State of New Hampshire
Supreme Court

NO. 2011-0817

2012 TERM

JUNE SESSION

In re: Florence Mae Tarr Trust

RULE 7 APPEAL OF FINAL DECISION OF
HILLSBOROUGH COUNTY PROBATE COURT

BRIEF OF APPELLANT RYK BULLOCK

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QUESTION PRESENTED

I. Did the probate court erroneously approve an agreement settling lawsuits, changing the use of the trust *res*, and dissolving the trust, when the trustees did not hold a meeting to vote on these matters, there was no quorum at the gathering in which they purported to accept it, some trustees inappropriately delegated away their fiduciary authority, and procedures required by both the law and the trust's bylaws were not followed?

Preservation: EMAIL FROM BULLOCK TO VARIOUS (Aug. 26, 2011), *Appx.* at 241; LETTER FROM RYK BULLOCK TO PROBATE COURT (Aug. 31, 2011), *Appx.* at 129; MOTION AND MEMORANDUM IN SUPPORT OF MOTIONS TO RECONSIDER (Oct. 5, 2011), *Appx*. at 238; TRUSTEE RYK BULLOCK'S SUPPLEMENTAL MEMORANDUM (Oct. 27, 2011), *Appx.* at 264; ORDER (Oct. 27, 2011), *Appx.* at 261.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Tarr Trust Land in Bedford

The Tarr Trust land[1] is located in the northwest corner of Bedford, forming the central section of an undeveloped swath comprising about 2,500 acres of private conservation land in Bedford, Goffstown and New Boston. GOFFSTOWN OPEN SPACE CONSERVATION PLAN (2005) at 65.

Conservationists give it among their highest values for water, wetlands, and wildlife. SOUTHERN N.H. REG'L PLANNING COMM'N, *Regional Comprehensive Plan* (2010) <http://www.snhpc.org/pdf/Final_Full_RCP.pdf>; TOWN OF BEDFORD, CONSERVATION COMMISSION, *Wetlands of Exceptional Value* (2006) <http://www.bedfordnh.org/pages/BedfordNH_Bcomm/Conservation/Map_Wetlands_Exceptional_Value.pdf>; N.H. DEP'T OF FISH & GAME, *Wildlife Action Plan* (2010) (Map: "2010 Highest Ranked Wildlife Habitat by Ecological Condition") <http://www.wildlife.state.nh.us/Wildlife/wildlife_ plan.htm>, *Appx.* at 315.

Although during her life the testator Florence Tarr resisted the Bedford's entreaties, AFFIDAVIT OF RYK BULLOCK (Apr. 26, 2010), *Appx.* at 432, the land is coveted by the Town. BEDFORD OPEN SPACE TASK FORCE, *Town of Bedford Open Space Plan* (2009) <http://www.ci.bedford.nh.us/pages/BedfordNH_planning/open.pdf> at 4-5 and map 4 at 25 <http://maps.wildlife.

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[1]

Book	Page	Acreage	Map	Lot	Location
8077	0980	0.50 acre	4	10	Polly Peabody Road
8077	0981	20.2 acres	4	17	Joppa Hill Road
8077	0982	129.9 acres	4	18	464JoppaHillRoad
8077	0983	5 acres	4	38	Joppa Hill Road
8077	0984	91 acres	5	1	Holbrick Hill Road
8077	0985	6 acres	5	15	Pulpit Road

PETITION TO REMOVE TRUSTEES AND TO APPOINT A SPECIAL TRUSTEE (Dec. 21, 2009), *Appx.* at 1; AMENDED PETITION FOR QUIET TITLE, DECLARATORY JUDGMENT, DAMAGES, ATTORNEY'S FEES AND OTHER EQUITABLE RELIEF (Jan. 3, 2011), *Appx.* at 318.

state.nh.us/website/maps/WAPmaps/Bedford/bedford11x17scoring.pdf> (land highlighted in fuchsia indicating "highest ranked habitat"); TOWN OF BEDFORD'S PETITION TO INTERVENE AS *AMICUS CURIAE* (Mar. 1, 2010), *Appx.* at 11 ("The Town of Bedford owns the real estate formerly owned by the Florence Tarr Trust, and wishes to protect it and preserve it for the benefit of future generations."); *see* GOFFSTOWN OPEN SPACE CONSERVATION PLAN (2005) at 65 <http://www.goffstown.com/images/stories/Boards_Committees/Conservation/Open_Space_Plan_11-06.pdf>.

II. Florence Mae Tarr Created a Wildlife Sanctuary

Florence Mae Tarr[2] owned the land, her house, and many cats. When she died in 1993, she left a will bequeathing to various causes and providing for the pets. She also created a non-profit trust to maintain the property as a "wildlife sanctuary," and put explicit restrictions on the identity of the trustees and the use of the land. LAST WILL AND TESTAMENT ¶ 10(a) (Jan. 7, 1993), *Appx.* at 50.

All trustees are required to "believe[] in the objects and underlying purposes" of the wildlife sanctuary. WILL ¶ 10(b)(1). The initial 14 trustees were named in the will, and all current trustees are among those named, including Ryk Bullock the appellant here. *See* DIRECTOR OF CHARITABLE TRUSTS' SUMMARY STATEMENT (Sept. 30, 2011), *Appx.* at 218. The will specified that "[u]pon the

[2]As explained herein, this appeal is at the intersection of three separate lawsuits which all inform its facts. In referring to documents, when no case name is specified, this brief refers to the case from which this appeal arose, *In re Trust of Florence Mae Tarr*, Petition to Remove Trustees and to Appoint a Special Trustee, Hillsborough County Probate Court No. 2010-EQ-058 (Appendix 1).

