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Case	2018-0309
Class	Appeal by Permission - Probate - Trust
Short Title	In re Trust of Mary Baker Eddy
Status	08. Orals Scheduled

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THE STATE OF NEW HAMPSHIRE

THE SUPREME COURT

IN RE TRUST OF MARY BAKER EDDY

CASE NO. 2018-0309

REPLY BRIEF OF APPELLANT
SECOND CHURCH OF CHRIST, SCIENTIST,
MELBOURNE, AUSTRALIA

ON APPEAL FROM DECISIONS OF THE CIRCUIT COURT,
DOVER PROBATE DIVISION (COMPLEX TRUST DOCKET)

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The brief of the Trustees of the Clause 8 Trust—referred to here as the “Director-Trustees” because of their conflicted duality as Directors of The Mother Church (“TMC”)—rests on an incorrect and unsubstantiated historical record, mischaracterizes the relief sought by Second Church (appointment of an independent trustee), and gives short shrift to the applicable statutory and common law prohibitions on conflicted trustees. The brief of the Director of Charitable Trusts (“DCT”) reflects the deliberate inaction of his office, and, thus, highlights the Probate Court’s error in denying Second Church standing.

I. THE TRUSTEES’ PRESENTATION OF HISTORICAL CONTEXT IS FLAWED AND UNSUBSTANTIATED

Much of the parties’ briefing focuses on historic proceedings involving the Trust and its administration since its inception. Second Church has examined this history, not to challenge “decisions and actions by the Trustees dating back decades,”¹ but to evidence the Director-Trustees’ conflicting fiduciary interests as Directors of TMC and Trustees of the Clause 8 Trust, and how an independent Trustee (Josiah Fernald) affected their administration of the Trust. Specifically Second Church recites the history of the Clause 8 Trust to demonstrate that (i) the interests of the Directors of TMC were from the beginning demonstrably adverse and in conflict with the broader goals and beneficiary class of the Clause 8 Trust; (ii) an independent Trustee was appointed in the beginning; (iii) the conflicting interests of the Director-Trustees were apparently held in check

¹ Brief of the Trustees (“Appellees’ Brief”) at 19.

during Fernald's tenure as an independent Trustee, demonstrated by the fact that 100% of the benefits of the Trust went to non-TMC organizations; (iv) this changed dramatically after Fernald passed and the Trust was left in the hands of the five Director-Trustees, demonstrated by the fact that by the 1980s and continuing through last year 100% of the benefits of the Clause 8 Trust were distributed to TMC, and excluded all others;² and that (v) this reversal of the intended priorities of the Trust under the Director-Trustees' administration continued, unabated, unnoticed and *at times aided and abetted by* the DCT— until Second Church identified the deficiencies and defaults in administration since Fernald's departure.³

The Director-Trustees assert conflicting facts and interpretations of this history, much of which is not supported by citations to the record. Where there are record citations, they do not support the Trustees' assertions. There is insufficient space to address all of these flaws here, but a few are worthy of note:

The Director-Trustees assert that by the time Mrs. Eddy died, "her religious activities had shifted to Boston" and that the New Hampshire Trusts were "intended to support the activities of" TMC in Boston.⁴ They cite nothing to support these allegations. Indeed, the findings of this Court were that Mrs. Eddy was intentional in her purpose of *not* gifting the residue of her estate to TMC in Boston, and that it was her intention "to create a public trust for promoting and extending Christian Science as

² Appellant's Appendix ("App.") 468, 488-89.

³ Appellant's Brief at 13-20.

⁴ Appellees' Brief at 9.

taught by her *to all parts of the world.*” *Fernald v. First Church of Christ, Scientist*, 77 N.H. 108, 109 (1913) (emphasis added) (citing *Glover v. Baker*, 76 N.H. 393 (1912)) (contrasting the granting language of Clauses 6 and 8).

