**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case No. 2007-0486, Martha A. Philbrick & a. v. Alan N. Thomas, Sr., the court on September 11, 2008, issued the following order:**

Having considered the record on appeal, the parties' briefs, and the oral arguments, the court concludes that a formal written opinion is not necessary for the disposition of this appeal. The petitioners, Martha A. Philbrick (Martha), Myra T. Elshout (Myra), and Leonard H. Thomas (Leonard), appeal from an order of the Rockingham County Probate Court (Hurd, J.) denying their request to invalidate special powers of appointment and a conveyance of land to the respondent, Alan N. Thomas, Sr. (Alan), under their mother's irrevocable trust. We affirm.

The record supports, or the probate court found, the following facts. Evelyn R. Thomas (Evelyn) is widowed and has four children — Martha, Myra, Leonard, and Alan. In July 1994, Evelyn established the Evelyn R. Thomas Irrevocable Trust (Trust), with herself and Martha as co-trustees. Evelyn funded the Trust with all of her New Hampshire real estate, including a nearly sixty-acre farm on Great Bay in Newington. Over the course of the next ten years, Evelyn executed a number of documents, including testamentary special powers of appointment, which altered the distribution scheme of the Trust assets upon her death. She initially provided for the farm to be split into two lots of nearly equal size (Lot A and Lot B); she later provided for Lot A to be distributed to Alan upon her death. Evelyn later added Alan as a co-trustee of the Trust, and deeded Lot B outright to him.

In March 2006, Martha, Myra, and Leonard petitioned the probate court to invalidate the special powers of appointment that Evelyn had exercised and to restore the ultimate disposition of the farm to the original terms of the Trust. On January 16, 2007, during the pendency of the petitioners' action, Martha, as trustee, executed a deed of Lot A to herself, Myra, and Leonard. Alan filed a motion to nullify the transfer.

In June 2007, after a four-day hearing, the probate court found that "at the time of execution of the Irrevocable Trust and special powers of appointment, Evelyn Thomas possessed sufficient testamentary capacity," that "none of the documents [she] executed . . . were executed under undue influence by Alan Thomas," and that "the transfer of Lot A by Martha Philbrick to herself, Myra Elshout and Leonard Thomas [was] prohibited by [statute]." As such, the probate court ordered that Martha prepare, execute, and record a deed conveying Lot A back to the Trust, and ordered the subsequent removal of Martha as a trustee. This appeal followed.

Our standard of review is established by statute. "The findings of fact of the judge of probate are final unless they are so plainly erroneous that such findings could not be reasonably made." RSA 567-A:4 (2007). "Consequently, we will not disturb the probate court's decree unless it is unsupported by the evidence or plainly erroneous as a matter of law." In re Estate of Treloar, 151 N.H. 460, 462 (2004) (quotation omitted).

At oral argument, petitioners' appellate counsel acknowledged that he had not argued the issues of testamentary capacity or undue influence in his brief, and that they were waived. See, e.g., State v. Davis, 149 N.H. 698, 703 (2003) (arguments not briefed are deemed waived). Instead, he asserted that the petitioners were relying upon the technical trust issues advanced in their brief. Specifically, that: (1) because the Trust was for the purpose of Medicaid planning, and because Evelyn's intent was to leave the farm to all of her children in equal shares, the various changes made to the property distribution scheme were invalid, as they "substantially varied from equality"; (2) the special powers of appointment made by Evelyn were void, as they were "not made as recognized by traditional property law"; (3) subsequent powers of appointment over the same property could not be made; (4) because Evelyn did not retain ownership of her property once it was conveyed to the Trust, she could not "invade the trust" and convey the property to Alan; and (5) Evelyn could not act alone, as she was not the sole trustee. Although the petitioners claimed in their notice of appeal that the probate court erred in ordering that Lot A be re-conveyed to the Trust and in removing Martha as a trustee, they did not argue those issues in their brief and, consequently, they are deemed waived. See, e.g., id.

