# "A Little Ditty": Basic Estate Planning

Table 3

January 2, 2019

TOP THREE: 3 things everyone over the age of 18 should have:

1. Healthcare Power of Attorney
2. Financial Power of Attorney
3. Basic Will

The "Poor Man's Will":

1. **Bank accounts**: Payable on death accounts - RSA 383-B:4-404
    a. Note the distinction from joint accounts - RSA 383-B:4-405
2. **Real estate**: Joint tenancy with rights of survivorship
    a. Note: No Tenancy by the Entirety in NH
    b. Could also do a life tenancy
    c. Consider reviewing the real estate deed – Is the client divorced? Did s/he then transfer the property of otherwise sever the joint tenancy?

BE CAREFUL OF CONFLICTS!

**Rule 1.7. Conflicts of Interest**

> (a) Except as provided in paragraphs (b) and (c), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client; or
> >
> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client , a former client or a third person or by a personal interest of the lawyer.

Postnuptial Agreements are enforceable in NH:

In re Estate of Wilbur, 165 N.H. 246, 250 (2013).

> Postnuptial agreements, like antenuptial agreements, carry a "presumption of validity," and the party seeking invalidation of the agreement must prove that the agreement was unfair. Id. at 251-252. Postnuptial contracts may or may not be subject to scrutiny "beyond that which applies to antenuptial contracts." Id.

Client Considerations - Will vs. Trust:

| Will | Trust |
|---|---|
| Control | Privacy |
| Spousal election | No spousal election. See Hanke, 123 N.H. 175, 179 (1983) (conveyance to trust can only be undone if conveyance was for purposes of thwarting spouse). |
| Pretermitted heir | No pretermitted heir |
| | Must be funded |
| Shorter window for creditors | Quicker access to money for beneficiaries |
| Public | Private |

Pretermitted heirs – RSA 551:10

> Every child born after the decease of the testator, and every child or issue of a child of the deceased not named or referred to in his will, and who is not a devisee or legatee, shall be entitled to the same portion of the estate, real and personal, as he would be if the deceased were intestate.

Good sample language:

> Other than what I have provided in this Will, I intentionally make no provisions for my children or the issue of my children, whether now alive or hereafter born, other than any provisions that may have been made for them herein.

BAD sample language:

> Other than what I have provided in this Will, I intentionally make no provisions for my heirs, whether now alive or hereafter born, other than any provisions that may have been made for them herein.

For additional reading, we recommend *In re Teresa E. Craig Living Trust*, 194 A.3d 967 (2018).

**Note that while this case was pending, the legislature amended RSA 564-B:1-112, adding the sentence: "RSA 551:10 shall not apply to any trust."**

Why include an *in terrorem* clauses (appropriate for both wills and trusts)?

Beneficiaries must receive enough to make them think twice about risking it with a will challenge.

*In terrorem* clause is both a shield and a sword. It serves to prevent disgruntled heirs from suing the fiduciary or the estate/trust, but it also allows the person appointed as executor or trustee to act in a way that may become dictatorial or unfair.

Remember the *Tamposi* case no-contest clause:

> If any person shall at any time commence or join in the prosecution of any proceedings in any court or tribunal to oppose the admission of the Grantor's will to probate or to have said will, this trust, or any other trust established by the Grantor set aside or declared invalid or to contest any part or all of the provisions included in said will, this trust or any other trust established by the Grantor, or to cause or to induce any other person to do so, then and in that event such person shall thereupon forfeit any and all right, title and interest in or to any portion of this trust, and this trust shall be distributed in the same manner as would have occurred had such person died prior to the date of execution of this trust. Nothing contained in this Article, however, shall preclude any beneficiary from enforcing, by litigation or otherwise, the executor's duties under said will or the trustee's duties under this or any other trust.
>
> An excerpt from Judge Cassavechia's final order (before the remand for the attorney and fiduciary fee issues) on Article 14 containing this language is attached for reference with the Article 14 language, too.