The Director-Trustees are conflicted in their dual roles, as noted by both the DCT and the Probate Court.⁵ This posture is exemplified by their predecessors’ positions in the early court cases and the history of their administration of the Trust. Contrary to the Director-Trustees’ characterization, Second Church did not assert “adversity among the executor of the estate, the Board of Directors, and the trustees of Mrs. Eddy’s other trusts.”⁶ Fernald and the Directors may have been perfectly civil – even friendly – with each other, but the Directors, in the proceedings in *Glover, Fernald, and Chase v. Dickey*, 212 Mass. 555, 99 N.E. 410 (1912), sought to have the residue of her estate distributed to them or TMC in Massachusetts, and the courts consistently held it would be distributed to a New Hampshire Trust. The history of the Director-Trustees administration of the Clause 8 Trust demonstrates how their conflicted interests as Directors of TMC, once freed of the presence of an independent Trustee (Fernald) led them to shift the Trust benefits exclusively to TMC.⁷

Further, in describing the appointment of the six initial Clause 8 Trustees in 1913, the Director-Trustees make two material assertions without record support.

⁵ App. 349, 381, 384.

⁶ Appellees’ Brief at 13.

⁷ App. 468-69, 488, 511, 521.

First, they assert that Fernald requested the Directors be appointed to serve with him as Trustees, citing a 1949 letter of Probate Judge Lord purporting to dispense with the need to replace Fernald after he died.⁸ This letter has nothing to do with the reasons for appointing the initial trustees in 1913.⁹

Second, the Director-Trustees set forth a seemingly “factual” narrative, to support their claim that “Fernald was not appointed as an ‘independent’ trustee to watch over the other trustees.”¹⁰ But this bald assertion, and the narrative offered to support it, are not supported by any citation to the record.

What the record does show is that the actual Petition filed by Fernald in 1913 prays for the appointment of “a suitable trustee or trustees” without mentioning the Directors or himself.¹¹ Against the background of the Directors’ repeated attempts to have the residue of the estate distributed to them instead of to a New Hampshire Trust, and the concerns expressed by

⁸ Appellee’s Brief at 15 (citing Trustees’ App. 217).

⁹ The Director-Trustees, DCT and Probate Court all rely on this 1949 Letter as an “Order,” concluding that it eliminates the sixth Trustee. Second Church stands on its prior arguments (*see* Appellant’s Brief at 39-40) that this letter should not be given the weight of an Order issued after proper notice and process. Notably, the copy of the 1949 Letter relied upon apparently came from the files of TMC, does not appear on any docket, and has not been authenticated by any testimony.

¹⁰ Appellees’ Brief at 15.

¹¹ Trustees’ App. 218.

then Attorney General George Tuttle in the *Fernald* case about the need for independent trustees,¹² Fernald’s request for a “suitable trustee or trustees” cannot possibly be read as an endorsement of the Directors. The same context, including the common law that suspects and presumptively invalidates transactions by such conflicted Director-Trustees, reasonably supports the inference made by Second Church that Fernald was appointed to provide independent fiduciary oversight among otherwise conflicted Trustees. Regardless, he was in fact independent and history shows that his presence kept the Director-Trustees honest to Mrs. Eddy’s intent and his departure ushered in decades of misuse —when the Director-Trustees, acting alone, turned the purposes and priorities of the Trust upside down.

Finally, Second Church does not seek to intervene generally in the administration of the Clause 8 Trust, nor does it intend to seek broad “institutional changes, personnel changes, independent investigations and reconciliations.”¹³ Second Church’s goal in seeking standing is limited in scope and more compelling in cause. Second Church seeks the appointment of an independent Trustee to restore *necessary* independence to the administration of the Clause 8 Trust. A review of the pleadings filed by Second Church will reveal that Second Church’s goal has always been focused on this limited, yet profoundly necessary objective.

¹² App. 367-68.

¹³ See Appellee’s Brief at 18, which distorts Second Church’s statement regarding efforts that may be undertaken by *an independent trustee*—not Second Church.

It was the lack of independence in the administration of the Clause 8 Trust by these conflicted Director-Trustees, and the failure of the DCT to act, that caused Second Church to raise the issues it has. Correspondingly, if an independent Trustee is appointed—which Second Church believes *must* happen—the impetus for formal intervention by Second Church should disappear.

