B.] appointed Loren as successor Trustee." See Stip. Ex.17 at 1. As the parties stipulated to admission of the document, the Court accepts August 10, 2010, as the date for the Respondent's resignation.

Over the course of Loren's incumbency as Trustee of the 2007 Trust, she made 36 quarterly distributions, totaling $3,225,000.00 — thirty-five into a joint account held by Loren and J.B. and one into an account titled solely to J.B. See Stip. Ex. 22; 24. The first distribution occurred in January 2011, some 5 months after the Respondent's

[34] In answer to inquiry of the Petitioners' attorney as to the reason for the Respondent's resignation the Respondent responded by an unconvincing tender to the effect that J.B. wished to appoint Loren trustee, he had the right to remove the Respondent from continuing to act in that capacity, and the Respondent didn't feel there was need for him to stay on and suffer the indignity of a forced removal. Rather the overwhelming credible evidence supports that, beyond a reasonable doubt, the predominant, if not sole, reason for his resignation was that he had completed the trustee service for which he had accepted and assumed the position.

resignation. The last distribution was made in September 2019. See Stip. Ex. 22. No further distributions were then made from the Trust before Loren ended her trusteeship on September 30, 2020, after the Court accepted and granted the *Stipulation of Partial Settlement* (referenced in footnote 1 on page 1, supra), and approved the accompanying *Settlement Agreement.* See Index ##18, 19; Stip. Ex. 21. The *Settlement Agreement* was executed by the Petitioners, J.B., and Loren, as both an individual and as Trustee of the 2007 Trust.

Under the *Settlement Agreement* the Petitioners, inter alia, were given the option of either (1) "tak[ing] over the Trust" on Loren ceasing to serve as Trustee and the Petitioners appointing a successor, or (2) receiving the balance of all assets remaining in the 2007 Trust. They ultimately chose the latter. The uncontroverted testimony was that the Petitioners received and equally shared between them a distribution from the 2007 Trust of something around $4,500,000.00. Loren also assigned all her "beneficial rights and interests . . . to [the Petitioners] such that they shall be the sole beneficiaries of the Trust[.]" Additionally, "Loren and J.B. in all capacities further assign[ed] to the [Petitioners] any and all rights of actions and claims, if any, they may have [had] against [the Respondent] and his firm. . . ." Still further, they "[a]greed to reasonably cooperate with the [Petitoners] in the prosecution of any actions or claims against the [Respondent] or his firm." Id. at 2.

II. Governing Law

A. Ascertainment of Grantor's Intent[35]

[35] During the procedural part of the litigation, the Respondent made known his plan to have J.B. testify on the merits to the effect that his intent in variously referring to the "Grantor's wife" and "Grantor's spouse" in the 1998 Trust was not that the terms be limited to only Sylvia. That prompted the Petitioners to file a

Although the 1998 Trust was created before the October 1, 2004, original enactment of the NHTC, the latter contains provisions that are largely made applicable to trusts established before its enactment, just as it does to the 2007 Trust that was established afterward. See RSA 564-B:11-1104. With that said, the Court sets out the statutory and common law[36] touching upon, if not directly governing, its adjudication of the merits of this litigation. Further, insofar as RSA 564-B:1-112(a) specifies that "[t]he rules of construction that apply . . . to the interpretation of and disposition of property by will also apply . . . to the interpretation of the terms of a trust[37] and the disposition of the trust property[,]" citation to cases or other sources lying within the context of a will litigation have been intentionally included. With that said, the Court proceeds to address the governing and otherwise related law.

It is long and well-established New Hampshire law that the intent of the grantor is the veritable North Star guiding a court in its interpreting a trust. See, e.g., Shelton v. Tamposi, 164 N.H. 490, 495 (2013) (intent of grantor is "paramount"); King v. Onthank,

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Motion in Limine asking that the introduction of extrinsic testimonial evidence through J.B., not be allowed for that purpose. See Index #34. The Respondent objected. See Index #38. The Court granted the *Motion in Limine*, finding that there was no ambiguity within the meaning and scope of either term insofar as they both definitionally denoted only J.B.'s then wife and spouse, Sylvia. See Index #44. While no appeal was taken to that ruling and the Court's denial of the Respondent's ensuing *Motion for Reconsideration*, see Index #48, in his testimony on the merits, the Respondent nonetheless suggested that he might yet present an appellate challenge to this Decree. As such, the Court feels compelled here to include law related to the use of extrinsic evidence to the extent it may have been deemed inadmissible.

[36] RSA 564-B:1-106 specifies that "[t]he common law of Trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state."

[37] RSA 564-B:1-103(19) defines, consistent with common law, "terms of a trust" as "the manifestation of the grantor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding."

152 N.H. 16, 18 (2005) (intent of testator is the "sovereign guide"); In re Frolich Estate, 112 N.H. 320, 325 (1972) (effectuation of testator's intent is the "cardinal rule" of will construction); Hodges v Johnson, 170 N.H. 470, 481 (2017) ("signal regard" is shown for the intention of the settlor); Amoskeag Bank v. Preston, 107 N.H. 330, 333 (1966) (testatrix wishes are the "touchstone" to interpretation of will); In re Clayton J. Richardson Trust, 138 N.H. 138 N.H.1, 3 (1993) (testator's intent is the "principle guide" to interpreting will); see also RSA 564-B:1-112(b); RSA 564-B:11-1101 (in construing a trust, preservation of settlor's intent is to be given "primary consideration").

In establishing the grantor's intention, it is that at the time of the trust's creation that controls. See In re Pack Monadnock, 147 N.H. 419, 424 (2002) (citation omitted); see also Merrow v. Merrow, 105 N.H., 106 (1963) (remarking that a testator's intention in making his will must be derived from its express contents, not his inadmissible declarations regarding different intent made before or after its execution) (citation omitted). "To determine the [grantor's] intent [courts] first look to the language of the trust." In re Trust by Dumaine,146 N.H. 679, 681 (2001). "[I]f no contrary intent appears in the will, words within the will are to be given their common meaning. In re Clayton J. Richardson Trust, 138 N.H. 1, 3 (1993.) (citation omitted). The same may be said of the enforcement of the grantor's intent "unless it is contrary to statute or public policy[,] Lanoue v. Comm'r, Soc. Security. Admin., 146 N.H. 504, 507(2001) (citation omitted), or it is illegal or impossible to do so." King at 18 (citations omitted).