Death changes everything. Think about the politics between the beneficiaries.

Guardianship: These responsibilities are HUGE. Carefully consider who you name.

RSA 564-E:108: Nomination of Guardian; Relation of Agent to Court-Appointed Fiduciary.

a. In a power of attorney, a principal may nominate a guardian of the principal's estate or guardian of the principal's person for consideration by the court if protective proceedings for the principal's estate or person are begun after the principal executes the power of attorney. Except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal's most recent nomination.
b. If, after a principal executes a power of attorney, a court appoints a conservator or guardian of the principal's estate or other fiduciary charged with the management of some or all of the principal's property:
    1. the agent is accountable to the fiduciary as well as to the principal;
    2. the power of attorney is not terminated and the agent's authority continues unless limited, suspended, or terminated by the court; and

3. The fiduciary shall have the same power as the principal to revoke, suspend, or terminate all or any part of such power of attorney.

For a case involving attorney's fees during guardianship proceedings, we suggest *Eaton v. Eaton*, 165 N.H. 742 (2013). Attached.

Powers of Attorney:

1. TYPES:
    a. **Limited**: gives someone else the ability to act in your place for a very limited purpose and time. E.g. A limited power of attorney could give someone the right to sign a deed to property for you at a closing if you are out of time. The document should specify when it ends.
    b. **General**: Comprehensive financial power given to someone else. Can be used if you are not incapacitated, but need help with financial matters. Ends on death or incapacitation unless rescinded before then.
    c. **Durable**: Can be general or limited. Remains in effect after someone becomes incapacitated. If someone does not have this type of POA, a court will have to appoint a conservator or guardian to act on your behalf. Remains in effect until death unless rescinded prior to incapacitation.
    d. **Springing**: Lets your attorney-in-fact act for you if you become incapacitated. Only triggered if you become incapacitated. This must be clearly defined in the document.
    e. **Healthcare**: NOT included in general power of attorney. Gives someone else the ability to make medical and treatment decisions that a principal can no longer make for themselves. Make sure you ask this person if they feel comfortable. This should be someone with whom the client can discuss their wishes frankly, and will support those wishes. Also consider geography, and ability to meet with physicians should the need arise.

**CONSIDER CAREFULLY BEFORE GIVING THE POWERS OF ATTORNEY TO THE FUTURE APPOINTEE.**

RSA 551:3 - Interested Witness

> Any beneficial device or legacy made or given in a will to a subscribing witness thereto or to the wife or husband of such a witness shall be void unless there be 2 other subscribing witnesses, and such subscribing witness shall be a competent witness thereto; but a provision therein for the payment of a debt shall not be void nor disqualify the creditor as a witness thereto.

PRACTICE TIP: Send client wills for review before signing.

CONSIDER: Who will keep the wills after they are signed? Some attorneys prefer to keep these in a fireproof, locked "will safe" at the attorney's office. Some attorneys prefer to keep the client responsible. Remember safe deposit key transfer issues upon death.

**NH inheritance default is *per stirpes*. RSA 561:1, II(a).

Areas for further consideration

- Decanting: We suggest the *Hodges* case: *Hodges v. Johnson*, 170 N.H. 470 (2017).
- Pet trusts
- Illusory Transfer in trusts: *Hanke v. Hanke*, 123 N.H. 175 (1983).

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY PROBATE COURT

JULIE SHELTON, Trustee, of the Elizabeth M. Tamposi GST Exempt Trust and the Elizabeth M. Tamposi Trust, both created under the Samuel A. Tamposi Sr. 1992 Trust, and the Elizabeth M. Tamposi Trust created under the Samuel A. Tamposi Sr. 1994 Irrevocable Trust, and ELIZABETH M. TAMPOSI

v

SAMUEL A. TAMPOSI, JR. and STEPHEN A. TAMPOSI, Individually and as Investment Directors of the Elizabeth M. Tamposi GST Exempt Trust and the Elizabeth M. Tamposi Trust, both created under the Samuel A. Tamposi Sr. 1992 Trust, and the Elizabeth M. Tamposi Trust created under the Samuel A. Tamposi Sr. 1994 Irrevocable Trust, and as Directors of the Tamposi Companies