II. GIVEN THE DCT’S DECLARED UNWILLINGNESS OR INCAPACITY TO ACT, SECOND CHURCH SHOULD HAVE STANDING TO ADDRESS THE NECESSITY OF AN INDEPENDENT TRUSTEE

The Probate Court’s failure to appoint an independent trustee of the Clause 8 Trust cannot be squared with common law and statutory prohibitions against impermissible enduring conflicts and pecuniary interest transactions.¹⁴ Director-Trustees summarily dismiss this important argument, stating only that statutes cited by Second Church—RSA 7:19-a (referred to as the “pecuniary interest statute”) and RSA 564-B:8-803 (the Trust Code provision concerning impartiality of trustees)—do not prevent them from “serving,” and, further, that:

Distributions of Clause 8 funds to or for the benefit of [TMC] to carry out its religious purposes, in accordance with the express instructions by Mrs. Eddy in her Will, are not pecuniary benefit transactions as defined in RSA 7:19-a, I.¹⁵

They are wrong on both points.

¹⁴ See Appellant’s Brief at 41.

¹⁵ Appellee’s Brief at 38.

First, although the cited statutes do not “prevent” conflicted trustees from “serving” *per se*, they do prohibit them from *acting* in transactions in which they have conflicting interests. Likewise, while distributions to TMC for the purposes set forth in Mrs. Eddy’s Will are not “pecuniary benefit transactions” *per se*, they are when the decision to make them is authorized by these conflicted Director-Trustees.

A “pecuniary benefit transaction” is defined as a transaction “between a charitable trust in which a trustee of the charitable trust has a financial interest, *direct* or *indirect*.” RSA 7:19-a, I(c) (emphasis added). The Director-Trustees, collectively, constitute the entire Board of TMC, which has a direct financial interest in the Claus 8 Trust. *See* RSA 7:19-a, I(b). An indirect financial interest is one in which the transaction involves “a person or entity of which the trustee is a proprietor, partner, employee, or officer.” *Id.* Individually, the Director-Trustees have an *indirect* financial interest in the Clause 8 Trust, as Directors of TMC.

A pecuniary interest transaction is *prohibited* unless it is “in the best interests of the trust” and, all of the conditions under RSA 7:19-a, II, are met, including that “the transaction receives affirmative votes from at least a 2/3 majority of all the *disinterested members* of the governing board of the charitable trust....” RSA 7:19-a, II (emphasis added). In the absence of an independent trustee, the Clause 8 Trust has been prohibited from making transfers to TMC.

Second, with respect to the duty of impartiality under RSA 564-B:8-803 (requiring impartiality in distributions to beneficiaries), a failure to so

act can be grounds for removal.¹⁶ Given their embedded conflict, these Director-Trustees are unfit to decide whether and when to distribute funds to TMC, and such unfitness is also grounds for removal of a trustee.¹⁷

Second Church has not requested standing to seek removal of any Director-Trustees, but only to fill the vacancy left by Fernald or, if no vacancy exists, then to add to their number at least one “independent trustee,” who (like Fernald) is not impaired. Without such independence in the fiduciary administration of the Trust, the Trust is disabled—unable appropriately to make distributions to or for the benefit of TMC—because the Director-Trustees, by themselves, are incapable of fully performing that fiduciary function. This disability arises not only because of the pecuniary interest statute, but also because of an enduring principle of common law that for hundreds of years has held such transactions by trustees and other fiduciaries with interests in the beneficiary presumptively invalid, unless ratified by independent trustees after full disclosure, and otherwise fair and equitable to the trust. *See, e.g., Sparhawk*, 21 N.H. 9; *Hollis v. Tilton*, 90 N.H. 119, 122 (1939); *cf. Magruder v. Drury*, 235 U.S. 106, 119 (1914); *Bartlett v. Dumaine*, 128 N.H. 497, 514–15 (1986); *Pearson v. Concord R. Corp.*, 62 N.H. 537, 550–51 (1883); *Jackson v. Smith*, 254 U.S. 586, 588–89 (1921); and *Restatement (Second) of Trusts* § 170 (1959), comment c.

The established dominant purpose of the Clause 8 Trust, to “promote and extend the religion of Christian Science as taught by [Mary Baker

¹⁶ This is an extension of the duty of loyalty under RSA 564-B:8-802. *See Shelton v. Tamposi*, 164 N.H. 490, 505 (2013).

¹⁷ *See* RSA 564-B:7–706(b)(3).

Eddy]” can only be fully and properly effectuated if the Trustees are able to exercise discretion to make distributions to all appropriate beneficiaries, including TMC, as well as others globally.

The solution imposed by the Probate Court and advocated on this appeal by the Director-Trustees and the DCT is to restrict the discretion of the Director-Trustees by presumptively prohibiting distributions to TMC. This is equally intolerable because it materially compromises the intended purposes of the Trust in order to accommodate the desire of these Director-Trustees to serve, alone, without the independent fiduciary oversight.