Documents from the other two suits include in their citation the case in which they appear. The two other cases are: 1) the *Cy Pres* case, *In re Trust of Florence Mae Tarr*, Petition for Cy Pres, 9th Circuit Probate Division No. 2011-EQ-1980 (Appendix 2, pages 316-491); and 2) the Quiet Title case, which was removed to the Federal District Court for the District of New Hampshire, *Florence M. Tarr Wildlife Sanctuary Trust, et al v. Town of Bedford*, N.H. Fed.Dist. No. 11-cv-00199 (Appendix 2, pages 492-505).

The appendix to this brief is divided into sections to reflect the three separate cases. An effort has been made to keep the record fully intact, although miscellaneous items, such as transmission letters, attorney appearances and withdrawals, and multiple copies of the service list, have been omitted. Because the appendixes are the records largely intact, and this brief does not cite every document in the appendix, the tables of contents of the appendixes do not list every document contained in them.

death, resignation, or incapacity of the first original Trustee[s], … the size of the Board shall be reduced *pro tanto*, and shall be successively reduced until there shall be no fewer than five … Trustees," and thereafter each appoints their successor. WILL ¶ 13.

The will "declare[d] that I have long had as one of my principal aims and purposes the maintenance, preservation and enhancement of all lands which I may own at the date of my death as natural sanctuaries for wildlife, in which there shall be no maiming or killing of animals, no hunting or trapping, no target practicing, no free running of dogs, and no dumping of toxic chemicals." WILL ¶ 10. Ms. Tarr demanded the land "must be posted and guarded particularly during hunting seasons," WILL ¶ 10(b)(3), and specified that the posting must be "with sturdy metal signs … under the provisions of New Hampshire RSA 635:4."[3] WILL ¶ 10(b)(7). The metal signs Ms. Tarr posted before her death and which remain today read:

POSTED
PRIVATE PROPERTY
HUNTING FISHING, TRAPPING, OR
TRESPASSING FOR ANY PURPOSE
IS STRICTLY FORBIDDEN
VIOLATORS WILL BE PROSECUTED

PHOTOS OF SIGNS, *Appx.* at 143.

III. Bylaws of the Trust

The Trust's Bylaws provide formalities for its administration. Trustees may resign, BY-LAWS OF THE FLORENCE M. TARR WILDLIFE SANCTUARY (undated), art. III §§ 2, 3, 11, *Appx.* at 149

[3]RSA 635:4 (1977) provides: "A person may post his land to prohibit criminal trespass and physical activities by posting signs of durable material with any words describing the physical activity prohibited, such as 'No Hunting or Trespassing,' printed with block letters no less than 2 inches in height, and with the name and address of the owner or lessee of such land. Such signs shall be posted not more than 100 yards apart on all sides and shall also be posted at gates, bars and commonly used entrances. This section shall not prevent any owner from adding to the language required by this section."

(hereinafter BYLAWS), may manage trust assets, BYLAWS, arts. IV & V, are indemnified for their acts as trustees, BYLAWS, art. IX, and may occupy offices such as chair, treasurer, secretary, vice chair, etc. BYLAWS, art. VI.

The bylaws require an annual meeting of the trustees, BYLAWS, art. III § 4, and provide for additional "special meetings," which "may be called at any time by the Chairman … and shall be called on the written request of any Trustee." BYLAWS, art. III § 5. Four days' written notice of meetings is required, except for emergency meetings, which require 24-hour notice by phone. BYLAWS, art. III § 6. Waiver of notice must be in writing. BYLAWS, art. XII.

Trustees are required to keep records, BYLAWS, art. X, and the secretary is required to create and retain minutes of meetings. BYLAWS, art. VI § 8.

A majority of trustees is a "quorum for the transaction of business at any meeting," BYLAWS, art. III § 7, and a majority vote "shall be the act of the … Trustees." BYLAWS, art. III § 8. Trustees may take action without a formal meeting, but only "if consents in writing setting forth the action to be taken shall be signed by all Trustees, and the written consents are filed with the records" of the trust. BYLAWS, art. III § 9.

IV. Dysfunctional Board

Many of the trustees are not local, and as a group they are largely dysfunctional. They do not keep in regular contact, ALBERT JOHNSON'S ANSWER (Mar. 27, 2010), *Appx.* at 20, and do not have regular meetings. *Id.*; MARCIA MARSTON'S ANSWER (Mar. 31, 2010), *Appx.* at 27. Trustees' efforts to cajole the chair to action were unsuccessful. *Id.* Trustee Marcia Marston stated that there was an "inability of the trustees to work together." *Id.* The Attorney General said "[t]he Trustees cannot agree to meetings or actions that should be taken on behalf of the Trust." PETITION FOR CY PRES ¶

22 (*cy pres* case) (Oct. 21, 2011), *Appx*. at 492.

