

MICHELE E. KENNEY

Pease International Tradeport
One New Hampshire Avenue, #350
Portsmouth, NH 03801

P 603.373.2043
F 603.433.6372
mkenney@pierceatwood.com
pierceatwood.com

Admitted in: NH, NY

Hand Delivered

August 28, 2017

Sharon Richardson, Clerk
Attention: Trust Docket
6th Circuit- Probate Division- Concord
163 North Main Street
Concord, NH 03301

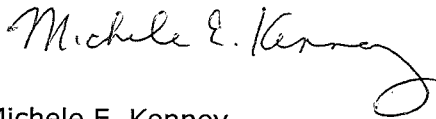
Re: In re Trust under the Will of Mary Baker G. Eddy¹
Trust Docket Case No. 317-1910-TU-00001

Dear Ms. Richardson:

On behalf of Second Church of Christ, Scientist, Melbourne, Australia ("Second Church"), I have enclosed an original and two copies of a Response to Objection by the Trustees of the Trust Under the Will of Mary Baker Eddy, Clauses 6 and 8, to Second Church of Christ Scientist, Melbourne (Australia), Motion for Leave to File Brief *Amicus Curiae* in the above captioned matter.

Thank you for your attention to this matter. Please contact me if you have any questions.

Very truly yours,



Michele E. Kenney

MEK/tma
Enclosures

cc: James F. Raymond, Esquire
Thomas J. Donovan, Esquire
Michael Courtney, Esquire

¹ This matter was reassigned to the Trust Docket from the docket of the 6th Circuit — Probate Division — Concord, pursuant to Administrative Order 2016-0005-TD (Kelly, J.), dated February 23, 2016.

THE STATE OF NEW HAMPSHIRE

TRUST DOCKET, 6TH CIRCUIT – PROBATE DIVISION – CONCORD

TRUST U/W/O MARY BAKER EDDY – CLAUSE 6

TRUST U/W/O MARY BAKER EDDY – CLAUSE 8

CASE NO. 317-1910-TU-0001

**RESPONSE TO OBJECTION BY THE TRUSTEES OF THE TRUSTS
UNDER THE WILL OF MARY BAKER EDDY, CLAUSES 6 AND 8, TO
SECOND CHURCH OF CHRIST SCIENTIST, MELBOURNE (AUSTRALIA),
MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE***

NOW COMES the Second Church of Christ Scientist, Melbourne (Australia) (“**Second Church**”), through its undersigned counsel, and files this response to the Objection (“**Objection**”) by The Trustees of The Trusts Under The Will of Mary Baker Eddy, Clauses 6 And 8, To Second Church’s Motion For Leave To File Brief *Amicus Curiae* (“**Motion for Leave**”) respecting the Assented-To Motion To Amend the 1993 Order, Convert Clause 6 And Clause 8 Trusts To Unitrusts, And Adopt For the Clause 8 Trust The Provisions of RSA 292-B, The Uniform Prudent Management Of Institutional Funds Act (“**Motion**”) and the Director of Charitable Trusts’ (“**Director**”) Memorandum In Support Of Trustees’ Motion To Amend 1993 Order And To Convert Trusts To Unitrusts (“**Director’s Memorandum**”), stating as follows:

1. This Court has the equitable jurisdiction to hear from friends of the Court, whether permitted by a specific rule or not. *See, e.g.*, 4 Am. Jur. 2d *Amicus Curiae* § 3 (2016) (“Courts have inherent authority to appoint an *amicus* even in the absence of a rule or statute”) (citing, *inter alia*, *State ex rel. Com’r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734 (Tenn. Ct. App. 2001)); *cf. In re Allaire Estate*, 103 N.H. 318, 320 (1961) (“This court is not averse to wisdom in any form, from any source, and does not hesitate to accept the benefit of briefs by *amicus curiae* in the proper construction of deeds and wills....”).

2. Contrary to the Trustees' assertion that Second Church fails to meet its burden of demonstrating that it could contribute expertise and arguments not presented by the parties,¹ Second Church provides its uniquely relevant and important perspective, expertise, and considerable work product, to aid the Court in understanding why an independent trustee must be appointed—to restore some modicum of independence and responsible administration of the Trusts—before sanctioning any changes in their administration.