Case Number: 316-2007-EQ-2109

# ORDER

This litigation concerns the Samuel A. Tamposi, Sr. 1992 Trust (the SAT, Sr. Trust). It was instituted by Julie Shelton, trustee of the Elizabeth Tamposi Trusts (the EMT Trusts), and Elizabeth Tamposi, individually, against Samuel A Tamposi, Jr. and Stephen Tamposi, individually, and as investment directors for the EMT Trusts and directors of the Tamposi Companies,[1] alleging breach of fiduciary duty. Samuel A. Tamposi, Jr. and Stephen Tamposi deny any breach of duty, move for removal of Julie Shelton as trustee of the EMT Trusts, and ask for enforcement of the *in terrorem* clause of the SAT, Sr. Trust through forfeiture of Elizabeth Tamposi's right, title and interest as beneficiary under the EMT Trusts.

[1] Per order dated 10/15/2009 (Index #354) the court found that it did not have jurisdiction to decide claims against the respondents as Directors of the Tamposi Companies.

size of that investment would not be considered proper; holding securities or other property in such a manner as the trustee deems best; and dividing or distributing trust property "in undivided interests, in cash or in kind or partly in each, in pro-rata or non-pro rata shares." Article TENTH (a), (c) and (e).

Article FOURTEEN contains a "no contest", or *in terrorem*, clause. So far as is now pertinent, it specifies:

> If any person shall at any time commence or join in the prosecution of any proceedings in any court or tribunal...to have ...this trust ...set aside or declared invalid or to contest any part or all of the provisions included in...this trust...or to cause or to induce any other person to do so, then and in that event such person shall thereupon forfeit any and all right, title and interest in or to any portion of this trust, and this trust shall be distributed in the same manner as would have occurred had such person died prior to the date of execution of this trust.

The paragraph concludes with: "Nothing contained in this Article, however, shall preclude any beneficiary from enforcing, by litigation or otherwise...the trustee's duties under this or any other trust."

The Third Amendment confers certain fiduciary responsibilities on the investment directors that are more commonly vested in a trustee. They are given authority and have the responsibility for the investment and management of the trust assets, while the trustee is tasked with determining the needs of the beneficiaries and distributing appropriate funds to them in accordance with the applicable ascertainable standard. The amendment also gives the investment directors authority to control, finance, and structure all real estate assets and operating entities; full authority to direct the retention or sale of all trust assets; and to direct the purchase of property with cash principal. Article TENTH-B (d), (e). They are further conferred license to act as managers or directors of the entities held as trust property that might otherwise raise inherent or

6167/.AH8 02/13/92 JTC

EXHIBIT A

SAMUEL A. TAMPOSI, SR. 1992 TRUST

Samuel A. Tamposi, Sr., of Nashua, New Hampshire (hereinafter called the "Grantor"), hereby declares that he is holding the sum of ten dollars ($10.00) as trustee hereunder; and as trustee he hereby acknowledges that he will hold said sum and all other property transferred to the trustee, all investments and reinvestments thereof, all additions thereto and all substitutions therefor (referred to herein as the "trust property"), IN TRUST, as follows:

FIRST: This trust may be known as the "Samuel A. Tamposi, Sr. 1992 Trust." The Grantor shall have the right at any time or times, by a writing or writings (other than a will or codicil) signed by the Grantor and delivered to the trustee during the Grantor's lifetime, to revoke the trust hereunder, or to alter or amend this trust instrument, in whole or in part. If this trust is revoked in its entirety, the revocation shall take effect upon the delivery of the required writing to the trustee, who shall thereupon pay or transfer to the Grantor, or as the Grantor directs, all of the trust property. Any alteration or amendment of this trust instrument shall take effect when delivered in writing to the trustee.

