State of New Hampshire
Supreme Court

NO. 2007-0486

2008 TERM

JANUARY SESSION

Martha Philbrick, Myra Elshout, & Leonard Thomas

v.

Alan Thomas, Sr.

RULE 7 APPEAL OF FINAL DECISION OF
ROCKINGHAM COUNTY PROBATE COURT

BRIEF OF PETITIONERS/APPELLANTS PHILBRICK, ELSHOUT & THOMAS

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QUESTIONS PRESENTED

1. Were conveyances made and powers of appointment exercised that were not in conformity with the intent of the donor at the time the trust was created?

2. Were the modifications or deviations from the original trust made by Evelyn Thomas invalid where the trust was irrevocable, she did not reserve power or authority to revoke or amend the trust, she did not retain conveyable property rights in the res or the trust, she was not the only trustee, and the beneficiaries did not consent?

STATEMENT OF THE FACTS

Evelyn Thomas lived for over 50 years on a 55-acre farm bordering Great Bay and Pease air base in Newington, New Hampshire. Evelyn, who is now 88 years old, currently lives in a care facility in Rockingham County, but was diagnosed with dementia, and has been mentally unavailable throughout the course of this litigation.

Evelyn has four children – Martha, Myra, Leonard, and Alan – now all in their 60s. Alan Thomas is the respondent and lives on a 2-acre parcel that was carved out of the farm in 1990. Martha Philbrick, Myra Elshout, and Leonard Thomas are the petitioners, and live in Newington and neighboring towns.

Medicaid rules require that for a period of five years before nursing home benefits are paid the beneficiary own no "countable" assets. 42 U.S.C. § 1396p(c)(1)(B)(i); Harry S. Margolis & Julie A. Braun, 2 ELDERLAW PORTFOLIO SERIES § 18-8.1 (2004). Sometime in the 1990s, Evelyn met a trust attorney through a marketing reference made at a financial planning seminar aimed at the elderly, who explained that putting property in an irrevocable trust might allow her to continue enjoying the farm while also not owning it in the ultimate eyes of the Medicaid program. 1 *Trn.* at 283; 3 *Trn.* at 31, 51, 64-65.

Evelyn R. Thomas Irrevocable Trust

For these purposes and also to manage estate taxes, 3 *Trn.* at 30-32, Evelyn created the Evelyn R. Thomas Irrevocable Trust (ERTIT), *appx.* at 1. The "Agreement of Trust," executed on July 6, 1994, included a number of provisions relevant here.

Evelyn as "donor" "does not retain any interest in the principal of" the trust. ERTIT ¶ 3.4 She also "does not reserve any power or authority whatever to revoke or amend any provision of

this Agreement of Trust." ERTIT ¶ 3.6. Among the provisions that she did not have power to amend or revoke include "[t]he intent of the Donor is to make an equal distribution to her children, as nearly as possible." ERTIT ¶ 5.1B.

Evelyn specifically reserved substantial power over her property, however. She retained the ability to "distribute, to and among any one or more the of the Legatees … so much of the principal of the Trust Fund … as the Trustee, in the Trustee's uncontrolled discretion, may deem advisable." ERTIT ¶ 4.1. She also retained the income from the trust property. ERTIT ¶ 4.1. Finally, she claimed the continuing ability to adjust the ultimate distribution: "Upon the death of the Donor, the Trust Fund shall be disposed of to and among such one or more of the Legatees … as the Donor may appoint." ERTIT ¶ 3.2.

Simultaneous with the creation of the trust Evelyn "transferred and delivered to the Trustees … [a]ll real estate in the State of New Hampshire." ERTIT Schedule A.

Alterations of Trust Administration and Property Disposition

In the Trust Agreement and then over the course of the following decade, Evelyn repeatedly altered details of the administration of the trust, current ownership of property otherwise in the trust, and the ultimate disposition of property in the trust. This was done through a series of documents, each duly formalized. Disposition in each document is as follows:

July 6, 1994. Trust Agreement. Evelyn and Martha are trustees. Alan gets a 10-acre portion of the farm (location to be determined), Martha gets the rest of the farm, and remaining trust assets are to be evenly divided between Martha, Myra, and Leonard. ERTIT ¶ 5.1 B.2. & ¶ 5.1 B.3, *appx.* at 4.