The respondent counters that the petitioners have failed to preserve the five technical trust arguments. We agree, in part. In response to questioning by the court at oral argument concerning the issue of preservation, the petitioners' appellate counsel stated that the first issue concerning equal shares was preserved in their initial petition to set aside the Trust conveyances. The petitioners have not, however, included the petition in the record. See Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004) ("It is the burden of the appealing party . . . to provide this court with a record sufficient to decide . . . issues on appeal, as well as to demonstrate that [it] raised [those] issues before the trial court."). As such, we have only the probate court's characterization that the petitioners' allegations were limited to the issues of Evelyn's testamentary capacity to execute the documents and Alan's undue influence over her — both of which have been waived for appellate review. Consequently, we deem the petitioners' first issue, concerning Evelyn's intent and the "equality clause," not preserved for our review.

Appellate counsel also asserted that "[Petitioner's trial counsel] preserved a number of issues in his closing," and he thought those issues were "there [in the closing]; they're barely there, to be sure, but they're there." In their reply brief, the petitioners, citing four pages of the June 15, 2007 hearing transcript, contend that "[a]ll the issues argued in [their] brief were preserved in the succinct closing presented to the trial court." Having reviewed the four pages of the June 15, 2007 transcript containing the petitioners' trial counsel's closing argument, we believe that the references made to the remaining technical trust issues, although minimal, were sufficient to preserve them. We address them in turn.

The petitioners contend that the special powers of appointment made by Evelyn were void, as they were "not made as recognized by traditional property law." Specifically, the petitioners argue that:

> 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.

To the extent that the petitioners argue that the special powers of appointment are void because of the specific nomenclature used in their execution, we disagree.

"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." Restatement (Second) of Property § 11.1, at 9 (1986). Further:

> (1) The donor is the person who brings the power of appointment into existence.
> (2) The donee is the powerholder.
> (3) The objects are the persons to whom an appointment can be made.
> (4) The appointees are the persons to whom an appointment has been made.

Id. § 11.2, at 12. The petitioners are correct that in each of the four special powers of appointment, all drafted by Attorney David Ferber and exercised by Evelyn, she is referred to as the "donor." It is clear, however, that the November 5, 1997 special power of appointment initially and correctly refers to Evelyn as the donor of the Trust, and simply retains that nomenclature throughout. The April 21, 1998 special power of appointment initially references the Trust and refers to Evelyn as the donor of the same ("the Donor hereby states that, on the death of the Donor, the Trust property is to be distributed as stated herein"). The May 20, 1998 special power of appointment

was intended to "clarify" the previous April 21 special power of appointment, and merely restates paragraph A of that previous special power, with its reference to Evelyn as donor. Finally, the January 29, 2003 special power of appointment again references the Trust and Evelyn's position as donor.

While it may not be completely clear as to whether the use of the term "donor" in the special powers of appointment was intended to refer to Evelyn as the donor of the Trust, or the donor of the special power, that is not fatal to the validity of the special powers of appointment. "Donor" may refer to Evelyn both as the donor of the Trust, and as the "person who brings the power of appointment into existence," id. Given the language of RSA 566:1 (2007), which states, in pertinent part, "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," the special powers of appointment at issue were not rendered invalid by the absence of reference to Evelyn as the "donee" when she actually exercised those powers.

To the extent that the petitioners argue that the language of the special powers of appointment either undermined the Trust's Medicaid planning purposes, or rendered it as revocable, we disagree. The respondent has proffered that the Trust, and provision 3.2 containing the testamentary special power of appointment, was "reviewed and approved" in December 2006 by the State's Department of Health and Human Services (DHHS). Attorney Ferber, who drafted the Trust, testified that the primary purpose of the Trust was to protect Evelyn's assets in the event of a nursing home stay, and that the Trust had achieved its purpose, as Evelyn was now a nursing home resident and her application for Medicaid benefits had been approved. Further, Attorney Ferber testified that, from approximately 1991 to June of 2006, DHHS and Medicaid had routinely approved benefits based upon trusts in the nature of Evelyn's. He testified that, subsequent to June 2006, DHHS began to treat trust property as "countable assets" for the purposes of Medicaid benefits, because of the inclusion of lifetime special powers of appointment in the provisions of many such trusts. Because the Trust in this case contained only provisions for testamentary special powers of appointment, however, it was approved. The petitioners do not contest the same.