SECOND: During the lifetime of the Grantor, the trustee shall distribute to the Grantor, or as the Grantor directs, all or such part of the net income or principal as the Grantor from time to time requests; and without any request, the trustee may distribute to the Grantor, at any time or times during the Grantor's lifetime, such amounts or all of the net income or principal as the trustee, in the trustee's discretion, considers advisable for any purpose. Any net income not so distributed may be added

128

physically or mentally unable to act in such capacity, may seek a determination as to such person's physical and mental condition from the principal physician then attending to such person's care. If such physician certifies in writing that because of physical or mental deterioration or illness such person is unable to manage his or her financial affairs, then such person shall be considered to have ceased or failed to serve as a trustee hereunder. Any person deemed to have ceased or failed to serve as a trustee hereunder pursuant to the above provisions may resume his or her duties as trustee upon the written acceptance of such office at such time as the principal physician then attending to such person's care certifies in writing that such person has regained the ability to manage his or her financial affairs. If any person does resume serving as a trustee hereunder, then any successor trustee who replaced such person shall thereupon cease to act.

FOURTEENTH: If any person shall at any time commence or join in the prosecution of any proceedings in any court or tribunal to oppose the admission of the Grantor's will to probate or to have said will, this trust or any other trust established by the Grantor set aside or declared invalid or to contest any part or all of the provisions included in said will, this trust, or any other trust established by the Grantor, or to cause or to induce any other person to do so, then and in that event such person shall thereupon forfeit any and all right, title and interest in or to any portion of this trust, and this trust shall be distributed in the same manner as would have occurred had such person died prior to the date of execution of this trust. Nothing contained in this Article, however, shall preclude any beneficiary from enforcing, by litigation or otherwise, the

executor's duties under said will or the trustee's duties under this or any other trust.

FIFTEENTH: The original of each alteration or amendment of this trust instrument, and of any resignation or appointment of a trustee, and each acceptance of appointment, shall be kept with or attached to the original trust instrument, which may be held by the trustee. Anyone may rely on a photographic reproduction of the executed original of this trust instrument or of any writings attached thereto as fully as on the original instrument; and the certificate of the trustee that the trustee is acting according to this instrument shall fully protect all persons dealing with the trustee.

SIXTEENTH: This trust instrument and the trusts hereunder shall be governed, construed and administered in accordance with the laws of the State of New Hampshire from time to time in force.

SIGNED this 24th day of February, 1992.

James T. Cam
Witness

Samuel A. Tamposi
Samuel A. Tamposi, Sr., Grantor and Trustee

Marjorie S. Dugas
Witness

STATE OF NEW HAMPSHIRE
COUNTY OF HILLSBOROUGH

The foregoing instrument was acknowledged before me this 24th day of February, 1992, by Samuel A. Tamposi, Sr.

Catherine E. Poulin
Notary Public
My Commission Expires:

CATHERINE E. POULIN, Notary Public
My Commission Expires August 18, 1994

RSA 564-B:1-112 Rules of Construction.

Effective: May 30, 2018

(a) The rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property. For the purposes of this section, RSA 551:10 is not a rule of construction. RSA 551:10 shall not apply to any trust.

(b) In interpreting or construing the terms of a trust, the settlor's intent shall be sovereign to the extent that the settlor's intent is lawful, not contrary to public policy, and possible to achieve.

(c) For the purposes of determining the benefit of the beneficiaries, the settlor's intent as expressed in the terms of the trust shall be paramount.

165 N.H. 742
Supreme Court of New Hampshire.
Daniel A. EATON

v.
Mary Louise EATON & a.

No. 2012–703
|
Argued: October 10, 2013
|
Opinion Issued: December 20, 2013

**Synopsis**
**Background:** Ward's attorney-in-fact brought action against ward and guardian to recover attorney fees that attorney-in-fact incurred during guardianship proceeding. The 8th Circuit Court, Keene Probate Division, Hampe, J., granted defendants' motion for summary judgment. Attorney-in-fact appealed.