For instance, when the Trust faced town tax problems, three trustees claim they relied on reports showing taxes and filings were up-to-date, did not know or have reason to suspect anything was wrong, blamed the oversight on trustee/treasurer Scot Pollock, and are now worried about missing money. ALBERT JOHNSON'S ANSWER (Mar. 27, 2010), *Appx.* at 20; JOHN TARR'S SUMMARY STATEMENT (Apr. 1, 2010), *Appx.* at 47; MARCIA MARSTON'S SUMMARY STATEMENT (Mar. 31, 2010), *Appx.* at 25; MARCIA MARSTON'S ANSWER (Mar. 31, 2010), *Appx.* at 27.

The dysfunction is as old as the trust. In 1994 the probate court ordered annual meetings, agendas 15 days before meetings, retention of minutes, filing of trust accountings, and development of a plan for the trust's objectives and how it might achieve them. MARCIA MARSTON'S ANSWER (Mar. 31, 2010), *Appx.* at 27; *see also* TARR TRUST SUMMARY STATEMENT (Sept. 29, 2011), *Appx.* at 214. Although the genesis of the order is unknown, presumably these board functions did not occur, or occurred so irregularly as to attract court involvement.

V. Two Pending Lawsuits

Separately from this – or perhaps because of – the Town of Bedford and the trust have some tax issues between them, which blossomed into two lawsuits.

A. Federal Civil Rights Suit

Starting in about 2005, the trust missed paying some of its town property taxes. PETITION TO REMOVE TRUSTEES AND TO APPOINT A SPECIAL TRUSTEE (Dec. 21, 2009), *Appx.* at 1; SUMMARY STATEMENT OF RESPONDENT SCOT POLLOCK (Mar. 31, 2010), *Appx.* at 45 (trustee/treasurer Scot Pollock concedes he failed to pay taxes for 2005 through 2007). The Town claims it appropriately delivered tax bills to Trustee/Treasurer Scot Pollock, but they went unanswered. The Trust claims

that amounts paid were not applied by the Town to the oldest outstanding bill as intended by the Trust, thus creating artificially long delinquencies. Ryk Bullock, the appellant here, points out he is highly involved in municipal affairs – he is Bedford Town Moderator, School District Moderator, has a mailbox at the Town Offices which he checks regularly, and in his capacity as trustee the Town has repeatedly sought his input on various Tarr Trust issues – and maintains that the town could have easily approached him about the trust's taxes. AFFIDAVIT OF RYK BULLOCK (Apr. 26, 2010), *Appx.* at 432.

Bedford thus issued tax liens. When Scot Pollock appeared at Town Hall to exercise the trust's statutory right of redemption, he was told the tax collector was out, and to return later. The next week when came back, the tax collector allegedly told him the land had already been deeded to the town. Tax deeds suggest Bedford took the property before the redemption period expired. Treasurer Pollock sought to reacquire the properties by tendering back taxes and statutory penalties. Bedford allegedly told him that, although at the time of tax-deeding the lots were collectively assessed at just $37,550, it had suddenly reassessed them at $1.35 million, making buy-back prohibitively expensive. AMENDED PETITION FOR QUIET TITLE, DECLARATORY JUDGMENT, DAMAGES, ATTORNEY'S FEES AND OTHER EQUITABLE RELIEF (Jan. 3, 2011), *Appx.* at 318; AFFIDAVIT OF SCOT POLLOCK (Apr. 28, 2010), *Appx.* at 435. The trust sued the Town, which removed to federal court. NOTICE OF REMOVAL (Apr. 26, 2011), *Appx.* at 316. Although this appeal does not involve the tax matters, important here is that case documents justify Bedford might be worried about liability.

The federal suit is pending.

B. Fiduciary Duty and Probate Trustee Replacement Suit

These events caught the attention of the Attorney General Charitable Trust Division, which in 2009 interviewed Scot Pollock. DIRECTOR OF CHARITABLE TRUSTS' SUMMARY STATEMENT (Sept. 30, 2011), *Appx.* at 218; AFFIDAVIT AS TO MILITARY SERVICE (May 4, 2011), *Appx.* at 111. In addition, starting in about 2003 the trust did not file state charitable trust reports or probate accountings. DIRECTOR OF CHARITABLE TRUSTS' SUMMARY STATEMENT (Sept. 30, 2011), *Appx.* at 218.

Thus, the Director of Charitable Trusts concluded the trustees neglected their fiduciary duties and were incapable of fulfilling them, and petitioned the probate court to remove and replace them with a special trustee. PETITION TO REMOVE TRUSTEES AND TO APPOINT A SPECIAL TRUSTEE (Dec. 21, 2009), *Appx.* at 1.[4] Parties to the replacement action are the State, the Town, the trust itself, six individual trustees, their bonding company, and the special-trustee-in-waiting. An abutter and a taxpayer's association were denied standing.

The replacement suit is pending.

VI. Mediation Session and Stipulation

The probate court replacement suit moved slowly. There were disputes about who are proper parties and intervention of new parties, attempted resignation of trustees, halting discovery, *pro se* actors with lawyers appearing and withdrawing, interaction with the federal case, alleged extra-judicial alienation of trust property with an attempt to appoint an emergency caretaker and seize accounts, and other matters. Finally, the court scheduled a mediation session on the trustee-

[4]The Petition was initially filed in the 1994 docket, but the case was subsequently re-docketed with a current (*i.e.* 2010) docket number.

replacement matter, with an appointed mediator, and in August 2011 the parties gathered at the probate court. NOTICE OF MEDIATION SESSION (July 13, 2011), *Appx.* at 117.