The petitioners also contend that subsequent powers of appointment for the same property cannot be made, and that any exercise of such powers by Evelyn after the first must be set aside; accordingly, they contend that the conveyance of Lot A to Alan is void. Specifically, they argue in their brief that:

> 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.

> Thus, for example, creditors may reach the property of an appointee.
>
> . . . But because of the interests created in the appointee, subsequent appointments of the same property cannot occur.

(Quotation and citations omitted).

Clause 3 ("Reserved Powers and Rights of Donor") of the Trust contains provision 3.2, which reads:

> Upon the death of the Donor, the Trust Fund shall be disposed of to and among such one or more of the Legatees, outright or upon trusts, conditions or limitations, as the Donor may appoint by express reference to this special power of appointment in a written instrument delivered to the Trustee or in such decedent's Will.

(Emphasis added.) The record is clear that all three of the special powers of appointment at issue included the required express reference to the special power of appointment provision of the Trust.

We agree with the respondent that the petitioners' argument fails to differentiate between testamentary powers of appointment, such as those at issue in this case, and inter vivos powers of appointment. Compare id. § 15.2, at 171 ("A donee of a power of appointment cannot revoke or amend an exercise of the power, except to the extent that a power of revocation or amendment is impliedly or expressly reserved by the donee at the time the power is exercised and the reservation is not prohibited by the terms of the power."), with id. § 15.2 comment b at 172 ("A will does not become legally operative until the death of the testator. Hence, the terms of the exercise of a power that are set forth in the will of the donee of the power may be revoked or amended by the donee to the same extent as any other provisions of the will."), and 7 C. DeGrandpre, New Hampshire Practice, Wills, Trusts and Gifts § 19.12, at 281 (4th ed. 2003) ("A power of appointment created by a will of a testator may be revoked or altered by the testator at any time prior to his death.").

Here, because provision 3.2 of the Trust provided only for testamentary special powers of appointment ("Upon the death of the donor"), none of the special powers exercised by Evelyn concerning Lot A would be effective until her death. As such, and contrary to the petitioners' contention, none of the testamentary special powers vested property interests in the appointee; those property interests will vest only upon Evelyn's death. None of the authorities cited by the petitioners in support of their argument is apposite. See, e.g., Emery v. Judge of Probate, 7 N.H. 142, 154 (1834) ("There is a distinction between a mere power, and a power coupled with a trust. If it is a mere power of appointment, nothing vests until the power is executed. If a trust is created,

the beneficial interest vests in the objects of the trust, subject to be devested by the execution of the power.").

Contrary to the petitioners' contention that "none of the prior appointments were revoked," the April 21, 1998 special power of appointment expressly revoked that of November 5, 1997, and the January 29, 2003 special power of appointment expressly changed that of April 21, 1998. Moreover, to the extent that the petitioners argue that an exercised special power of appointment must expressly revoke any previously exercised special power, they have cited no authority for this proposition, and we know of none. Further, Attorney Ferber testified that he was unaware of any authority for the same and that the exercise of a second testamentary special power of appointment would serve to revoke a previous exercise of such power if the two were inconsistent.

The petitioners further contend that because Evelyn did not own property once it was conveyed to the Trust, she could not "invade the trust" and convey lot B to Alan. Specifically, they refer to the November 25, 1997 deed, which conveyed lot B to Alan, and state:

> 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 . . . .