November 5, 1997. Exercise of Special Power of Appointment. Referring to the farm

having been subdivided into two roughly equal lots, upon Evelyn's death, Alan gets Lot B. Lot A is to be sold with the proceeds equally divided between Martha, Myra, and Leonard. EXERCISE OF SPECIAL POWER OF APPOINTMENT (Nov. 5, 1997), *appx*. at 17.

November 25, 1997. Appointment of Additional Trustee. Evelyn appoints Alan as additional trustee. APPOINTMENT OF ADDITIONAL TRUSTEE (Nov. 25, 1997), *appx*. at 18.

November 25, 1997. Deed. Lot B was conveyed outright to Alan by deed executed by Evelyn in her capacity as trustee. NON-CONTRACTUAL TRANSFER (Nov. 25, 1997), *appx*. at 19.

April 21, 1998. Exercise of Special Power of Appointment. Lot A is to be distributed to Martha, Myra, and Leonard. Alan gets specific items, including a car and farm equipment. The residue of the estate, except for a sum designated to Evelyn's church, is to be divided equally among the four children. The document specifies that lifetime gifts are not to be deducted from a child's share or distribution upon death. EXERCISE OF SPECIAL POWER OF APPOINTMENT (April 21, 1998), *appx*. at 22.

May 20, 1998. Exercise of Special Power of Appointment. Clarifying that the outright gift of Lot B to Alan is not to be deducted from his share of distributions to take effect upon Evelyn's death. EXERCISE OF SPECIAL POWER OF APPOINTMENT (May 20, 1998), *appx*. at 24.

January 29, 2003. Exercise of Special Power of Appointment. Alan gets Lot A upon Eveyln's death. EXERCISE OF SPECIAL POWER OF APPOINTMENT (Jan. 29, 2003), *appx*. at 25.

The details of each alteration of the trust are less important to Martha, Myra, and Leonard than the ultimate outcome – that upon Eveyln's death, Alan will receive the ***entire*** farm, and the (insubstantial) residue of the estate will be divided among the four children with no deduction for the lifetime gifts to Alan.

STATEMENT OF THE CASE

In 2006 Martha, Myra, and Leonard petitioned the Rockingham County Probate Court to invalidate Evelyn's various exercises of powers of special appointment and the outright deeding of Lot B to Alan, and to restore the ultimate disposition of the farm to the terms of the original trust. After a 4-day trial (concerning issues largely irrelevant to this appeal) the court (*Peter G. Hurd*, J.) did not grant the relief.

This appeal followed.

SUMMARY OF ARGUMENT

After setting forth the trust instrument and the various changes made to it, Martha Philbrick, Myra Elshout, and Leonard Thomas point out that their mother's trust was for the purpose of Medicaid planning, and that her intent was to leave the farm they grew up on to all the siblings equally. They argue that because the various changes made to the property distribution substantially varied from equality, they are invalid.

They further explain that the "powers of appointment" made by their mother were not made as recognized by traditional property law, and that they are therefore void.

They point out that because Evelyn, their mother, did not own the property once it was conveyed to the trust, and she thus could not give it away to their fourth sibling, Alan. Likewise, because she was not the only trustee, whatever she could do, she could not do alone. Finally, they explain that repeated powers of appointment cannot be made, and that all exercises of the power after the first should be set aside.

ARGUMENT

I. Trust Property Disposed Unequally

A. Trust for Medicaid Planning

Evelyn's purpose in creating the trust was to facilitate her receipt of Medicaid benefits, and to ensure that her assets are not "countable" such that the existence of the farm would preclude her from benefitting from the Medicaid program. The trust "reserve[s] as much power of the grantor as possible, yet not give them too much power so that the trust will be considered an asset for Medicaid purposes." 3 *Trn.* at 34 (testimony of attorney who created trust).

Thus the trust is (A) irrevocable, ERTIT *Whereas Clause* ("the Donor, intending to create an irrevocable trust"); (B) cannot be amended, ERTIT 3.6; (C) does not allow Evelyn to "retain any interest in the principal," ERTIT 3.4; and (D) contains "All real estate in State of New Hampshire. ERTIT *Schedule A, appx.* at 16.

David Ferber, Esq., of Concord, New Hampshire, was the attorney who drafted the trust. He testified in this case. He said the trust "tr[ies] to go right up to the line and not cross it" by allowing "the trustee [to] take property out of the trust or money, distribute it to a beneficiary, and the beneficiary can then give that property back to the donor. So it's a way of keeping control of the trust." 3 *Trn.* at 34.