Understandably there were no minutes of the mediation session, so what exactly occurred is not part of the record. Nonetheless, some important things can be discerned.

Present at the mediation session were: the Attorney General by its director and assistant director of charitable trusts, the Town of Bedford through its lawyer, the Tarr Trust through its lawyer, and the trust's bonding carrier through its lawyer. The trustees personally present were Veronica Tinker and Albert Johnson. Scot Pollock and John Tarr were not present. Marcia Marston, a third trustee, was not personally present but her lawyer was. And Ryk Bullock, the appellant here, was present at the beginning of the mediation, but had to leave part way through. SETTLEMENT STIPULATION (Aug. 5, 2011), *Appx.* at 119 (hereinafter STIPULATION).

The mediation session produced a four-page hand-written settlement stipulation. It provides:

- The Town conveys the land back to the Tarr Trust, which reconveys it to an approved outside land conservation entity, such as the Bedford Land Trust (BLT). The entity would also get the money in the Tarr Trust bank accounts. The conveyances would be subject to approval by the court in a *cy pres* proceeding in which all parties would have a right to object. STIPULATION ¶¶ 1, 2, 3, 5, 12, 13.

- Bedford would waive all past-due taxes and fees associated with the conveyances. In addition, Bedford and the Tarr Trust's bonding carrier would pay a total of $50,000 to the Tarr Trust as a "facilitation fee" for the conveyances. STIPULATION ¶¶ 6, 10.

- The State would release all trustees from liability, except for Scot Pollock, who the State reserves the right to indict. The trust's bonding carrier would likewise release all trustees except Scot Pollock from claims for indemnification and the bond would be released. STIPULATION ¶¶ 8, 9, 11, 16.

- The probate court would notify all trustees of a hearing, and approve the stipulation. If not approved, any party may withdraw. STIPULATION ¶¶ 14, 15.

- Once approved, both the probate court replacement-of-trustees action, and the federal civil rights action would be non-suited. STIPULATION ¶¶ 4, 7.

The stipulation was signed by the State's lawyer, the Town's lawyer, and the trust's lawyer. It was signed personally by trustees Veronica Tinker and Albert Johnson. It was not signed personally by trustee Marcia Marston, but by her lawyer. Scot Pollock and John Tarr did not sign.

It was also not signed personally by trustee Ryk Bullock, because he was not present for the entire meeting; it was signed for him "per telephonic confirmation" by the trust's lawyer. STIPULATION (signature page), *Appx*. at 124. *See also* ORDER (Oct. 27, 2011), *Appx.* at 261 ("Ryk Bullock was a participant in the mediation session…. Ryk Bullock had another person sign the agreement for him because he was not able to stay long enough to sign it himself."); LETTER FROM RYK BULLOCK TO PROBATE COURT (Aug. 31, 2011), *Appx.* at 129 ("I acquiesced and allowed Attorney Thorner to sign in my stead"); *Trn*. at 20 (Thorner: "I signed the agreement on behalf of Ryk Bullock, not as his attorney. He did not have personal counsel … And because he had to leave early, he asked that in his stead I sign the document and go over it with him via the telephone."); TARR TRUST SUMMARY STATEMENT (Sept. 29, 2011), *Appx.* at 214 (Thorner: "Trustee Ryk Bullock did leave the Mediation, but later directed that counsel for the Florence Mae Tarr Trust sign the Agreement on his behalf, which is what occurred.").

VII. Ryk Bullock Realizes Problems with the Settlement

In the days immediately following the mediation session, Ryk Bullock learned that the settlement agreement contemplated two deeds that would convert the Tarr wildlife sanctuary into a pedestrian park. This raised a number of issues which began to trouble him. MOTION AND MEMORANDUM IN SUPPORT OF MOTIONS TO RECONSIDER (Oct. 5, 2011), *Appx*. at 238.

Ryk Bullock realized that through the settlement agreement the trust had alienated its entire *res* and dissolved its existence, and had neutered Florence Tarr's restrictions on use of the land. It made these consequential or even existential decisions without a formal and personal vote of the trustees duly recorded in the minutes, and without a "meeting" noticed up for such purposes. Rather this was done in a non-private setting which included the presence of the government and implicit threat of prosecution, but lacked a quorum of the trustees.

VIII. Ryk Bullock Withdraws Consent to the Settlement

Consequently Ryk Bullock embarked to undo the stipulation. He wrote: "Although I authorized Attorney Thorner to sign the settlement agreement in good faith, based on information that has subsequently become available I can no longer support the agreement." MOTION AND MEMORANDUM IN SUPPORT OF MOTIONS TO RECONSIDER (Oct. 5, 2011), *Appx*. at 238.

His first effort, shortly after the mediation, was an email to the trust's lawyer, several of the trustees, and the Attorney General, raising an objection to the ultimate use of the Tarr Trust land saying, "I rescind my consent … to that agreement in my capacity as a Trustee of the Florence M. Tarr Wildlife Sanctuary." EMAIL FROM BULLOCK TO VARIOUS (Aug. 26, 2011), *Appx.* at 241.