The Supreme Court, Lynn, J., held that for purposes of power-of-attorney statute's provision stating that failure to comply with provisions governing principal's disclosure statement and attorney-in-fact's acknowledgement does not invalidate otherwise valid durable power of attorney, durable power of attorney, which lacked attorney-in-fact's acknowledgement, was not "otherwise valid."

Affirmed.

****1286** 8th Circuit Court—Keene Probate Division

**Attorneys and Law Firms**

Laboe Associates, PLLC, of Concord (Kerri S. Tasker and John E. Laboe on the brief, and Mr. Laboe orally), for the petitioner.

Bradley & Faulkner, P.C., of Keene (Gary J. Kinyon on the brief and orally), for the respondents.

**Opinion**

LYNN, J.

***743** The petitioner, Daniel A. Eaton, appeals an order of the 8th Circuit Court—Keene Probate Division (*Hampe*, J.), which granted the summary judgment motion filed by the petitioner's mother, Mary Louise Eaton (Mrs. Eaton), and her guardian, Michael Eaton (Michael). We affirm.

***744** This is the second appeal arising from the petitioner's attempts to be paid for legal fees he incurred in guardianship proceedings involving his mother. *See* *In re Guardianship of Eaton*, 163 N.H. 386, 42 A.3d 799 (2012). The following facts are drawn from *Eaton* and from the record in this appeal.

In March 2010, Dean Eaton (Dean), the petitioner's brother, filed a petition for guardianship over their mother, Mrs. Eaton. *Id.* at 388, 42 A.3d 799. The petitioner objected to Dean's petition and filed his own petition. *Id.* In a June 2010 settlement agreement, the petitioner and Dean agreed that their brother, Michael, would be appointed guardian. *Id.* Shortly thereafter, the trial court found Mrs. Eaton to be incapacitated and appointed Michael guardian over her person and estate. *Id.* Thereafter, the petitioner filed a motion under RSA 464–A:43 (2004), requesting the trial court to order Michael, as guardian of Mrs. Eaton's estate, to pay the attorney's fees the petitioner incurred during the guardianship proceedings. *Id.* Michael objected, and the trial

court denied the petitioner's motion. *Id.*We upheld the trial court's decision in *Eaton*. *Id.* at 393, 42 A.3d 799.

In October 2010, the petitioner filed the instant action, in which he again sought payment of legal fees incurred during the guardianship proceeding. He alleged that he was entitled to the fees because he acted as his mother's attorney-in-fact pursuant to a durable general power of attorney, which was executed in October 2004. The respondents moved for summary judgment on three grounds: (1) that the actions taken by the petitioner were not done pursuant to the power of attorney but for the petitioner's own benefit; (2) that the petitioner had no authority to act under the power of attorney because it lacked the acknowledgment required by RSA 506:6, VII(a) (2010); and (3) that the petitioner admitted under oath in a deposition that the only time he acted under the power of attorney was in connection with obtaining medical records. The trial court found that there were genuine issues of material fact in dispute with regard to the respondents' first and third arguments which precluded the trial court from granting summary judgment. However, with respect to the second argument, the trial court ruled that "the acknowledgment requirement of RSA 506:6, VII(a) is mandatory and therefore Daniel Eaton could not have been acting as Mary Lou Eaton's attorney-in-fact when he undertook the acts [for which the legal fees were claimed], as a matter of law." The trial court therefore granted summary judgment for the respondents on that ground.