Thus, unlike some traditional trusts that have centuries of law associated with them, the trust at issue here has almost none – it is fairly new, is not used often, may have been invented locally, and insofar as it walks a fine line, it is somewhat experimental. Attorney David Ferber testified that although Evelyn was found eligible, 3 *Trn*. at 30, 53, State authorities who determine these matters have "gotten more strict" and if presented these days with the trust here at issue,

would count the trust assets in calculating eligibility – that is, the Medicaid planning would fail.

Moreover, there have been a slew of public policy and ethical questions raised regarding the type of Medicaid planning for which the trust is designed. *See* Timothy L. Takacs & David L. McGuffey, *Medicaid Planning: Can it Be Justified? Legal and Ethical Implications of Medicaid Planning*, 29 WM. MITCHELL L. REV. 111 (2002). For such reasons, although it was promptly found unconstitutional, in the 1990s Congress passed a law popularly known as the "Granny's Lawyer Goes to Jail" act, banning lawyers from discussing Medicaid planning with clients.[1]

Because of these risks, 3 *Trn.* at 61, Evelyn included in the Trust Agreement precatory language that suggested her children should use her assets to support her in the event that there is a "loss of eligibility" from Medcaid. ERTIT ¶ 4.2.

B. Construe Trust Language to Enforce Donor's Intent

When construing a trust, "the intention of a settlor is paramount," which is determined "from the express terms of the trust itself." *In re Lowy*, __ N.H. __ (decided Aug. 23 2007). "The nature and extent of the interest given to trust beneficiaries is to be determined from the whole instrument and not from an isolated phrase." *In re Trust by Dumaine*, 146 N.H. 679, 681 (2001) (quotations omitted). This Court's "standard of review for a probate court's ruling is the same as that for a superior court or district court ruling. Thus the findings and rulings of the

[1]42 U.S.C. § 1320a-7b(a)(6) ("Whoever for a fee knowingly and willfully counsels or assists an individual to dispose of assets (including by any transfer in trust) in order for the individual to become eligible for medical assistance under a State plan under subchapter XIX of this chapter, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1396(p)(c) of this title shall … be guilty of a misdemeanor and upon conviction thereof fined not more than $10,000 or imprisoned for not more than one year, or both."). In 1998 the United States was enjoined from enforcing the law on free speech grounds. *N.Y. Bar Ass'n v. Janet Reno*, 999 F.Supp. 710 (N.D. N.Y. 1998). In 1998 the United States Attorney General informed Congress and the President that the Justice Department would not enforce the law because it is "plainly unconstitutional." 29 WM. MITCHELL L. REV. 111, n. 120.

probate court will be sustained unless lacking in evidentiary support or tainted by an error of law." *In re Estate of Crowley*, 129 N.H. 557, 559 (1987).

Intentions that change after the trust is formed are not controlling. "It is the intention which exists at the time of execution which controls, not one thereafter formulated and not expressed in the instrument." *In re Gallet*, 765 N.Y.S.2d 157 (N.Y.Sur. 2003); *City Bank Farmers Trust Co. v. Macfadden*, 65 N.Y.S.2d 395 (N.Y. Sup. 1946) ("The intention of the grantor is that intent revealed by the words used in the trust instrument and not his secret wishes, desires or thoughts after the event.."); *Mooney v. Northeast Bank & Trust Co.*, 377 A.2d 120 (Me. 1977) ("It is our function to find not what she intended to say, but what she intended by what she did say."); *Fiduciary Trust Co. v. Brown*, 131 A.2d 191 (Me. 1957) (settlor' intent determined by viewing "the situation in the light of circumstances existing" on date trust created); *In re Will of Crabtree*, 865 N.E.2d 1119 (Mass. 2007) ("It is fundamental that a trust instrument must be construed to give effect to the intention of the donor as ascertained … in the light of circumstances known to the donor at the time of its execution."); *DiCarlo v. Mazzarella*, 717 N.E.2d 257 (Mass.1999) (same); *Pond v. Pond*, 678 N.E.2d 1321 (Mass.1997) (same); *Groden v. Kelley*, 415 N.E.2d 850 (Mass.1981) (same).