"[I]t is the [grantor's] intent, as ascertained from the language of the entire instrument, that governs the distribution of assets under a trust[,]" id. (citations omitted), "and not from an isolated phrase or clause of it." Indian Nat. Bank v. Rawls, 105 N.H.

142, 145 (1963) (citations omitted). Further, grantors are presumed to understand the import of the words used in the trust instrument, inclusive of knowledge and intention related to the legal effect of language employed, e.g., Blue Ridge Bank & Trust Co. v. McFall, 207 S.W.3d 149, 157 (Mo. App. W.D. 2006) (citations omitted see also Estate of Came, 129 N.H. 553 (1987) (Johnson, J. dissenting) (citations omitted). It is also generally presumed that they "know and approve all dispositions and omissions in [their trusts]." Id. It has been shown that they know how to include limiting language when it is desired, as well. See Cowan v. Cowan, 90 N.H. 198, 201 (1939).

When terms of a trust evince a "clear and of well-defined force and meaning, [they] must stand as written." Blue Ridge at 157 (citation omitted). In such instances a court must interpret the grantor's intent in accordance with the language chosen, and "there is no need to look to rules of construction [because] the courts cannot rewrite a [trust] using rules of construction." Id. (citations omitted). It is only where a word or language is of uncertain meaning that the court is tasked with need to construe the grantor's intention, or most probable intention, from the wording used. See Simpson 139 N.H.1, 8 (1994).

"Although extrinsic parol evidence is inadmissible to vary or contradict the express terms of a trust, such evidence may be received in aid of a court's determination of the [grantor's] intent where the language used in the trust instrument is ambiguous."[38] Bartlett, 128 N.H. at 505; see, e.g., Simpson at 8, ("where the terms of a

[38] Lack of precision does not make a term "ambiguous," rather, ambiguity exists where there is reasonable disagreement as to a term's meaning. Cf. Anna H. Cardone Revocable Trust v. Cardone, 160 N.H. 521, 531 (2010) (interpretation of deed); see also Whitcomb.v. Peerless Ins. Co., 141 N.H. 149, 151 (1996) (interpretation of insurance policy).

[trust] are ambiguous, . . . extrinsic evidence may be admitted to the extent that it does not contradict the express terms of the [trust]") (citation omitted). Thus, "[e]xternal facts may be received to explain or resolve doubts, but not to create them." 7 C. DeGrandpre, New Hampshire Practice, Wills, Trusts and Gifts, § 13.07, at 144 (4th ed. 2003) (quotations omitted). For example, our Supreme Court, while observing that courts "examine extrinsic evidence of the [grantor's] intent only if the language used in the trust is ambiguous," In re Trust by Dumaine, 146 N.H. at 681, noted that what extrinsic evidence was introduced in that case ultimately lent support to its determined construction of the unambiguous trust terms there at issue. See id. at 683. Accordingly, a grantor's comments before or after execution of a trust are not permitted to contradict the express language in the instrument, but, where appropriate, it may serve in some cases as a helpful tool in affirming the court's determination of his or her intent. See, e.g., Merrow v. Merrow, 105 N.H. 103, 106 (1963) (citations omitted); accord Simpson, 139 N.H. at 8 (citations omitted).

"Where a court is construing an inter vivos trust evidenced by a written instrument, 'the terms of the trust are to be determined by the provisions of the instrument as interpreted in the light of all the circumstances and other competent evidence of the intention of the [grantor] with respect to the trust.'" Trust by Dumaine at 681. "The [grantor's] intention is a question of fact to be determined by competent evidence, and not by rules of law." Bartlett v. Dumaine, 128 N.H. 497, 505 (1986) (citations omitted). However, as earlier stated, extrinsic evidence is not admissible in the absence of language ambiguity reasonably discerned." In re Trust of Dumaine, 146 N.H. 679, 681 (2001) (citation omitted). And extrinsic evidence may not be used to vary

or contradict the express, plain meaning, and unambiguous terms of the trust. Pack Monadnock, at 423 (citation omitted). Yet, New Hampshire case law also supports the proposition that when a readily apparent unexpected contingency occurs, extrinsic evidence may be introduced and examined to determine the intent of the grantor in response to the contingency. See In re Devin's Estate, 108 N.H. 190, 191 (1967) (will making no provision for what would happen to a residuary legatee's share if she predeceased the testatrix and had no heir).

While the New Hampshire Trust Code (NHTC) provision on decanting, RSA 564-B:4-418, was not in existence either at the time the 1998 Trust or the 2007 Trust were created and the de facto decanting of assets from the former into the latter occurred, its original 2008 enactment and later amendments to its current version have consistently prohibited decanting from one trust to a second if the second trust includes a beneficiary that is not a beneficiary of the first trust. See RSA 564-B:4-418 (b) (1) (2008); RSA 564-B:4-418 (b) (1) (2023). Such seems to also be the consensus among states that permit decanting as a matter of common law or case law. See G. Bogert et. al., The Law of Trusts and Trustees §567 (2021).

B. Fiduciary Duties

Here, the Court largely restates statutory law recited in its earlier ruling, see Index #30, on the Respondent's *Motion to Dismiss,* see Index ##27, 28, with respect to fiduciary duties that the Petitioners aver he violated in amending the 1998 Trust and distributing all its assets to the 2007 Trust, as they have equal application and relevance to the adjudication of the merits.

Under the NHTC the Court is empowered to remedy a breach of trust by granting the relief sought by the Petitioners. See RSA 564-B:10-1001(b) (9) (court may void act of trustee, trace trust property wrongfully disposed of, and recover the property); RSA 564-B:10-1002 (court may award damages for breach of trust). Here the Petitioners allege that the Respondent's distribution of assets from the 1998 Trust to the 2007 Trust constitutes a breach of trust, specifically, a violation of the duty to administer the 1998 Trust and distribute its property "in good faith, in accordance with its terms and purposes and the interests of the beneficiaries," consistent with the provisions of the NHTC's RSA 564-B:8-801 (duty to administer), and the duty of impartiality. See RSA 564-B:8-803.