3. Second Church approaches this Court as a friend to present relevant materials and context for the current issues before the Court: the Motion, which, among other things, seeks to fundamentally change the dispositive terms of the Trusts and, more importantly, the intent of Mary Baker Eddy.

4. Neither the Trustees' Motion nor the Director's Memorandum contain the facts necessary for this Court to understand the full history of the Trustees' maladministration of the Trusts and it is that context that informs why the proposed resolution articulated in the Motion is so fundamentally flawed.

5. It is self-evident that the Trustees of the Clause VI and Clause VIII Trusts (collectively, the "**Trusts**") have an embedded conflict in their dual capacity as Trustees of the Trusts and as Directors of The Mother Church.

6. The question that has been before the Court for over a year now is how to address this issue to ensure that: 1) going forward, the intent of Mary Baker Eddy is carried out without the stain of the embedded conflict; 2) the Trusts are protected from the hostility of the Director/Trustees; and 3) the Trusts are made whole for the historical transgressions of the conflicted trustees.

¹ See Objection ¶ 7.

7. The proposal submitted by the Trustees and the Director is deficient with regard to the first two issues and ignores the third issue altogether. This Court's primary focus should be to respect the clear intentions of Mary Baker Eddy. The Trustees' primary duty should be to implement the clear instructions and directives of Mary Baker Eddy. By seeking to convert the Trusts to unitrusts, while presenting an expedient Band-Aid for the embedded conflict, evidences the Trustees' desire to remain embedded and in control of the Trusts even if that means that the result is to disregard the clear intentions of Mary Baker Eddy.

8. By her Will through Clause VIII, Mary Baker Eddy evidenced her intention that the Clause VIII Trust assets be used to promote and extend Christian Science as taught by her by distributing 100% of the income every year and so much of the principal as deemed appropriate to extend and promote the religion as taught by Mary Baker Eddy. There are no institutional or endowment type restrictions under Clause VIII; rather, there is the clear intent that Clause VIII assets and income be used generously to promote and extent the religion as taught by Mary Baker Eddy whether through distributions to branch churches, societies, reading rooms, translations, and the like, and whether such promotion and extension is local or centralized through activities of The Mother Church.

9. The conversion of the Trusts to unitrusts, and the limitation on disbursements, are contrary to Mary Baker Eddy's clear intention. Second Church has a unique perspective, focus, and unrelenting regard for Mary Baker Eddy's clear intention. Second Church appreciates the non-hierarchical structure of Christian Science, has an absolute lack of hostility toward the Clause VIII Trust, and is interested in restoring the Clause VIII Trust to Mary Baker Eddy's original prominence in the promotion and extension of the religion of Christian Science as taught by Mary Baker Eddy. Thus, Second Church is set apart from the Trustees, who seek to remain in

control regardless of the perversion of their means to the intentions of Mary Baker Eddy, and Second Church offers an important perspective different from the Director of Charitable Trusts.

I. The Motion Fails To Cure The Embedded Conflict of Interest

10. Every decision that these conflicted Trustees make is presumptively improper. *See, e.g.*, RSA 7:19-a [Regulation of Certain Transactions Involving Directors, Officers, and Trustees of Charitable Trusts]; RSA 564-B:8-801, *et seq.* [Duties and Powers of Trustee]; *cf. Magruder v. Drury*, 235 U.S. 106, 119-20 (1914) (“The rule in such cases springs from his [the trustee’s] duty to protect the interests of the estate, and not to permit his personal interest to in any way conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity.”); *Hollis v. Tilton*, 90 N.H. 119, 122 (1939) (quoting *French v. Currier*, 47 N.H. 88, 98 (1866)) (A trustee “cannot act for his own benefit in any contract, or purchase, or sale, as to the subject of the trust.”). Thus, the New Hampshire Supreme Court observed in *Sparhawk v. Allen*, 21 N.H. 9 (1850), that: “If the court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud.” *Id.* at 22 (quoting *Hatch v. Hatch*, 9 Ves. 292 (Lord Eldon) and discussing cases supporting the presumption of invalidity of transactions where the guardian/trustee benefits from a transaction with the trust).

11. There is but only one cure to this embedded conflict: appointment of an independent trustee to monitor and report to the Court and the Director about the administration of the Trusts.