A few days later his second effort was a letter to the probate court. LETTER FROM RYK BULLOCK TO PROBATE COURT (Aug. 31, 2011), *Appx.* at 129. His objections were that significant issues were decided without a vote of the trustees, and that the settlement agreement would allow a change of use of the land. *Id.* The letter was returned to him with a clerk's notation dated September 9:

> Letter being returned to you. Anything that is filed with the court needs to be on the right forms and copies to all parties. Please fill out the petition/motion and return it back to the court.

CLERK'S ORDER (Sept. 9, 2011), *Appx.* at128.

Meanwhile, apparently disregarding Ryk Bullock's letter, the probate court issued an order: "Stipulation, There being no objection this agreement is approved and ordered." NOTICE OF DECISION (Sept. 6, 2011), *Appx.* at 118.

Ryk Bullock then made, with a proper-form filing in the probate court, his third effort to undo the stipulation. In it he conceded he had allowed the Trust's attorney to sign the settlement agreement for him, but that he could no longer support it. He noted his previous email and letter attempting to withdraw his consent, and again listed some of his reasons: that significant decisions were being made without a vote of the trustees in accord with the trust's bylaws, and that the settlement allowed a change in the use of the land contrary to Ms. Tarr's intent. He incorporated by reference similar rehearing motions filed by the parties seeking intervention, and asked the court to reconsider its decision. MOTION AND MEMORANDUM IN SUPPORT OF MOTIONS TO RECONSIDER (Oct. 5, 2011), *Appx*. at 238.

This prompted the court to hold a hearing on the interventions and this issue. In his fourth attempt to undo the stipulation, Ryk Bullock told the court: "My intent simply was … to withdraw my assent to the settlement agreement." *Trn.* at 16, 18.

The court issued a post-hearing order calling for memoranda, and as his fifth effort, Ryk Bullock filed one. ORDER (Oct. 13, 2011), *Appx.* at 254. He again listed some of his objections to the stipulation, which were that the trust appeared to have alienated the trust property and dissolved the trust without an appropriate vote of the trustees, and that the settlement would allow pedestrian uses when Ms. Tarr intended a wildlife sanctuary. He asked the court to reject the agreement, and to return the property to the Tarr Trust. TRUSTEE RYK BULLOCK'S SUPPLEMENTAL MEMORANDUM

(Oct. 27, 2011), *Appx.* at 264.

> The court denied Ryk Bullock's request. It wrote:
>
> > Ryk Bullock was a participant in the mediation session…. Ryk Bullock had another person sign the agreement for him because he was not able to stay long enough to sign it himself. In his [filings] Ryk Bullock stated that he wished to revoke his assent to the agreement on the basis that it was his understanding that the parties would have another meeting to decide upon future restrictions on the use of the real property in the Florence Mae Tarr Trust. In order to revoke his agreement, Ryk Bullock must prove that there was a defect in the formation of the agreement, or that he has a legal right to be excused from performance of the agreement because of misrepresentation, mutual mistake or other reason. At the hearing, Ryk Bullock did not present any evidence that there was malfeasance in creating the Settlement Agreement or that there is any reason why the performance of the Settlement Agreement is flawed.

ORDER (Oct. 27, 2011), *Appx.* at 261. Ryk Bullock appealed.

SUMMARY OF ARGUMENT

After describing the land, the terms of the will, the bylaws of the trust, the troubles faced by the trustees, and the lawsuits in which they are involved, Ryk Bullock describes his efforts to undo the settlement agreement. He argues that there was no meeting of the trust to approve the settlement, no quorum at the gathering, and no lawful vote of the trustees. He notes that despite these procedural failures, the trust purported to alienate its entire *res* and dissolve itself. He then argues that the probate court applied the wrong test, and that under these circumstances it was wrong to approve the settlement, which this Court should undo.

ARGUMENT

I. Settlement Session was Not a Meeting

The Tarr Trust bylaws require that decisions about the trust and trust property be made by a majority vote of a quorum of the trustees, and only at a "meeting" that has been called by the trustees with four days' notice. *See also* RSA 293-A:8.22 ("Unless the … bylaws provide for a longer or shorter period, special meetings of the board of directors shall be preceded by at least 2 days' notice").

The mediation settlement session, held at a courthouse, was not a "meeting." Although noticed by the court, it was not called by the chair or by any trustee as the bylaws require. No minutes were taken. The session was essentially public – the government was there. Trustees had no opportunity to deliberate in private. Nothing about the session can be called a "meeting" as it is defined by trust documents.

Ryk Bullock knew the trust once got in trouble with the probate court for insufficient formalities, and knows from his experience on municipal boards how they generally operate. He thought a regular meeting of the trustees would be scheduled in the bylaws fashion, with a quorum and minutes, to deliberate and vote on whether to ratify the tentative settlement reached at the mediation session.

Because there was never a majority vote of the trustees at a bylaws-defined meeting, the thing that occurred at the settlement session does not constitute an "act of the … Trustees." Accordingly this Court should set aside the probate court's ratification of the agreement. In the alternative, the trustees should have an opportunity to convene a meeting, so they can deliberate whether in their fiduciary duty they should disapprove the agreement, or approve it and submit it for ratification.

II. There was no Quorum at the Settlement Session

The trust bylaws require that a meeting consist of a quorum of the trustees, present personally or by phone, and that a majority constitutes a quorum.