As earlier stated, the Respondent argues that there was no breach of trust because the distribution to the 2007 Trust effectuated and carried out the intent of the Grantor as expressed in the 1998 Trust. See *Motion to Dismiss Memo of Law* at 2. Thus, the Court must decide whether the facts as alleged by the Petitioners constitute a violation of either the duty to administer, the duty of impartiality, or both.

Turning first to the duty to administer, the NHTC, quoted in part in the preceding paragraph, more fully instructs that a "trustee shall administer, invest and manage the trust and distribute the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter." RSA 564-B:8-801. At its core, the duty to administer requires a trustee to follow the terms of the trust with respect to the interests of the beneficiaries. See Hodges v. Johnson, 170 N.H. 470, 482 (2017).

That the 1998 Trust empowered its Trustee to distribute its assets to another trust pursuant to its distributee trust provision is not a matter of dispute. It is only whether in doing so, it was accomplished consistent with its terms that is the subject of contention.

As already related RSA 564-B:8-801 charges a trustee with a duty to "administer, invest and manage the trust and distribute the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter."

The NHTC sets forth certain standards of care governing a trustee's duties when managing trust assets. See, e.g., RSA 564-B:8-802 (duty of loyalty); RSA 564-B:8-803 (duty of impartiality); RSA 564-B:8-804 (prudent administration). It recognizes, however, that a grantor may modify the trustee's duties, thus diminishing or relieving him or her of certain fiducial burdens. See RSA 564-B:1-105(a) ("[e]xcept as otherwise provided in the terms of the trust, this chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary"); cf. Bartlett, 128 N.H. at 507-15 (common law). Further, a trustee "who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach" resulting from that reliance. RSA 564-B:10-1006.

The power of a grantor to insulate a trustee from liability, however, is not without limitations. As an overriding, mandatory rule, the NHTC excepts from the general proposition that "[t]he terms of a trust prevail over any provision of this chapter . . . the effect of an exculpatory term under RSA 564-B:10-1008[.]"

RSA 564-B:1-105 (b)(8). In turn, RSA 564-B:10-1008 directs that "[a] term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it: (1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries . . . ." RSA 564-B:10-1008(a)(1). In addition, it mandates that terms of a trust do not prevail over, inter alia, "the duty of a trustee to act in good faith and in accordance with the terms of the trust, the purposes of the trust, and the interests of the beneficiaries." RSA 564-B:1-105(b)(2). In sum, although certain duties like prudence and impartiality are "default rules" that may be circumvented by contrary election of a grantor, "trust terms may not altogether dispense with the fundamental requirement that trustees not behave recklessly, but in good faith, with some reasonable degree of care, and in a manner consistent with the terms and purposes of the trust and the interests of the beneficiaries." RESTATEMENT (THIRD) OF TRUSTS § 77 comment d (2015).

The New Hampshire Supreme Court has recognized that RSA 564-B; 8-801 "[s]pecifically, [imposes on] a trustee "a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust; the trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust." Shelton, 164 N.H. at 500 (quotations, brackets, and ellipses omitted and emphasis added) quoting RESTATEMENT (THIRD) OF TRUSTS § 79(1) (a) (2007).

The Court observes that by defining "terms of the trust" in the manner RSA 564-B:1-103(19) does, the NHTC adopts the common law rules of construction set forth, supra. It also defines a beneficiary as meaning: "a person that: has a present or future beneficial interest in a trust, vested or contingent." RSA 564-B:1-103(2) (A). While RSA

564-B:1-103(7) denotes that "Interests of the beneficiaries" means "the beneficial interests provided in the terms of the trust[,]" the NHTC does not define "beneficial interests."

Thus, to determine whether the Respondent's trustee duty to administer, invest, and distribute authority was properly exercised or breached owing to the subject decanting, one must consider the meaning of the terms used in RSA 564-B:8-801.

The New Hampshire Supreme Court has recognized that section 8-801 "[s]pecifically" imposes on a trustee "a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust; the trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust." Shelton, 164 N.H. at 500 (quotations, brackets, and ellipses omitted and emphasis added) quoting RESTATEMENT (THIRD) OF TRUSTS § 79(1) (a) (2007); cf. Merrill Lynch Trust Co., FSB v. Campbell, No. CIV.A. 1803-VCN, 2009 WL 2913893, at *7 (Del. Ch. Sept. 2, 2009) ("Under Delaware law, when a trust has more than one beneficiary, a trustee is under a duty to administer the trust in a manner which preserves a fair balance between the beneficiaries, and to ensure the integrity of the trust's assets.")

Courts determine the meaning of a statute by analyzing its plain terms. Landry v. Landry, 154 N.H. 785, 787 (2007). To discern the plain meaning of a pivotal term, courts may permissibly consult the dictionary for its common definition. See, e.g., State v. Flodin, 159 N.H. 358, 363 (2009); Board of Water Comm'rs, Laconia Water Works v. Mooney, 139 N.H. 621, 626 (1995) (an undefined statutory term is given its "plain and ordinary meaning"). "Beneficial interest" is defined as "[a] right or expectancy in

something (such as a trust or an estate) as opposed to legal title to that thing." BLACK'S LAW DICTIONARY at 934 (10th ed. 2009).

The Court also observes that RSA 564-B:8-801 sets forth the required duties in the conjunctive, cf. Gagnon v. New Hampshire Ins. Co., 133 N.H. 70, 78 (1990) (term "and" implies conjunctive application), and thus a trustee has an unwaivable duty, when administering, distributing or decanting trust property, to act not only: (1) in good faith; (2) according to its terms and purposes as discerned using established principles of construction; (3) in accord with the NHTC; but also (4) giving due consideration to the rights and expectancies of the beneficiaries as they are identified in the trust.

"Good faith" was undefined in the NHTC until 2015. See 2015 Laws 272:64.[39] If one looks to its plain and ordinary meaning, Board of Water Comm'rs, Laconia Water Works, 139 N.H. at 626, the term implies "[a] state of mind consisting in . . . faithfulness to one's duty or obligation [or]. . . absence of intent . . . to seek unconscionable advantage." BLACK'S LAW DICTIONARY, supra at 808. This approach is not inconsistent with the definition adopted by the NHTC in 2015 as both imply an obligation "to observe reasonable limits in exercising" discretionary powers. See Centronics, 132 N.H. at 143; BLACK'S LAW DICTIONARY, supra at 808.