12. Instead, these conflicted Trustees offer a proposal that, as can only be expected, retains their monopolistic unsupervised control over these Trusts.

13. Specifically, the conflicted Trustees propose: 1) removing The Mother Church as a permissible beneficiary; and 2) converting the Trusts to unitrusts and applying UPMIFA to the administration of the Clause VIII Trust.

14. The proposal distracts from the cancer plaguing the Trusts: the conflicted Trustees themselves and their failures throughout their tenure as Trustees to act in honor and respect of the clear intentions of Mary Baker Eddy. Moreover, the proposal represents a denial of the New Hampshire Supreme Court's decision in *Fernald v. First Church of Christ, Scientist*, 77 N.H. 108 (1913) (holding that Mrs. Eddy's intention was not to give the trust property to The Mother Church, but to create a public trust for promoting and extending Christian Science as taught by her).

15. There is no need to alter the dispositive terms of the Trusts or to restrict the class of beneficiaries. Put simply, there is nothing wrong with the Trust itself—the only change necessitated by the embedded conflict is the appointment of an independent trustee.

A. Removing The Mother Church As A Permissible Beneficiary Breaches the Trust

16. The Trustees proposal to remove The Mother Church as a permissible beneficiary of the Clause VIII Trust is a self-serving mechanism to resolve the embedded conflict, despite that The Mother Church itself may well be necessary to the extension and promotion of the religion of Christian Science as taught by Mary Baker Eddy.

17. The conflicted Trustees know that by already fattening the coffers of The Mother Church with over \$26 million in self-interested distributions since 1970, The Mother Church has already received grossly more than its fair share of trust distributions.

18. Not wanting to address that obvious issue and the potential of having to disgorge some portion of the \$26 million that was distributed to itself as a result of the embedded conflict,

under the guise of a selfless act, and not to extend or promote of the religion of Christian Science as taught by Mary Baker Eddy, the conflicted Trustees offer to remove The Mother Church as a beneficiary going forward while maintaining absolute control over the Trusts.

19. The New Hampshire Trust Code provides that when 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.”²

20. Mary Baker Eddy did not intend that The Mother Church be extricated as a permissible beneficiary of the Clause VIII Trust.

21. Prohibiting distributions to The Mother Church as a permissible beneficiary is misplaced; its role as a permissible beneficiary is not the problem. The problem rests squarely in that the Directors of The Mother Church are serving as conflicted Trustees of the Clause VIII Trust and have used that conflict to perpetuate self-interested distributions to The Mother Church for decades, for purposes other than the promotion and extension of the religion of Christian Science as taught by Mary Baker Eddy. Second Church has identified many distributions from the Clause VIII Trust to The Mother Church that cannot possibly benefit the promotion and extension of the religion of Christian Science as taught by Mary Baker Eddy and would be happy to disclose these discoveries to the Court when the Court deems appropriate.

22. Moreover, removing The Mother Church as a permissible beneficiary does not cure the embedded conflict. The conflicted Trustees will retain the ability to make consequential, discretionary decisions that they cannot be trusted to make independent of their duty as Directors of The Mother Church.

² RSA 564-B:1-112 [Rules of Construction] (emphasis added).

23. For example, as proposed, the conflicted Trustees will determine who receives distributions from the Clause VIII Trust. While the proposal suggests that distributions will not be made to “The Mother Church or to specific programs administered by The Mother Church,” how is anyone to know the extent to which a program is administered by The Mother Church, directly or indirectly? Who is going to monitor the conflicted Trustees to ensure that distributions are made impartially from the self-interests to The Mother Church and without reprisal or retaliation against branch churches and members that have sought to cause the Trusts to be administered in accordance with Mary Baker Eddy’s intentions? Only an independent trustee would have the intimate knowledge necessary to inform this Court and the Director of the extent to which the intent of Mary Baker Eddy is being carried out.

24. The history of the Trustees’ hostility against the Clause VIII Trust and the administration of the Trusts proves that these conflicted Trustees cannot be trusted to administer the Trusts selflessly in strict adherence to Mary Baker Eddy’s clear intention to promote and extend the religion of Christian Science as taught by Mary Baker Eddy and that reality should disqualify them from serving as sole Trustees of the Trusts going forward, regardless of whether The Mother Church is a permissible beneficiary. So selfless and pure is Second Church’s mission to restore the Clause VIII Trust that it argues here that The Mother Church should not be removed as a permissive beneficiary, despite Second Church’s discovery that The Mother Church has historically received millions of dollars of self-interested distributions from the Clause VIII Trust.