We disagree with the petitioners' characterization of the deed's language. The deed reads in pertinent part:

> KNOW ALL PERSONS BY THESE PRESENTS that Evelyn R. Thomas, Trustee of the [Trust] . . . for consideration paid grants to Alan N. Thomas, Sr. . . . with Warranty Covenants the following described premises.
>
> . . . .
>
> Meaning and intending to convey a portion of the premises conveyed by Evelyn R. Thomas to Evelyn R. Thomas, Trustee of the [Trust] . . . .

The deed is signed in the name of the Trust by "Evelyn R. Thomas, Trustee."

Further, Evelyn's conveyance was authorized both by statute and the express language of the Trust. Specifically, RSA 564-B:8-815 (2007) allows a trustee, without authorization from the court, to exercise "powers conferred by

the terms of the trust" and, except as limited by those terms, to exercise "all powers over the trust property which an unmarried competent owner has over individually owned property." The terms of the Trust include the preamble to clause 6, which states:

> In extension and not in limitation of the powers given the Trustees by law or under any other provisions of this instrument, the Trustees, and each one of them singly, shall have the following powers, in each case to be exercised or exercisable from time to time, in the Trustees' uncontrolled discretion, without notice to any beneficiary and without order, leave or license of Court . . . .

Such powers include provisions 6.13 and 6.18, which, respectively, provide trustees with the power:

> To sell or divide real or personal property for distribution, to distribute wholly or partially in kind, and to make distributions in kind by allotting, transferring or conveying specific real or personal property or undivided interests therein at such values and for such consideration as the Trustee deems just and proper, which values and consideration shall be conclusive;

and

> To execute deeds, assignments, leases, notes, contracts or other instruments in writing, whether or not under seal, incident to any of the Trustee's powers . . . .

(Emphases added.) Finally, clause 4 ("Disposition During Lifetime of Donor") contains provision 4.1, which reads, in pertinent part:

> During the lifetime of the Donor, the Trustee may distribute, to and among any one or more of the Legatees as may be living from time to time, so much of the principal of the Trust Fund at such time or times and in such amounts and proportions as the Trustee, in the Trustee's uncontrolled discretion, may deem advisable.

In sum, we find no merit in the petitioners' argument. The language of the deed is clear that Evelyn conveyed Lot B to Alan in her capacity as trustee of the Trust, and we see no evidence that she exceeded her authority, under either our statutes or the Trust document, in doing so.

The petitioners contend that because Evelyn was not the sole trustee, she could not act alone in deeding Lot B to Alan, and that the conveyance is,

therefore, void. While they cite RSA 564-B:7-703 (2007) as standing for the proposition that, in the case of multiple trustees, our trust law generally allows for "majority action and solitary action in some circumstances," they do not argue that Evelyn's solitary action in this case was prohibited by the statute. Instead, the petitioners have argued that Evelyn's action was "ultra vires, and thus void." We disagree.

First, we again note that RSA 564-B:8-815 allows for a trustee, without authorization from the court, to exercise "powers conferred by the terms of the trust" and, except as limited by those terms, to exercise "all powers over the trust property which an unmarried competent owner has over individually owned property." As cited above, the terms of the Trust include the preamble to clause 6, which provides that the trustees, "and each one of them singly" shall have the powers delineated in provisions 4.1, 6.13 and 6.18, including the power to make an inter vivos deed of real property.

Second, while the petitioners contend that the provision in the preamble of clause 6, allowing action by the trustees "singly," refers only to "administrative powers – those that are non-discretionary and do not [a]ffect the beneficiaries' substantive interests," the language of the preamble and provisions 6.13 and 6.18 clearly indicate otherwise. Further, we see nothing in either Hayes v. Hayes, 48 N.H. 219 (1868), or Rockwell v. Dow, 85 N.H. 58 (1931), the two cases cited by the petitioners, to support their position. In sum, we see nothing in either the language of RSA 564-B:8-815, or that of the Trust, to support the petitioners' argument that Evelyn's action was ultra vires.

Affirmed.

Broderick, C.J., Dalianis, Duggan, and Galway, JJ., concurred.

**Eileen Fox,**
**Clerk**

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