Conversely, it is well-established that "[a]n abuse of discretion may result from the exercise of discretionary authority in bad faith or from improper motive. Thus, a discretionary power is abused if a trustee acts dishonestly, such as when the trustee

[39] Under the current version of the law, it is defined as: "with respect to a trustee, trust advisor, or trust protector, the observance of common standards of honesty, decency, fairness, and reasonableness in accordance with the terms of the trust, the trust's purposes, and the interests of the beneficiaries as their interests are defined under the terms of the trust . . . ." See RSA 564-B:1-103(30).

receives an improper inducement for exercising the power in question." RESTATEMENT (THIRD) OF TRUSTS §87 comment c (2015).

"Generally, courts will defer to a trustee's discretion in the absence of an abuse of discretion – the heightened standard for imposing liability on trustees in the exercise of their discretionary authority." William R. Culp & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 Real Prop. Tr. & Est. L.J. 1, 48 (2010). An abuse of discretion may be found not only where there is an "improper motive," RESTATEMENT (THIRD) OF TRUSTS §87 comment c (2015), but where, inter alia: (1) acts are undertaken in good faith beyond the purpose to which the power was conferred; (2) there is a failure to exercise discretion by acting "arbitrarily or without knowledge of or inquiry into relevant circumstances"; (3) there is a "mistaken interpretation of the terms of the trust or power"; or (4) there is "a misunderstanding of applicable fiduciary law." Id.

Resolution of this matter requires the Court to determine the standard of fiducial care required of the Respondent while acting as Trustee of the 1998 Trust and the 2007 Trust within the dictates of applicable statutory and common law. As a preliminary matter, it observes that:

> [a] trustee has both (i) a duty generally to comply with the terms of the trust and (ii) a duty to comply with the mandates of trust law except as permissibly modified by the terms of the trust. Because of this combination of duties, the fiduciary duties of trusteeship sometimes override or limit the effect of a trustee's duty to comply with trust provisions; conversely, the normal standards of trustee conduct prescribed by trust fiduciary law may, at least to some extent, be modified by the terms of the trust.

RESTATEMENT (THIRD) OF TRUSTS § 76 comment b (1) (2015).

C. Duty to Beneficiaries

In the NHTC, the term "beneficiaries" includes those without fully vested property interests. See RSA 564-B:1-103(2) (A). The Petitioners' "beneficial interests" are those delineated in the trust. RSA 564-B:1-103(7) ('interests of the beneficiaries"); B:1-103(19) ("Terms of the trust"). In this matter, the Petitioners belong to a class of persons designated in the 1998 Trust and 2007 Trust documents, eligible to receive trust property and income distributions, at the Trustee's discretion. See, e.g., Stip. Ex. 1 at 5, 8; Stip. Ex. 3 at 6. They are also within a class of individuals who may be named beneficiaries of a distributee trust. See id. This status, though arguably less than a fully vested property right, see RSA 564-B:8-814(b), by statute, see RSA 564-B:1-105 (b)(2), nonetheless entitles them to protection from a fiduciary who fails "to act in good faith . . . and the interests of the beneficiaries." Id.; see also 564-B:8-801.

Although RSA 564-B:8-814(b)-(c) limit the duties owed to unvested interests and grants broad discretion to treat beneficiaries unequally, the statute does not absolve a trustee from all duties to beneficiaries. Section (b) states: "if a distribution to or for the benefit of a beneficiary is subject to the exercise of the trustee's discretion, . . . then the beneficiary's interest is neither a property interest nor an enforceable right, but a mere expectancy" and section (c) mandates that "if the terms of a trust permit distributions among a class of beneficiaries, . . . then the trustee may make distributions unequally among the beneficiaries and may make distributions entirely to one beneficiary to the exclusion of the other beneficiaries." Both subsections (b) and (c), however, are subject to good faith limitation set forth in subsection (a) mandating that: "the trustee shall

exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries." Hence, the conditional nature of a beneficiary's interest or the ability to treat beneficiaries unequally does not relieve a trustee of the basic duty to make good faith decisions and be mindful of a beneficiary's interests. In addition, while RSA 564-B:8-814(b) states that discretionary distributions are "mere expectanc[ies]" and thus a beneficiary does not have a "property right" to receive such a distribution, that provision does not excuse a fiduciary from fulfilling mandated duties. Rather, this statute merely labels the nature of the beneficial interest. Cf. G. Bogert, The Law of Trusts and Trustees §181 (discussing possible types of beneficial interests). It does not, however, render a potential interest unworthy of any fiducial protection or care. For this Court to state otherwise it cannot do consistent with its obligation to interpret and apply statutory law as written. Cf. Town of Newbury v. N.H. Fish & Game Dep't., 165 N.H. 142, 144 (2013) (courts cannot add language that the legislature "did not see fit to include").

Finally, to regard the law as relieving the Respondent of a duty under RSA 564-B:8-801 would lead to an absurd result. Cf. State v. Bulcroft, 166 N.H. 612, 614 (2014). It would relieve trustees of their fiduciary duties to beneficiaries with an interest in future income or principal until a distribution is made. That is not, and cannot be, the law. Beyond that, it would conflict with New Hampshire case law. See In re Goodlander, 161 N.H. at 497 (beneficiary specifically found not to have a vested interest in income still owed duty of impartial administration of trust).

III. Analysis

As earlier indicated, the controversy at the heart of this case is whether the

decanted distribution of the 1998 Trust assets into the distributee 2007 Trust was undertaken and accomplished lawfully. The Petitioners maintain that it was not because it was premised on flawed assertion by the Respondent that: the terms of the 1998 Trust define use of the words "Grantor's wife" and "Grantor's spouse" as signifying any one of a class of persons to whom J.B. might be married at the time a right, power, or authority was exercisable by or conferrable upon that spouse. Instead, the Petitioners' claim that the 1998 Trust clearly and unequivocally defines use of both those terms as meaning only J.B.'s wife, Sylvia, alone as an individual, and to whom he was married when the trust was established.