"[W]hen the donor's purpose can be ascertained and is legal, it is the court's duty to enforce it." *Adams v. Page*, 76 N.H. 96, 97 (1911). In a trust document if "words are plain and unambiguous there is no necessity for judicial interpretation." *State v. Bankers' Trust Co.*, 164 A. 377 (Vt. 1933).

Extrinsic evidence of intent, such as which child was the more dutiful, is only relevant when there is an ambiguity and intent cannot be discerned from the trust instrument. *In re Pack*

Monadnock, 147 N.H. 419 (2002).

Powers of appointment are limited by the intent clause. "If, but only if, the donor does not manifest a contrary intent, the donee of a special power can effectively" appoint property. RESTATEMENT OF PROPERTY, Powers Of Appointment § 358; *Loring v. Karri-Davies*, 357 N.E.2d 11 (Mass. 1976) (as donor is "who creates the power and he who can broaden or narrow the manner of its exercise"). An exercise of the power of appointment in violation of the donor's intent is void. *Stewart's Estate v. Caldwell*, 271 So.2d 754 (Fla. 1972); *Northern Trust Co. v. Porter*; 13 N.E.2d 487 (Ill. 1938).

C. Evelyn Intended to Distribute Equally

Evelyn was unmistakably specific in her intent. "The intent of the Donor is to make an equal distribution to her children, as nearly as possible." ERTIT ¶5.1 B. To make sure equal really meant equal, the trust further provides: "In carrying out this intention, any gifts made by the Donor, or by this Trust, to the Donor's children during the lifetime of the Donor, are to be deducted from the distribution made hereunder to said children." *Id.*

Evelyn made clear that she could not alter this provision, nor any others: "The Donor does not reserve any power or authority whatever to revoke or amend any provision of this Agreement of Trust." ERTIT ¶ 3.6. Thus, even if Evelyn's feelings toward her children changed over the years, based on which one cared for her greatest or ignored her most, at the time she created the trust she was careful to ensure they would be treated equally in the hope they would escape the rancor unequal treatment can create.

D. Power of Appointment

A "power of appointment " is created when one person, the donor, grants another person, the donee, authority to designate beneficiaries of the donor's property. *Wetherill v. Basham*, 3 P.3d 1118 (Ariz.App. 2000); RESTATEMENT (SECOND) OF PROPERTY, Donative Transfers § 11.1 ("A power of appointment is authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property."); *see* DeGrandpre, 7 NEW HAMPSHIRE PRACTICE, WILLS, TRUSTS AND GIFTS § 19.08[2].

The powers of appointment made by Evelyn in this case purport to be exercised by Evelyn as "donor." That is either a consequential mistake in drafting, or a fatal misunderstanding of the power of appointment by the drafter. In either event, exactly who occupies each role is important in this case:

> (1) The donor is the person who brings the power of appointment into existence.
> (2) The donee is the powerholder.
> …
> (4) The appointees are the persons to whom an appointment has been made.

RESTATEMENT (SECOND) OF PROPERTY, Donative Transfers § 11.2 (1986), *Terms Identifying Various Persons Related To Power Of Appointment.* These terms have been developed over centuries. *See Emery v. Judge of Probate*, 7 N.H. 142 (1834) (construing power of appointment); *Coburn v. Pickering*, 3 N.H. 415 (1826) (citing Lord Coke) (identifying donor and donee).

The "appointees" are Evelyn's four children. ERTIT 1.2

Evelyn is the "donor," as she is the one "who brought the power of appointment into existence."

Evelyn is also "the powerholder," and thus the "donee" of the power of appointment.

But, the trust instrument recites that Evelyn reserved the power to appoint as "donor." ERTIT 3.2 ("Upon the death of the Donor, the Trust Fund shall be disposed … as the *Donor* may appoint."). All the powers of appointment Evelyn exercised specify they are being exercised as "donor." EXERCISE OF SPECIAL POWER OF APPOINTMENT (Nov. 5, 1997), *appx.* at 17 ("the *Donor* hereby states"); EXERCISE OF SPECIAL POWER OF APPOINTMENT (April 21, 1998), *appx.* at 22 (the *Donor* hereby states"); EXERCISE OF SPECIAL POWER OF APPOINTMENT (May 20, 1998), *appx.* at 24 ("clarify the previous Exercise of Special Power of Appointment"); EXERCISE OF SPECIAL POWER OF APPOINTMENT (Jan. 29, 2003), *appx.* at 25 ("Evelyn R. Thomas, the *Donor,* hereby exercises the special power of appointment").