At the outset of this litigation there were six trustees, but a few months before the mediation session it appears Scot Pollock was removed as a trustee and not replaced. DIRECTOR OF CHARITABLE TRUSTS' MOTION FOR ENTRY OF FINAL DEFAULT AGAINST SCOT POLLOCK (May 4, 2011) (handwritten order: "granted" May 24, 2011), *Appx.* at 109, 110.

John Tarr attempted to resign as a trustee, and also did not appear at the mediation or send a representative. LETTER FROM JOHN TARR TO ATTORNEY GENERAL (July 19, 2011) and MOTION TO WITHDRAW (June 20, 2011), *Appx.* at 112, 113. It is not clear, however, whether John Tarr's resignation took effect. MOTION TO WITHDRAW (Handwritten order: moot, case settled, Aug. 16, 2011), *Appx.* at 112.The State's position is that the resignation was ineffectual. DIRECTOR OF CHARITABLE TRUSTS' PARTIAL OBJECTION TO ATTORNEY PERREAULT'S MOTION TO WITHDRAW (June 27, 2011), *Appx.* at 114 ("The Court has not accepted Mr. Tarr's resignation therefore he is still a Trustee of the Florence M. Tarr Trust."). If the State is right, he was still on the board of trustees at the time of the mediation session; if the State is wrong, the trust had an insufficient number of trustees according to the will, and therefore could not constitute a quorum in the absence of a properly named substitute.

Trustees Albert Johnson and Veronica Tinker were trustees and were present throughout the mediation. Marcia Marston, also a trustee, did not appear at the mediation, but did send her attorney.

Ryk Bullock was present at the beginning, but did not stay to the end.

A special fiduciary had not yet been appointed, and the fiduciary-in-waiting did not attend the

meeting. ORDER (Feb. 11, 2011), *Appx.* at 108 ("By agreement of the parties … Motion to Appoint Special Trustee … [is] held in abeyance.")

The chart below details who was a trustee at the time of mediation; whether they personally attended it; whether they signed the mediation agreement; and if so, whether they did it in person or through someone else.

Name	**Trustee at time of mediation**	**Personally attended mediation**	**Signed mediation agreement**	**Signed through another**
Scot Pollock	*no*	*no*	*no*	*no*
John Tarr	*no*	*no*	*no*	*no*
Albert Johnson	yes	yes	yes	no
Veronica Tinker	yes	yes	yes	no
Marcia Marston	yes	no	no	yes
Ryk Bullock	yes	beginning but not end	no	yes
Special Fiduciary	*no*	*no*	*no*	*no*

Of those four who were clearly trustees (Johnson, Tinker, Marston, Bullock), three were personally present at the beginning of the meeting (Johnson, Tinker, Bullock), but only two at the end of the meeting (Johnson & Tinker). The bylaws requires presence, as does statute. RSA 293-A:8.20. A majority constitutes a quorum, and an even split is not a majority.

As there was phone contact between Ryk Bullock and the delegated signatory, it is clear the agreement was signed after he was gone. Thus when Ryk Bullock left before the vote, he destroyed the quorum, making it impossible for the trust to transact any business.

Moreover, the terms of the will do not allow fewer than five trustees, and nobody was incapacitated. *See* RSA 564-B:7-703. For quorum and vote-tallying purposes, therefore, the removal of Scot Pollock must be ignored and/or the resignation of John Tarr must be rejected (as the Attorney General suggests). This results in an even smaller minority. If the special fiduciary is regarded as having already been appointed, the minority is smaller still.

No matter which calculation, there are not enough votes for a majority. Whatever happened at the settlement conference, it was not an act of the trust. Either the agreement must be set aside, or the trust must be given a chance to have a meeting and a vote according to the process in the bylaws.

III. There was no Vote of the Trustees at the Settlement Session

The bylaws require that transaction of trust business shall be by vote of a majority of trustees. A vote must take place at a noticed meeting, at which there is a quorum and a record. Because the settlement session was not at a meeting, no vote could be taken. Signing the settlement agreement cannot be considered a vote, as there were no quorum and minutes.

Moreover, whatever action the trustees took was under an implicit theat. The participants were ordered there by the court, but the attorney general was at the table, and the settlement agreement explicitly promises to refrain from bringing criminal charges. By signing the document the trustees (other than Scot Pollock) obtained a promise of non-prosecution.

Because there was no vote, the settlement agreement has never been approved by the trustees, and is not an action of the trust. The agreement should be set aside, or the trust should be given an opportunity to schedule a vote according to the procedures in the bylaws.

IV. Trustees Inappropriately Delegated Fiduciary Duties at the Settlement Session

Fiduciary duties of a trustee are personal. Although routine or ministerial powers can be delegated, a trustee cannot delegate discretionary duties. *Burke v. Concord R.R.*, 61 N.H. 160, 230 (1881) ("This trust was committed to the directors to be personally administered by them, and not to be delegated to others…."); RESTATEMENT (SECOND) OF TRUSTS § 171 (1959) ("The trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform."); *but see Smith v. Lillian v. Donahue Trust*, 157 N.H. 502, 510 (2008) (recognizing UTC supercedes common law); RSA 564-B:7-703. New Hampshire's version of the Uniform Trust Code incorporates the implicit distinction between delegation of duties between co-trustees, which can be overriden by the settlor, and delegation of duties to agents with professional abilities outside the Trust. *C.f.* RSA 564-B:7-703(e) & RSA 564-B:8-807; Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property is it, Anyway*?, 38 AKRON L. REV. 649 (2005) ("While the UTC essentially retains the traditional rule with respect to delegations among co-trustees, it … allow[s] delegations to agents of 'duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances.' The two standards are different 'because the two situations are different.' The broader standard for delegations to an agent is based on the recognition that many trustees do not have the skills of a professional trustee, in which case delegations of the functions they are not competent to perform should be encouraged. By contrast, the stricter rule with respect to delegations among co-trustees – prohibiting delegations of functions the settlor reasonably expected the trustees to perform jointly – 'is premised on the assumption that the settlor selected co-trustees for a specific reason.' The UTC's rules with respect to both kinds of delegations are default rules that a settlor whose intent is otherwise may

override in the terms of the trust.").