Indeed, it is the Respondent contention that while those terms originally referred to Sylvia, it is apparent from reading the 1998 Trust in its entirety rather than just its introductory paragraph, that Grantor J.B.'s intent was to include more broadly, within those terms, anyone having that status at any future time that the trust continued to exist and be administered. He mainly cites the SLAT provision affording J.B. the receipt of indirect financial benefits under shared use with his spouse and/or other family members, without adverse estate tax consequence, as of material import to effectuation of the Grantor's intent.

As earlier indicated, the Respondent and the Petitioners made the same arguments in advancement of their respective positions on the Respondent's *Motion to Dismiss* that the Court denied at an earlier stage of the litigation. Nothing was presented on the merits that persuades it of the virtue of the Respondent's claim now. There is simply no language in the 1998 Trust, whether read in isolation, or in its whole, that supports that argument. The inclusion of the SLAT and the Cesser provisions

whether read together or independently does not in any manner suggest the Grantor's intention was to supersede Sylvia's identification as the Grantor's wife and spouse under the terms of the 1998 trust in the event of a later divorce (a considered covered possibility) with a future matrimonial partner (an unreferenced prospect).

The introductory paragraph of the 1998 Trust clearly identifies Sylvia Wright as the "Grantor's spouse" and/or "Grantor's wife" without any qualification or suggestion of a class of wives or spouses. Compare that to the description of John and Will as "the Grantor's children living on the date of this agreement. . . ." Stip. Ex. 1 at 1. Similarly, the distributee trust provision's inclusion of the singular noun "wife" among the class of other plural noun "issue" beneficiaries, strongly suggests to the extent it may not manifest, the Grantor's awareness of how to expand the meaning of "the Grantor's wife" to include a successor or successors if that had been his intention.

Further, as divorce clearly was not an unconsidered possibility, why or the reason J.B. did not provide for a successor "floating spouse" in the event of Sylvia's predeceasing him or a later divorce, lacks certain answer reflecting testimonial consensus in the record, and is perplexing.

The Court reiterates its rejection of the Respondent's pre-merits, and to the measure he renewed or continued it on the merits, argument presented under his *Objection to the Petitioners' Motion in Limine to Preclude Extrinsic Evidence on the Issue of Grantor's Intent*, see Index #34, that because the identification of Sylvia as the "Grantor's wife" and "Grantor's spouse" was set out in the introductory paragraph of the 1998 Trust, it does not constitute an operative definitional term of the trust agreement itself, but merely a preliminary recital. See Index ##38 (*Objection to Motion in Limine*),

44 (*Order on Motion in Limine*), 45 (*Motion for Reconsideration*), 48 (*Order on Motion for Reconsideration*).

The Court also takes note that the Cesser provisions are not cojoined with the SLAT provision in the 1998 Trust in any manner that would suggest that they were intended to pertain or apply in any marital scenario other than to that involving J.B. and Sylvia, alone. Indeed, so far as this Court can ascertain, there is no reference anywhere in the 1998 Trust to the Grantor potentially remarrying in any context, including in the event of Sylvia's natural death or that figuratively occurring upon a divorce; such mention as would be seemingly expected in the instance of a Grantor as driven to secure the indirect access distribution benefits available to him under a SLAT trust, as the Respondent paints J.B.[40]

Additionally, if a class of potential floating spouses were the intent and effect of the 1998 Trust's references to the "Grantor's wife" and the "Grantor's spouse," as the Respondent has plead and somewhat more vaguely proffered in his testimony, there would have been no need or reason to introduce and add the floating spouse beneficiary language incorporated into the 2007 Trust.[41]

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[40] In his own testimony, J.B. played down his sense of the importance of the SLAT provision at the time the 1998 Trust was given birth because it was only funded with its stock in the Company, and the Company was essentially illiquid until it was sold in 2006. As such, the Trust had nothing to distribute for his indirect access and use.

[41] The Court is cognizant that in the Trustee's Amendment the Respondent expresses a purported desire to "clarify the extent of the Trustee's discretion to decant," Stip. Ex. 11 at 2, I. Recitals, para. D., and "state more clearly the Grantor's objective that the Trustee is empowered to decant." Id., II. Amendment. But in both instances the "clarifications" serve not to elucidate the decanting afforded under the distributee trust provision and its limitation to "one or more (but not necessarily all)" of its original three beneficiaries, but to those of such of them as then remained and a focused expansion to still others. Accordingly, the true motivation for expanding the scope of discretionary beneficiaries belies the claimed efforts to afford clarifications recited in the cited recital and the Amendment itself.

Credible testimony was given by Sylvia of her clear recollection, owing to its nature and proximity to the divorce action that came to pass starting two and a half years later, of a meeting the Wrights had with the Respondent at his law office. At the meeting a discussion was had on the Respondent's recommendations for an irrevocable trust and J.B.'s Company stock gifting as the best means to achieve their estate tax avoidance or minimization objectives estate planning-wise. She testified that she distinctly recalled that as she and J.B. were leaving or were about to leave, J.B. asked the Respondent words to the effect of whether there was any reason that the Wrights should not go forward with his recommendations, to which the Respondent answered with words to the effect of, "Probably in the case of an acrimonious divorce." No contrary testimony or evidence was presented denying or rebutting that testimony.

At his deposition taken in advance of the merits the Petitioners' attorney asked the Respondent why he hadn't raised with the Wrights the issue of incorporating a floating spouse-like provision or equivalent language into the 1998 Trust. The Respondent answered with words to the effect that he either "didn't want to stir that pot" or "that's not the type of pot I like to stir."

The foregoing, taken into account together with the Respondent's: (1) failure to do what he felt professional conduct "strongly urge[d], (if not require[d])" in securing a conflict waiver from Sylvia while representing J.B.'s trust and estate planning concerns during the pendency of the Wright's divorce proceedings; (2) deference to J.B.'s reluctance to engage Sylvia about providing the conflict waiver; and (3) failure to follow up having J.B.'s interim estate planning needs addressed by attorneys at the law firm of J.B.'s divorce attorney, leave the Court persuaded that the 1998 Trust's lack of an

floating spouse-like approach to addressing the meaning of the "Grantor's wife" and "Grantor's spouse," was more likely than not the product of intention inspired by a desire to avoid, or leastwise lessen, evoking uncomfortable tension or outright discord within the greater context of the joint husband and wife legal representation that the Respondent had formerly taken on.