****1287** On appeal, the sole issue is whether the trial court erred in ruling that the absence of an acknowledgment executed by the petitioner and affixed to the durable general power of attorney precluded the petitioner from acting under the power. This presents an issue of statutory interpretation, which is a question of law that we review *de novo*. *Schiavi v. City of Rochester*, 152 N.H. 487, 489, 880 A.2d 428 (2005). "We are the final arbiter of the legislature's intent as ***745** expressed in the words of the statute considered as a whole." *Eaton*, 163 N.H. at 389, 42 A.3d 799. "Further, we interpret a statute in the context of the overall statutory scheme and not in isolation." *Id.* "When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used." *Id.* "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id.* "We do not consider legislative history to construe a statute that is clear on its face." *Id.*

In this case there are two pertinent requirements for a durable general power of attorney: it must have affixed to it both a properly executed "disclosure statement" by the principal, *see*RSA 506:6, VI(a), and a properly executed "acknowledgment" by the attorney-in-fact, *see*RSA 506:6, VII(a). RSA 506:6, VII(a) specifically states that an attorney-in-fact "shall have no authority to act" under the power of attorney unless the attorney-in-fact first has executed and affixed to it the required acknowledgment.

The disclosure statement serves multiple purposes under the statute. First, it ensures that the principal made an informed decision to appoint an attorney-in-fact. RSA 506:6, VI(a). Second, it informs the principal, among other things, that the durable general power of attorney grants the attorney-in-fact the power to make decisions concerning the principal's "money, property, or both" on the principal's behalf. *Id.* Third, it also informs the principal that the principal has the power to revoke the power of attorney as long as she is "of sound mind." *Id.*

The acknowledgment explains the duties and responsibilities of, and burdens on, the attorney-in-fact as the principal's agent. RSA 506:6, VII(a). It informs the agent that the durable general power of attorney "is valid only if the Principal is of sound mind when the Principal signs it." *Id.* It ensures that the attorney-in-fact is aware that he owes the principal a fiduciary duty. *Id.* Under this fiduciary duty, the attorney-in-fact must "observe the standards observed by a prudent person, which means the use of those powers that is reasonable in view of the interests of the Principal and in view of the way in which a person of ordinary judgment would act in carrying out that person's own affairs." *Id.* The acknowledgment further informs the attorney-in-fact not to "use the money or property for [his] own benefit or to make gifts to [him]self or others unless the Durable Power of Attorney specifically gives [him] the authority to do so." *Id.* It also informs the attorney-in-fact that if his acts are challenged, he has the burden of proving that he "acted under the standards of a fiduciary." *Id.*

While the petitioner and the respondents purport to agree that the durable general power of attorney here was "valid," their divergent views ***746** on the meaning of validity renders their agreement illusory. The respondents contend that the power of attorney was valid only in the sense that it was not void from the outset merely because it lacked an executed and affixed acknowledgment. However, according to the respondents, the petitioner did not have the authority to act pursuant to the power until the acknowledgment ****1288** was executed and affixed to the power of attorney. *See* RSA 506:6, VII(b) (2010) ("The acknowledgment ... need not be signed when the durable power of attorney is executed as long as it is executed prior to the [attorney-in-fact] exercising the power granted under the durable power of attorney."). Although we agree that a power of attorney that does not contain an executed and affixed acknowledgment is not void from the outset, to define "valid" in this narrow sense would be inconsistent with the accepted usage of the word. *SeeWebster's Third New International Dictionary* 2529–30 (unabridged ed. 2002) ("valid" means "able to effect or accomplish what is designed or intended; effective; efficacious"). Thus, to be "valid," an attorney-in-fact must be able to *use* the durable general power of attorney for its intended

purposes.

The petitioner, by contrast, relies upon RSA 506:6, VIII(b) (2010) to argue that he was entitled to act pursuant to the durable general power of attorney despite the fact that it lacked an executed and affixed acknowledgment. We conclude that the petitioner misconstrues the meaning of the statute. RSA 506:6, VIII(b) provides: "Failure to comply with paragraph VI or VII shall not invalidate an *otherwise valid* durable power of attorney, subject to the provisions of RSA 506:7, IV(b)" (emphasis added). By its terms, this statute creates an exception to the requirements that a power of attorney contain both an executed and affixed disclosure statement and acknowledgment. However, this exception applies only to powers of attorney that are "otherwise valid." To determine whether the durable power of attorney is "otherwise valid" one must look to RSA 506:6, VIII(a) (2010), which sets forth the requirements for validity. RSA 506:6, VIII(a) states:

A power of attorney shall be valid if it:

(1) Is valid under common law or statute existing at the time of execution; or

(2) Has been determined by the court to be valid upon the filing of a petition pursuant to RSA 506:7.