The trust documents here do not provide for delegation, and Florence Tarr specifically named the trustees in her will, thus indicating a desire that fiduciary duties be personally exercised.

Of the four (or five or six) trustees, only two signed the settlement agreement. Two more signed through delegation to others – Marcia Marston's lawyer signed for her, and the trust's lawyer signed for Ryk Bullock. Settling lawsuits, which would dispose of all trust property and determine the identity of its trustees however, is a highly discretionary act. It cannot be delegated.

To the extent signing the settlement agreement was considered an act of the trust, it lacked the exercise of personal fiduciary duty, and therefore is ineffective and should be set aside. In the alternative the trust should be given an opportunity to call a meeting and hold a valid vote.

V. Trust Unlawfully Alienated its *Res* and Dissolved its Existence at the Settlement Session

The initial purpose of the settlement agreement was only to settle two lawsuits: in one the State wanted to replace the trustees and in the other the trust wanted its land back from the Town.

But the settlement went far beyond that. It accomplished a highly significant thing: it alienated the entire *res* of the trust – both the bank account and the land.

By giving everything away, the trust would be left with nothing to administer. Trusts that have no purpose are dissolved. RSA 564-B:4-410 ("[A] trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.") 76 AM.JUR. 2nd *Trusts* § 71 ("A trust can terminate under several circumstances, including … a conveyance by the trustee …, when no purpose of the trust remains to be achieved, or the purposes of the trust have become … impossible to achieve.").

Thus the settlement accomplished a second highly significant thing: it dissolved the trust.

As noted, there was no meeting noticed for these purposes, no quorum at the settlement session, no private deliberation among the trustees without the presence of the government, and no vote taken or recorded there. Thus, the gathering at mediation was not qualified to make the decisions to alienate the *res* and dissolve the trust, and did not do so within the bylaw process. *See also* RSA 292:10-a (requiring two-thirds majority to dissolve). For this reason, the settlement agreement should be set aside.

If the trustees want to alienate the property for which they are responsible and put themselves out of business, they can. But they must call a meeting, apply their fiduciary duty, and decide whether settling the suits is worth the cost of the trust's property and existence.

VI. Trustees Unlawfully Changed Use of the Tarr Trust Land at the Settlement Session

The settlement agreement accomplished one more significant thing: it changed the use of the trust property.

Florence Tarr's will established a wildlife sanctuary. In several places her will says: " there shall be no maiming or killing of animals, no hunting or trapping, no target practicing, no free running of dogs, and no dumping of toxic chemicals."

The Town suggests this does not bar pedestrian use. TOWN OF BEDFORD'S SURREPLY TO MOTION TO INTERVENE FILED ON BEHALF OF AYRSHIRE PARTNERS, INC. ¶ 6 (Oct. 3, 2011), *Appx.* at 244. Bedford's position however, is contravened by both the will language and Ms. Tarr's example.

Her will cites by RSA number New Hampshire's posting law. WILL ¶ 10(b)(7). The will requires the land be posted "with sturdy metal signs … under the provisions of" the statute. RSA

635:4 (which has not been amended since Ms. Tarr's death), provides that "[a] person may post his land to prohibit criminal trespass and physical activities by posting signs of durable material with any words describing the physical activity prohibited."

Ms. Tarr herself posted the land with "sturdy metal signs" which remain today, and are pictured in the record. They say: "trespassing for any purpose is strictly forbidden."

Although the settlement agreement itself does not say anything about changed uses, sometime shortly after the mediation session two deeds were circulated among the parties that purport to implement the terms of the settlement. The deeds would transfer the property and rights to it from the Tarr Trust to the Bedford Land Trust, as envisaged in the settlement. DEED, *Appx.* at 145; EASEMENT DEED, *Appx.* at 159. Quoting the will, the deeds appropriately ban "maiming or killing of animals, … hunting or trapping, … target practice and free roaming of dogs." They also bar resource extraction, building development, and heavy recreational uses that require infrastructure.

But the deeds also explicitly provide for "passive recreational uses," which are defined as: "hiking, snowshoeing, ice skating, fishing, bird watching, cross-country skiing …, picnicking and any similar uses provided that they are not inconsistent with the spirit and intent of this Deed and do not interrupt the peaceful, tranquil character of the property or the animals which are to be protected."

Although these activities are low-impact, they nonetheless do not comport with Ms. Tarr's explicit instructions. She contemplated only sustenance of animals, not human "passive recreational uses."

The deeds were not available at the mediation session. When they were later distributed Ryk Bullock became notified of this theretofore unknown implication of the agreement, which prompted his efforts to undo it. The deeds indicate the settlement agreement implies a substantial change of use,

but without the benefit of a *cy pres* proceeding and its attendant proof that the trust has become "impossible or impractical." RSA 547:3-d.