The Respondent was obviously aware of and included the SLAT provision in the 1998 Trust but didn't include defining "Grantor's wife" or Grantor's spouse" in terms of a floating spouse; although he testified, by way of an explanation for not having done so that he was not aware of the use of such a provision at the time the 1998 Trust was established. The Respondent claimed that the floating spouse provision had not at the time been a concept contained in his drafting practice "toolbox," and he had not become aware of it until some unspecified date between 1998 and 2007. He also conceded, however, that the SLAT trusts and floating spouse provisions are complementary concepts.

The Respondent was fully aware that he had included not only the SLAT but also the Cesser provisions in the 1998 Trust. He was further conscious of the adverse effect that the latter's divorce consequences would have on the former's marriage conferred financial and tax advantages. As its legal architect, he was also cognizant that he had unqualifiedly identified Sylvia in the Trust variously, both as the "Grantor's wife" and the "Grantor's spouse." In doing that, he chanced survival of the Wright's marriage over the prospect of a divorce. Indeed, the express terms of the Trust leave this Court no room under New Hampshire law for, and militates against, any debate over ambiguity that the Respondent has advocated.

The record is devoid of any credible evidence that a professional of the Respondent's professed caliber of professional knowledge, skill, experience, training, and education within his specialized field of practice would not have appreciated and understood that, as he had cautioned J.B. in his letter of June 19,1998, see Stip. Ex. 5 at 2, (bullet 2), the terms of the 1998 Trust afford the referenced financial and tax benefits to J.B. only " for so long as Sylvia lives[,]" and once the Wrights were no longer husband and wife, Sylvia was effectively dead, trust-wise.

Interestingly, although it was not until the Wright's divorce had commenced and later concluded, some two months after J.B. met Loren, that J.B. and the Respondent appears to have become attuned to and focused on J.B.'s loss of the indirect benefits he formerly had under the SLAT provision.[42] The entire period between the divorce on March 2, 2004, and J.B.'s remarriage to Loren on January 31, 2009, J.B. could not have received those financial and tax benefits as he was unmarried, and John and Will were its sole, co-equal discretionary beneficiaries. They remained so until the 1998 Trust was amended by the Respondent, as declared disinterested Trustee, and all its assets were decanted into the newly established 2007 Trust. Depending on the validity of the amendment, Loren became or may not have become a beneficiary under the 2007 Trust, along with John and Will.

[42] The Court is left to presume that it was not until after the sale of the Company in 2006, J.B. had retired and moved to a new residence in Maine, that their focus on the SLAT provision and the receipt of trust distributions to supplement finances took on greater importance.

With respect to the Trustee's amendment or termination power under paragraph K of Article V in the 1998 Trust, the Court also disaffirms the Respondent's claim that the "or for any other reason" set forth in the paragraph constitutes an independent and all-encompassing catch-all predicate for his exercise of that authority. As the Court understands the Respondent's assertion, the other articulated bases for amending or terminating the Trust that precede it do not afford examples or delimit the scope of when the exercise is proper, but stands unfettered and non-aligned in a manner that subsumes not only the preceding recited predicates, but further, any future circumstance(s) or occurrence(s) that the Trustee, in his sole and absolute discretion, determines to be cause. Such a construction would render the preceding particularized terms purposeless and unneeded, since they would be included, perforce, within the broader, more generalized, and limitless scope of "for any other reason." In other words, the first sentence of the paragraph could simply have stated: "To terminate or amend any trusts hereunder if the disinterested Trustee of such trust determines, in his sole and absolute discretion, that continuation of the trust in its original form would be unwarranted for any reason." Apart from that, the inclusion of the adjective "other" between "any" and "reason" in the phrase "or for any other reason," is seen as suggestive of other unarticulated reason or reasons similar and commensurate with those more particularized that precede it; rather than one wholly different in scope and of disparate nature.

Furthermore, the interpretive doctrine of ejusdem generis utilized under certain circumstances to assist determination of what otherwise presents as an ambiguous

term or phrase in a legislative enacted statute or within a contractual context, see, e.g., Narramore v. Clark & Tr., 63 N.H. 166 (1884) (legislative context); MPG Bedford, LLC. v. KDG Bedford, LLC., No. 2017-0535 (non-precedential order), 2018 WL 3968473 (N.H. WL 3968473 (N.H. August 18, 2018) (contractual context), may be assistive in ascertaining the breadth of the "for any other reason" phrase in paragraph K.

Arguably, so far as it may be applicable here, that canon of construction posits that "where general words follow enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent but are to be held as applying only to persons and things of the same kind or class as those specifically mentioned."[43] State v. Proctor, 171 N.H. 800, 806 (2019). A premise for application of the doctrine is that there is a common thread or shared characteristic underlying those more particularized and topic-driven words or phrases that warrants constraining the meaning of the general expression to one or those of a similar nature, and not more expansive than those more specifically focused. Under the express language of paragraph K, any termination or amendment of the 1998 Trust is to be based on a circumstance or circumstances that the disinterested Trustee determines will imperil its entirety or work to the disadvantage of some limited aspect as it was originally constituted, rendering continued administration "inadvisable." Though hardly a model of grammatical clarity, the Court discerns that two of the three justifying causes relate to future potential occurrences of unknown or uncertain prospect adversely

[43] In Proctor, the Supreme Court acknowledged that the principal of ejusdem generis can also be applied in the instance of specific words following those general, such that the general words are construed to embrace only objects similar in nature to those enumerated by the specific words[,] citing Kurowski v. Town of Chester, 170 N.H. 307, 311 (2017).

affecting the trust. The first is recited as the "unduly burdensome, uneconomical and inefficient, or otherwise unwise because of the modest nature or value of the assets in the trust" and is related to detrimental, internally based, administrative operations and functions. The second is externally driven, premised on later implemented tax or legislative changes that would disadvantage the trust as then constituted, going forward. That said, the third, "for any other reason," is general, unconfined, and unrestricted to or by any specific or defined realm of causal genre. However, even without application of ejusdem generis construction, the phrase cannot be read or construed as expansively as read literally. That is because the disinterested Trustee is clearly bound to use that discretion consistent with his rights, powers, authorities, and duties imposed under governing law[44] and the express terms of the 1998 Trust.