Restricting the ability of the Trustees to perform the dominant purpose of the Clause 8 Trust to “promote and extend the religion of Christian Science as taught by [Mary Baker Eddy]” to accommodate the five Director-Trustees is a perversion of trust law. This Trust does not exist for the convenience of the Director-Trustees. It exists to benefit those Mrs. Eddy intended to benefit, fully and without unnecessary compromise, globally to promote and extend the religion of Christian Science as taught by Mrs. Eddy. Yet this purpose is being compromised to accommodate these Director-Trustees, and the DCT is admittedly unwilling to do anything about this.¹⁸

That the DCT would advocate such a solution is a compelling example of its ineffectiveness on this issue. The DCT is charged with enforcing the pecuniary interest statute, among other protections. Instead, the DCT has taken a leadership role in accommodating these conflicted Director-Trustees, compromising both the goals of the pecuniary interest

¹⁸ DCT Brief at 33.

statute and the intentions of the settlor, which are supposed to be paramount.

The DCT's reason for so compromising the State's interest in enforcing its laws and Mary Baker Eddy's intentions as a settlor, is apparently its concerns that the appointment of an independent trustee would entangle it or the Probate Court in religious matters in violation of the First Amendment to the United States Constitution.¹⁹

These issues were briefed extensively before the Probate Court, which deferred ruling on such issues until such time as there is a vacancy among the remaining five Director-Trustees to be filled.²⁰ It did, however, indicate that the "neutral principles of law test" would allow the DCT and Court to "continue to oversee the appointment of trustees, as it has since 1910, without becoming unduly entangled in church doctrinal controversies."²¹

Second Church agrees: the issue is not yet ripe for determination, because the purported entanglement issue does not arise until a candidate for Trustee is actually considered by the Court, and because neutral principles can be applied to the selection of an independent trustee.²² Further, the Director-Trustees are not before the Court in their capacity as Directors of a church, but as Trustees of a New Hampshire charitable trust, lawfully declared by Mary Baker Eddy under her Will and deemed valid

¹⁹ *Id.*

²⁰ *See* March 2018 Order at 3-4 fn. 3.

²¹ *Id.*

²² *Id.*

and enforceable by this Court over 100 years ago. The church autonomy doctrine was intended to protect the rights of voluntary religious associations, and not fiduciaries of charitable or religious Trusts.²³ See *Watson v. Jones*, 80 U.S. 679 (1871).

The important point here is that the DCT has effectively disabled itself on this issue and chosen to accommodate these conflicted Director-Trustees rather than enforce the State’s statutory and common law principles and the intentions of the Trust settlor, Mary Baker Eddy, as declared long ago in *Glover and Fernald*.

This is why Second Church must have standing on the issue of appointment of an independent trustee: because the status quo is intolerably wrong and there is no one else to advocate for its correction. Allowing standing in such situations is the goal of “special interest standing.” The *Blasko* factors themselves are directed to this same goal: where something is extraordinarily wrong in the administration of a charitable trust, and those with standing are not doing anything to address it, the law should allow someone to advocate the cause, especially where, as here, such party is not seeking any direct benefit.

²³ If the Court is nonetheless inclined to address these First Amendment issues further on the instant appeal, Second Church respectfully directs its attention to its First Amendment Memorandum filed in the Probate Court (App. 530-43).

CONCLUSION

For the reasons stated above, the Court should vacate the March 2018 Order with respect to the Probate Court's denial of Second Church's (a) motion for standing to seek the appointment of an independent trustee to the Clause 8 Trust and (b) motion for the appointment of an independent trustee to the Clause 8 Trust.

CERTIFICATION OF COMPLIANCE WITH RULE 16(11)

Pursuant to Sup. Ct. R. 26(7), the undersigned counsel certify that this Reply contains 2,979 words, exclusive of the cover page, table of contents, and table of authorities.

CERTIFICATION OF SERVICE

The undersigned counsel certify that a copy of this Reply is being filed on this date through the Supreme Court's electronic filing service, which "satisfies the requirement in Supreme Court Rule 26(2) that a filer provide to all other parties a copy at or before the time of filing." Sup. Ct. 2018 Supp. R. 18(a).

Respectfully submitted,
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