With respect to RSA 506:6, VIII(a)(2), the petitioner does not contend that a court has determined that the power of attorney at issue is valid. And insofar as the instant proceeding may be considered to provide the occasion for such a determination, *see*RSA 506:7, RSA 506:6, VIII(a)(2) cannot plausibly be read to confer upon the courts an *ad hoc* authority to declare ***747** valid a power of attorney if doing so would contravene other provisions of RSA 506:6. To the contrary, in deciding whether a power of attorney has been or can be validly used, courts must apply the law as specified in RSA 506:6, including the acknowledgement requirement, unless another provision of the statute specifically excepts the power of attorney in question from the need to comply with RSA 506:6, VII(a). As explained below, RSA 506:6, VIII(a)(1) provides the only possible basis for excepting a power of attorney from the requirements of RSA 506:6, VII(a), and it does not apply in this case.

Based upon its terms, it is apparent that the purpose of RSA 506:6, VIII(a)(1) is to function as a "grandfather" provision that serves to validate durable general powers of attorney which, although not complying with the present requirements of RSA 506:6, were valid under the governing law (either common law or statutory) in effect when they were executed. New Hampshire law did not address the use of disclosure statements or acknowledgments in connection with powers of attorney prior to 2001, when the legislature added paragraphs V through IX to RSA 506:6. *See*RSA 506:6, V–IX (Supp. 2001); *see also* Laws 2001, 257:1. ****1289** However, under the 2001 legislation, the inclusion of disclosure statements and acknowledgements in powers of attorney, as provided for by paragraphs VI and VII of the statute, was discretionary rather than mandatory. RSA 506:6, VI, VII (Supp. 2001). The 2001 legislation also added paragraph VIII, which provided: "Nothing in paragraphs V–VII of this section shall render ineffective a durable power of attorney validly executed under New Hampshire law."[1] RSA 506:6, VIII (Supp. 2001).

It was not until 2003 that another statutory amendment revised paragraphs VI and VII of RSA 506:6 to make disclosure statements and acknowledgments mandatory components of durable general powers of attorney. *See*RSA 506:6, VI, VII (Supp. 2003); *see also* Laws 2003, 312:4. At the same time, the legislature amended paragraph VIII of RSA 506:6 to include subsections (a) and (b). RSA 506:6, VIII (Supp. 2003). However, the 2003 amendment included within the exception for "otherwise valid" powers of attorney created by paragraph VIII(b) only powers of attorney that lacked disclosure statements; powers of attorney that lacked an acknowledgment were not covered by the exception.[2] *Id.* In 2005, the ***748** legislature once again amended RSA 506:6, VIII(b) to its present form, which makes clear that "otherwise valid" durable powers of attorney may include those that lack either a disclosure statement, an acknowledgment, or both. *See* Laws 2005, 71:4.

With the above statutory history in mind, when RSA 506:6, VII(a), VIII(a) and VIII(b) are read together, it becomes clear that to be "otherwise valid" without a disclosure statement and/or an acknowledgment, a durable power of attorney must be one that *did not require these components to be valid at the time it was executed.* Construing the "otherwise valid" language of RSA 506:6, VIII(b) in this fashion is the only way to avoid it contradicting RSA 506:6, VI(a) and VII(a), a result that would be contrary to our settled rules of statutory interpretation. *See Appeal of Union Tel. Co.*, 160 N.H. 309, 311, 999 A.2d 336 (2010) ("When interpreting two statutes which deal with similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute.").