Reading and having considered the framework and construct of the full text of paragraph K in Article V leads the Court to conclude that its scope is limited to circumstantial matters like those particularized rather than open-ended and generalized in relation to termination or amendment for a trust lying within the confines or reach of the 1998 Trust. To the extent the "for any other reason" of paragraph K is asserted by the Respondent to be the basis for the Trustee's Amendment and the decanting into the 2007 Trust as a new distributee trust conferring an expanded designation of discretionary beneficiaries beyond one or both of the 1998 Trust beneficiaries at that

[44] See RSA 564-B:8-814 (a) ("Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, . . . the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.") See also RSA 564-B:1-103 (7), (19), (30) (A); 564-B:1-105 (b) (2)-(3).

time, John and/or Will, the Court finds and rules that it is not within the scope of reasons for amending the Trust that paragraph envisions.

IV. Conclusion

Owing to the depth and complexity of this Decree, the Court now summarizes its rulings.

The distributee trust provision of the 1998 Trust empowered the Trustee to exercise his discretion to decant trust assets to a distributee trust created by the Grantor for the benefit one or more, but not necessarily all, beneficiaries "selected out of a class composed of the Grantor's wife and the Grantor's issue living from time to time." At the time the 1998 Trust was created, the Grantor's wife was Sylvia and the Grantor's issue were John and Will. Sylvia was eliminated as a member of that class of beneficiaries upon J.B.'s divorce from Sylvia in accordance with the terms of the 1998 Trust, leaving a class of just John and Will, and any potential future living issue of the Grantor later born or adopted. No other issue were born or adopted before the 1998 Trust was terminated. No distributions were made to any beneficiary during the incumbency of the first three Trustees, Sylvia, William Walker, and the Respondent.

Between the Wrights' March 2004 divorce and J.B.'s remarriage to Loren in January of 2009, J.B. had remained unmarried and spouseless, while John and Will continued to constitute the only discretionary beneficiaries of the 1998 Trust.

By early 2006, however, in anticipation of the 1998 Trust's gain of liquidity through the sale of the Company, initial steps were taken for amending the 1998 Trust and establishing a new distributee trust by J.B, as its grantor. Those initial steps

involved the resignation of William Walker as Trustee, Grantor J.B.'s appointment, and the Respondent's acceptance of service as successor Trustee in Walker's stead.

Under the undated Trustee's Amendment[45] that the Respondent had executed, the distributee trust provision of the 1998 Trust was amended to include the Trustee's decanting of its assets

> into a new irrevocable trust created by the Grantor . . . that may have current and future beneficiaries other than all of the Grantor's descendants who are eligible discretionary beneficiaries of the [1998 Trust] provided that one or more of the Grantor's descendants are beneficiaries of the [new] distributee trust, and only members of the Grantor's family who are not descendants of the Grantor may also be beneficiaries of the new trust.

Unlike the 1998 Trust as originally constituted in which it is undefined, the Amendment then proceeds to define the meaning of "members of the Grantor's family" as including the Grantor, the Grantor's descendants, and "any person to whom the Grantor may legally be married in the future."

Given that: (1) the distributee trust provision limits the establishment of a new distributee trust to one or more, though not necessarily all, of the original beneficiaries of the 1998 Trust, who at the time were only John and Will; (2) the determination that the "for any other reason" phraseology under the foregoing ejusdem generis analysis lies outside the realm of permissible inducements for amending the 1998 Trust; and (3) the Trustee's Amendment and 2007 Trust purport to expand the discretionary beneficiaries beyond "one or more (but not necessarily

[45] Assuming the standard chronology for the execution of such legal documentation was followed, the Amendment was likely executed sometime between mid to late August and early September of 2007 based on the September 4, 2007, execution of the 2007 Trust and the September 6, 2007, execution of the Trustee's Memorandum.

all)" of those designated in the 1998 Trust's distrbutee trust provision, the Trustee's Amendment and the 2007 Trust constituted ultra vires undertakings by the Respondent. As such, the decanting was improper and violated the Respondent's trustee duty under RSA 564-B:8-801, insofar as it constituted an improper administration and management of the Trust and a distribution of its trust property not done in good faith as defined in RSA 564-B:1-103 (30)(A).

The decanting also violated the Respondent's fiduciary duty as Trustee under RSA 564-A:8-803, to act impartially in administering, managing, and distributing the 1998 Trust property, "giving due regard to the beneficiaries' respective interests." John and Will were the only discretionary beneficiaries of the Trust when the decanting took place, yet the Respondent ignored their status as such in numerically diminishing their beneficial standing. That the Respondent had never met, spoken, or otherwise communicated with either John or Will until they brought their lawsuit, was conceded. They never even saw a copy of the 1998 Trust and its terms until it was obtained for them by an attorney that they had engaged in 2018, well after the decanting occurred. Although the Respondent acknowledged that there were judicial options available to him to modify, terminate, or reform to correct any mistake(s) in, the 1998 Trust, see, eg., RSA 564-B:4-410; 4-411; 4-412; 4-415; 4-416, he represented that he chose not to do that in the interests of accomplishing the amendment "in the most cost efficient manner," given his belief that the terms of the distributee trust provision made a judicially established modification — even if undertaken consensually — unnecessary and more cost effective. To whatever degree that may ring plausible, this Court is far more persuaded under the totality of

the evidence presented, that the Respondent's predominant reason for modifying the Trust in the fashion he did was to avoid the attendant need a judicial action would have required for the beneficiaries to be given advance notice of what it was that he wanted to do and for what purpose.