There is no indication the trustees were alerted to this at the time of the settlement. Certainly they did not vote on it. Accordingly the settlement agreement is not an act of the trust, and thus should be set aside. The alternative is to allow the trust an opportunity to schedule a meeting and hold a vote according to the process Ms. Tarr indicated in her will.

VII. Ryk Bullock's Should Have Been Allowed to Withdraw His Assent to the Settlement

The probate court denied Ryk Bullock's request to undo the settlement agreement on the grounds that he failed to prove "misrepresentation [or] mutual mistake." ORDER (Oct. 27, 2011), *Appx.* at 261.

The court applied the wrong standard. Misrepresentation and mutual mistake is a test the probate court appears to have borrowed from the law regarding reformation of contracts, *See e.g.*, *McSherry v. McSherry*, 135 N.H. 451 (1992); *Gannett v. Merchants Mut. Ins. Co.*, 131 N.H. 266 (1988), or perhaps from the law regarding settlement by counsel on behalf of client. *See e.g.*, *Byblos Corp. v. Salem Farm Realty Trust*, 141 N.H. 726 (1997); *Halstead v. Murray*, 130 N.H. 560 (1988).

The Tarr Trust situation, however, is about neither reformation of a contract nor authorization for settlement by a lawyer.

Rather it involves whether a trust – before settling lawsuits, giving away its *res*, dissolving its existence, and changing use of property it was established to protect – must engage in statutory and bylaw-required formalities.

Although the facts of this case are unique, the Massachusetts Supreme Judicial Court has decided one remarkably similar. In *Swift v. Hiscock*, 183 N.E.2d 875 (Mass. 1962), the beneficiary

of a will first assented – but then soon objected – to the executor's accounting.

> We pass now to the question of whether an assent to an executor's accounting, once voluntarily given and with full knowledge of the facts, may be withdrawn prior to the allowance of the account. We are of opinion that it may not be withdrawn as of right. An assent to an account is tantamount to a stipulation. A party may not disregard a stipulation given by him, nor can be revoke or escape from it at his will. But a court may vacate a stipulation if it is deemed improvident or not conducive to justice.

Swift v. Hiscock, 183 N.E.2d at 877 (quotation and citation omitted). The court then determined the beneficiary is allowed to withdraw his assent:

> With the foregoing principles in mind, we are of opinion that the judge ought to have permitted the [beneficiary] to withdraw his assent. There was no substantial lapse of time between the assent and its proposed withdrawal; nor is it shown that the executor or anyone else had changed position (by continued administration of the estate or otherwise) or would have been prejudiced if the assent were withdrawn. The matters which [the beneficiary] desired to litigate, the amounts of the executor's and attorney's fees, were meritorious. … We are of opinion that [the beneficiary] ought, in these circumstances, to have been given an opportunity to contest these charges.

Swift v. Hiscock, 183 N.E.2d at 877-78.

In Ryk Bullock's case, "[t]here was no substantial lapse of time between the assent and its proposed withdrawal." In the short time between his assent to the settlement stipulation and his efforts to undo it, nobody relied or was prejudiced. And like *Swift v. Hiscock*, Ryk Bullock's reasons for withdrawal are meritorious.

But even if this Court rejects *Swift v. Hiscock*, under the erroneous standard the probate court applied here, Ryk Bullock proved both "misrepresentation [or] mutual mistake," and the court should have allowed him to withdraw his assent to the settlement agreement.

Ryk Bullock was reasonable in his understanding that following the mediation session, the trustees would gather at a properly-noticed meeting, with a quorum and minutes in accord with the bylaws, and deliberate and vote to approve, or not, the terms of the agreement. He reasonably did

not expect that the trust would alienate the entire *res* of its fiduciary duty and disband itself without such a vote. He reasonably understood he would have a chance to deliberate regarding the changes in use that are reflected in after-available deeds, and determine along with his co-trustees whether the changes were in accord with their fiduciary duties to Ms. Tarr's will. To the extent these things were not going to happen, there was either a misrepresentation by the signatory to Ryk Bullock, or a mutual mistake regarding the terms of the settlement when he allowed his name to be affixed.

Accordingly, this court should order the probate court set aside the settlement, and allow the trustees to follow the process set forth in the trust's bylaws for a vote on such consequential matters. To the extent the dysfunction of the board will render that unlikely, the trustee-replacement suit should be finally decided so that new trustees have an opportunity to ensure an appropriate trustee decision-making process.

CONCLUSION

Based on the foregoing, this Court should reverse the probate court's approval of the settlement stipulation, remand for a determination of approval in light of the proper standard, and direct that the probate court provide the trustees an opportunity to vote on the settlement in accord with procedures in the trust's bylaws.

Respectfully submitted,

Ryk Bullock
By his Attorney,

Law Office of Joshua L. Gordon

Dated: June 20, 2012

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Ryk Bullock 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 on several matters: 1) relating to the governance of charitable trusts in a litigation context, 2) the delegation of fiduciary duty under the Uniform Trust Code, and 3) litigation-settlement in the context of trusts.

I hereby certify that on June 20, 2012, copies of the foregoing will be forwarded to those on the service list.

Dated: June 20, 2012

Joshua L. Gordon, Esq.