E. Mixed up Nomenclature

It is possible that Attorney Ferber, who drafted the trust, merely conflated the nomenclature. To set things right, it can be accurately said that the power of appointment was given by Evelyn the donor to Evelyn the donee. RSA 566:1 ("the term power of appointment includes all powers which are in substance and effect powers of appointment regardless of the language used in creating them"). If that is the case, it means that power was exercised by Evelyn acting as *donee*. But because the donee's appointments were exercised not in accord with the intent of the donor to divide equally, the appointments are void.

If, on the other hand, the language in the trust instrument and in the four exercises of the power means what it says, that the power is exercised by the *donor*, the power that was reserved is not a "power of appointment" – at least not in the sense understood by centuries of property law and by statute. RSA 566:1. Rather it is an amendment to the trust, which contradicts the

clause disclaiming any reservation of amendment. Moreover, such a power to amend would undermine the trust. As noted, to fulfill its Medicaid planning purpose, the trust requires that Evelyn give up control over the real estate. If she can so easily amend basic provisions of the trust instrument, it cannot be said that the trust is irrevocable, or that she gave up her "interest in the principal." *See In re Malualani B. Hoopiiaina Trusts*, 118 P.3d 861 (Utah 2005).

A third possibility is that the power Evelyn exercised is neither a power of appointment nor an amendment, but something new, as yet unnamed in trust law. RSA 566:1. In that case, the trust document does not provide for it; and if it does, the yet-unnamed power must still be in accord with the stated intent.

Just because Evelyn sits in both seats does not relieve her actions from the intent clause she specified in the trust document. Whatever the power she exercised is called, their result is a lopsided property distribution, completely out of step with the intent unambiguously expressed in the language of the trust. They are therefor void.

II. Conveyance of Lot B Out of Trust is Void

After the trust was created, Evelyn had the farm divided into two roughly equal parcels, known as Lot A (which contains the farmhouse and other improvements), and Lot B (undeveloped land). Lot B is contiguous with the 2-acre parcel which Evelyn gave to Alan before the creation of the trust, and on which he lives.

Three years after the trust was created, Evelyn conveyed Lot B to Alan by deed. NON-CONTRACTUAL TRANSFER (Nov. 25, 1997), *appx.* at 19.

A. Evelyn Could Not Invade the Trust

The deed language is unclear regarding in what capacity Evelyn made the transfer. She is identified as "trustee" of the trust in a long dependent clause in the deed's first paragraph, but the deed does not indicate the conveyance was made in that capacity. It thus appears that she may have conveyed Lot B as a natural person.

If this is so, the conveyance is clearly void, as there is no doubt she did not own it – the property was clearly placed in the trust and the trust instrument disclaims any interest in it. ERTIT *Schedule A*; ERTIT ¶ 3.4. She had no power to invade the trust.

B. Evelyn Could Not Act Singly

If the dependent clause identifying Evelyn as "trustee" of the trust is considered, it suggests Evelyn acted in her capacity as trustee. There are other problems with this.

Although the New Hampshire court never had an opportunity to rule on the question, "[t]he traditional rule, in the case of private trusts, was that if there were two or more trustees, all had to concur in the exercise of their powers." Austin W. Scott, William F. Fratcher, Mark L. Ascher, 3 SCOTT AND ASCHER ON TRUSTS § 18.3 at 1367 (5th ed.) (citing numerous authorities

from numerous jurisdictions); *see e.g., Horowitz v. State St. Trust Co.*, 186 N.E. 74 (Mass. 1933).

The common law was altered by statute in New Hampshire in 1901. *See* Statutory History: 1901 LAWS 2:1; PL 309:3 (1926); RL 363:3 (1942); RSA 564:3 (1955). Former RSA 564-A:6 (repealed 2004) provided "[a]ny power vested in three or more trustees may be exercised by a majority." *See Rockwell v. Dow*, 85 N.H. 58 (1931); *Ladd v. Ladd*, 75 N.H. 371 (1909) ("the instrument creating the trust [] neither provides in terms nor by necessary implication that the trustees shall act as a unit. Consequently a majority may act in all cases."). More recently, the law has been further altered to generally allow majority action and solitary action in some circumstances. RSA 564-B:7-703 (portion of the Uniform Trust Code, effective 2004).