Because the durable power of attorney at issue in this case was executed in October 2004, after the date when an acknowledgment was a mandatory prerequisite to the use of the power, it does not qualify as "otherwise valid" within the meaning of RSA 506:6, VIII(b).[3] Consequently, ****1290** the trial court did not err in granting the respondents' motion for summary judgment.

*Affirmed.*

DALIANIS, C.J., and HICKS, CONBOY and BASSETT, JJ., concurred.

**All Citations**

165 N.H. 742, 82 A.3d 1284

Footnotes

1 Under the 2001 legislation, paragraph V was added to RSA 506:6. It stated: "An attorney in fact is not authorized to make gifts to the attorney in fact or to others unless the durable power of attorney explicitly authorizes such gifts." RSA 506:6, V (Supp. 2001); *see also* Laws 2001, 257:1.

2 Pursuant to Laws 2003, 312:4, RSA 506:6, VIII(b) stated: "Failure to comply with paragraph VI shall not invalidate an otherwise valid durable power of attorney, subject to the provisions of RSA 506:7, IV(b)."

3 The petitioner asserts that our construction of RSA 506:6, VIII(b) renders RSA 506:7, IV(b) (2010) superfluous. We disagree. While RSA 506:6, VIII(b) permits the use of powers of attorney that lack disclosure statements and/or acknowledgments if they were executed at a time when these components were not required, the "subject to the provisions of RSA 506:7, IV(b)" language of the statute serves to make clear that, although the power may be valid, gifts or transfers made pursuant to such "grandfathered" powers of attorney do not enjoy the presumption of lawfulness conferred by the first sentence of RSA 506:7, IV(b). Moreover, pursuant to the second sentence of RSA 506:7, IV(b), an attorney-in-fact acting under such a power, when challenged, must bear the burden of proving that a transfer of the principal's property made for less than adequate consideration "was authorized and was not a result of undue influence, fraud, or misrepresentation."

**Citing References (5)**

| Treatment | Title | Date | Type | Depth | Headnote(s) |
|---|---|---|---|---|---|
| Cited by | **1. K.L.N. Construction Company, Inc. v. Town of Pelham**<br>107 A.3d 658, 661+ , N.H.<br>GOVERNMENT - Municipalities. Impact fee statute's refund requirement allowed payment of unencumbered fees to current property owners rather than to original payors. | Dec. 10, 2014 | Case | | 3<br>4<br>6<br>A.3d |
| — | **2. Supplying omitted words in statute or ordinance**<br>126 A.L.R. 1325<br>(Supplementing annotation in 3 ALR 404.) The general rule, stated in the original annotation, that where words have been omitted from a statute or ordinance by inadvertence or... | 1940 | ALR | — | 6<br>A.3d |
| — | **3. 140 Am. Jur. Trials 185, Defending Attorney-in-Fact from Claims Relating to Invalidity of Power of Attorney or Violation of Terms and Duties Thereof**<br>Am. Jur. Trials<br>A power of attorney is a legal device whereby one individual can empower another individual to act on his or her behalf for certain purposes. Powers of attorney are used in both... | 2018 | Other Secondary Source | — | 10<br>11<br>12<br>A.3d |
| — | **4. Am. Jur. 2d Guardian and Ward s 180, § 180. Attorney's fees and cost of litigation**<br>Am. Jur. 2d Guardian and Ward<br>If litigation is necessary to assert or defend the ward's rights and the expenditure is reasonable, the legal expenses and costs of such litigation are allowable to the guardian in... | 2018 | Other Secondary Source | — | 1<br>2<br>A.3d |
| — | **5. CJS Agency s 40, § 40. Written authority; power of attorney—Requisites and sufficiency**<br>CJS Agency<br>Where the authority of an agent is conferred in writing, it ordinarily is sufficient if the principal in the writing makes a clear expression of his or her intention relative to... | 2018 | Other Secondary Source | — | 9<br>10<br>12<br>A.3d |