Because the amendment, decanting, and termination of the 1998 Trust were not undertaken within the Respondent's rights, powers, and authorities conferred upon him by the 1998 Trust, they each constitute a compensable breach of trust. But for the breaches of trust and wrongful termination of the 1998 Trust, the Petitioners, as the Grantor's issue then living, were its only discretionary beneficiaries that could and should have been the recipients of the Trustee's faithful exercise of fiduciary responsibility pending termination of the Trust. See Stip. Ex. 1 at 14-28, art. II, sec. II para. A-B.

The consequence of the Respondent's breaches of trust is that $3,225,000.00 in 1998 Trust assets were wrongfully distributed to persons who were not discretionary beneficiaries of the Trust. Though both the Respondent and J.B. testified without challenge that the Respondent did not distribute that money during his trusteeship, he planned, arranged for, and oversaw the details in establishing the path to making the distributions possible and having them carried out. What he did was done for the specific purpose and with full expectation that the former 1998 Trust assets decanted into the 2007 Trust would gradually be distributed out to Loren for shared use with J.B.

The Petitioners have amply proved by affirmative evidence that in the Respondent's amending of the 1998 Trust and his decanting of its assets to the 2007

Trust, he did not act in good faith "observance of common standards of honesty, decency, fairness, and reasonableness in accordance with the terms of the [1998 Trust], the [T]rust's purposes, and the interests of the beneficiaries as their interests are defined under the terms of the [T]rust." RSA 564-B:1-103(30). In so ruling, the Court assumes that the failure to exercise good faith, constitutes bad faith. However, if that assumption is erroneous, in not notifying or consulting the Petitioners about the amendment and decanting, the Respondent prioritized the non-beneficial interests of J.B. and Loren over the sole beneficial interests of the Petitioners, constituting such a knowing, deliberate, deceitful, and disloyal indifference to the Petitioners' interests as meets and satisfies the standard for finding conduct commensurate with bad faith.

Accordingly, the exoneration provisions of Article II, Section I, paragraph B., subparagraph 3(b) do not afford the Respondent safe harbor from accountability for his improper exercise of trustee powers and discretions. Under the facts found and law applicable, his exercise of those powers and discretions were not executed within the context of "appropriate circumstances" and the Petitioners have "prove[d] by affirmative evidence" that in amending and decanting the assets of the 1998 Trust in the manner that he did, the Respondent as "Trustee was acting in bad faith," rendering the exoneration provision of the 1998 Trust unenforceable. Stip. Ex. 1 at 9, art. II, sec. I, para. B., subpara. 3.(b); RSA 564-B: 10-1008 (a)(1).

As the recital of governing law set out in this Decree makes clear, it is not the Grantor's intention after the fact, but at the time the 1998 Trust was established that controls interpretation of its contents. Reading the express language of the entire Trust, the Court is unpersuaded that the Grantor its references to his wife or spouse were

intended to signify a possible class of wives or spouses to whom he might later marry. That he could have done that in express terms is not a matter of dispute, so long as it that had been agreeable to Sylvia. Fearful that it would have been adding more overload than her apparent acceptance of the Cesser provisions tolerated, it is this Court's assessment that the addition of floating spouse-like definition to the phrases "Grantor's wife" and "Grantor's Spouse" more likely than not was gauged to risk casting a darker cloud over the Wrights' continued marriage, and/or leastwise, the prospect of the Respondent's continued joint representation of both J.B. and Sylvia. As a result, it was intentionally omitted. In so ruling, the Court's determination is assisted with what it values as the most credible testimony from which it can draw reasonable inference, namely: (1) Sylvia's clear and undisputed recollection of the Respondent's response to J.B.'s query posed as he and Sylvia were leaving or were about to depart from the meeting held at the Respondent's law office; and (2) the avoidance of "pot stirring" answer that the Respondent gave at his deposition to the question from the Petitioner's counsel over why he did not raise or promote a discussion with the Wrights over inclusion of floating spouse-like language in the 1998 Trust.

V. Rulings on Requests for Finding of Fact and Rulings of Law

The parties have both filed a series of Requests for Findings of Fact and Rulings of Law and associated pleadings. See Index ##35, 36, 49-54. Because the Court is satisfied that it has sufficiently set out the facts and applicable law essential to support its rulings on appeal, the parties' respective requests for finding of facts and rulings of law are GRANTED so far as consistent with the narrative facts, rulings and law set out within. Any of their requests that are inconsistent, either expressly or by necessary

implication, and especially those set out in the Respondent's submissions after the merits were heard that clearly expand well beyond testimony presented for entry in the record, see Index ##51, 53, are DENIED. Beyond that, given the foregoing rulings, the Respondent's *Motion to Withdraw Former Trustee's Second Amended Request for Findings of Fact and Rulings of Law and Request for Further Relief*, see Index #52, and the Petitioners' *Objection*, see Index 53, are both DENIED AS MOOT.

VI. Orders

The Petitioners' *Petition* is GRANTED consistent with the orders that follow.

1. The distributive decanting of assets from the 1998 Trust to the 2007 Trust is declared void ab initio.

2. Judgement for damages is entered against the Respondent in favor of the Petitioners in the amount of $3,225,000.00.

3. The Petitioners are awarded their reasonable fees and costs in accordance with RSA 564-B:10-1004 based on this Court's determination that the Respondent's conduct in wrongly amending the 1998 Trust for the purpose of a distributive decanting of its assets to the 2007 Trust, necessitated that the Petitioners institute the legal action of concern that should not have been otherwise required, at their own expense, and that justice and equity require such an award. Accordingly, the Petitioners are DIRECTED to submit to the Court and the Respondent an affidavit of the reasonable fees and costs that they have incurred in this litigation within 30 days of the date of the Clerk's Notice of Decision in remittance of this Decree to the parties. The Respondent shall submit any objection he has to the affidavit with particularized specification of the basis for each asserted challenge within 15 days of the Court's receipt of the Petitioners' affidavit.

The Clerk is DIRECTED to forward the foregoing Decree to counsel for the parties by email delivery, followed by regular mailing as in the normal course.

Dated: 1/24/2025

Gary R. Cassavechia (Ret. Judge),
Judicial Referee

SO ORDERED.

I hereby certify that I have read the foregoing recommendation(s) and agree that, to the extent the Judicial Referee has made factual findings, he has applied the correct legal standard to the facts determined by him.

Dated: 1/24/2025

Christine W. Casa, Judge