Whether unanimity or majority was necessary need not be established; when Evelyn alone conveyed Lot B to Alan she was neither. Her action was *ultra vires*, and thus void. To the extent that Clause 6 of the trust document allows action by trustees singly, they are administrative powers – those that are non-discretionary and do not effect the beneficiaries' substantive interests. *See Hayes v. Hayes*, 48 N.H. 219 (1868) (defining administrative powers in jurisdictional context); *Rockwell v. Dow*, 85 N.H. at 58 (same).

C. Evelyn Could Not Cause Unequal Results

Regardless of what capacity Evelyn was in when she conveyed the deed, and regardless of whether she constituted the requisite number of trustees, she did not have power to cause the result. The lopsided distribution is out of compliance with the equality intent of the trust at the time it was created.

As noted, when Evelyn created the trust she unambiguously intended that her four children benefit equally. By giving Lot B to Alan, the other three children, at most, share Lot A, a plainly

unequal distribution. As Evelyn also unambiguously disclaimed any power to amend the trust or to revoke it, the deed cannot be read as a *sub silentio* amendment. For this reason the conveyance of Lot B to Alan should be set aside.

III. Conveyance of Lot A Out of Trust is Void

A. Evelyn Could Not Cause Unequal Results

For the same reasons as explained, *supra*, the conveyance of Lot A to Alan creates a result that is blatantly unequal – Alan gets the entire farm whereas Martha, Myra, and Leonard get none. Because that result violates the intent of the donor at the time the trust was created, the conveyance is void.

B. Evelyn Could Not Make Subsequent Appointments

"Under a power of appointment, title to the property remains with the donor until the donee exercises the power. At that time, title passes through the donee to his appointee." *Leach v. Hyatt*, 423 S.E.2d 165, 167 (Va. 1992); Annotation, *Powers of Appointment: Revocation or Amendment of Exercise of Power Powers of Appointment: Revocation or Amendment of Exercise of Power to Appoint Future Interest, after Exercise by Inter Vivos Instrument*, 60 A.L.R.3d 143; *c.f.*, *Emery v. Judge of Probate*, 7 N.H. 142, 154 (1834).

Thus, for example, creditors may reach the property of an appointee. *Fiske v. Warner*, 99 N.H. 236 (1954) ; *Johnson v. Cushing*, 15 N.H. 298 (1844); DeGrandpre, 7 NEW HAMPSHIRE PRACTICE, WILLS, TRUSTS AND GIFTS § 19.09 ("where a general power of appointment is exercised by the donee … the subject matter of the power will be deemed part of the donee's assets and may be claimed by creditors if the donee's own estate is insufficient to satisfy such obligations" because " it would be a fraud to creditors to allow the donee to enjoy all the benefits of ownership and then avoid his creditors by appointing the property to another.")

Partial appointments, wherein the donee appoints a portion of an estate in one exercise of the power, and another portion of the estate in a second exercise of the power, do not pose any

problem. *See e.g.*, RESTATEMENT OF PROPERTY, Powers Of Appointment § 358, *Illustration*. But because of the interests created in the appointee, subsequent appointments of the same property cannot occur.

Evelyn repeatedly appointed the same property. Her first exercise of the power of appointment was on November 1997. She appointed Lot B to Alan, and also appointed the proceeds of Lot A to Martha, Myra, and Leonard. EXERCISE OF SPECIAL POWER OF APPOINTMENT (Nov. 5, 1997), *appx*. at 17. Thereafter she exercised *mesne* appointments of Lot A, with a final appointment of Lot A to Alan in 2003. EXERCISE OF SPECIAL POWER OF APPOINTMENT (Jan. 29, 2003), *appx*. at 25. None of the prior appointments were revoked, nor could they be.

Even if the first appointment was valid, the subsequent ones were not, and thus should be voided.

CONCLUSION

In accordance with the foregoing, Martha Philbrick, Myra Elshout, and Leonard Thomas request that the conveyance of Lot B to Alan be set aside. They also request that the powers of appointment be voided, and that the terms of the unamended trust be enforced. If the first power of appointment is valid, in the alternative they request that the trust, as altered by that first appointment, be enforced.

Respectfully submitted,

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By their Attorney,

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Dated: January 17, 2008

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Martha Philbrick, Myra Elshout, & Leonard Thomas requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are novel in this jurisdiction.

I hereby certify that on January 17, 2008, copies of the foregoing will be forwarded to Bradley Lown, Esq.

Dated: January 17, 2008

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