25. Accordingly, the Court should hear from Second Church in order to understand the full context of the Trustees’ embedded conflict, so that it can make an informed decision as to whether to accept the Motion, instead of rubber stamping a proposal manufactured by

conflicted Trustees and approved by a Director who may lack resources to fully investigate the extraordinarily complicated and dense 107 year history of these Trusts.

B. Unitrust Conversion and Application of UPMIFA

26. The Director indicates that in order for the Uniform Prudent Management of Institutional Funds Act (“UPMIFA”), codified at RSA ch. 292-B, to govern the Clause VIII Trust, the Trusts must convert to unitrusts pursuant to RSA 564-C:1-106(b), and then apply to the Court for permission to use different distribution requirements pursuant to RSA 564-C:1-106(g), such as the requirements of UPMIFA, and specifically RSA 292-B:3 through 7.

27. RSA 564-C:1-106(g) prohibits this attempt to back-door the Clause VIII Trust into UPMIFA.

28. RSA 564-C:1-106(g) provides that once a trust converts to a unitrust, the trustee, or if the trustee declines to do so, a beneficiary, may petition the court to:

- (1) select a payout percentage different than 3 to 5 percent;
- (2) provide for a distribution of net income, as would be determined if the trust were not a unitrust, in excess of the unitrust distribution if such distribution is necessary to preserve a tax benefit;
- (3) average the valuation of the trust's net assets over a period other than 3 years;
or
- (4) Reconvert from a unitrust.

29. Nowhere in RSA 564-C:1-106(g) does it provide that a trust can elect to become part of the requirements of UPMIFA or that the distribution standards can be anything other than those described in RSA 564-C:1-106(g) (*i.e.*, payout percentage different than 3-5%, distribution of net income in excess of unitrust distribution amount, average the valuation of the trust’s net assets over a time period other than 3 years, and reconversion from a unitrust).

30. The four options described under RSA 564-C:1-106(g) are specifically related to altering the distribution standard under a conventional unitrust. RSA 564-C:1-106(g) provides no legal basis for altering the administrative rules that govern a trust. Accordingly, the suggestion that after converting to a unitrust, the Court can authorize the application of the administrative rules of UPMIFA under RSA 292-B:3 through 7 is misplaced.³

31. Moreover, the rules of UPMIFA apply to “endowments,” which, as applied here, would violate the fundamental intention of the Clause VIII Trust, which expressly provides for the mandatory distribution of all income on an annual basis, in addition to as much of the principal as the Trustees deem wise to promote and extend the religion of Christian Science as taught by Mary Baker Eddy.

32. Indeed, the definition of an “endowment fund” under UPMIFA itself is contrary to the terms of the Clause VIII Trust:

“Endowment fund” means an institutional fund or part thereof that, under the terms of a gift instrument, *is not wholly expendable by the institution on a current basis*. The term does not include assets that an institution designates as an endowment fund for its own use.

RSA 292-B:2, II (emphasis added).

33. UPMIFA provides that “the appropriation for expenditure in any year of any amount greater than 7% of the fair market value of an endowment fund...creates a rebuttable presumption of imprudence.”⁴

34. Capping the amount the Trustees may distribute per year violates the explicit intention of Mary Baker Eddy for a more liberal distribution scheme as evidenced by the inclusion

³ See RSA 292-B:3 [Standard of Conduct in Managing and Investing Institutional Fund]; RSA 292-B:4 [Appropriation for Expenditure or Accumulation of Endowment Fund; Rules of Construction]; RSA 292-B:5 [Delegation of Management and Investment Functions]; RSA 292-B:6 [Release or Modification of Restrictions on Management, Investment, or Purpose]; and RSA 292-B:7 [Reviewing Compliance].

⁴ RSA 292-B:4, VI.

of a broad authority over the distribution of principal coupled with the fundamental purpose of the Clause VIII Trust to “promote and extend the religion of Christian Science as taught by me [Mary Baker Eddy].” That language, it should be said, reflects an explicit intention of liberality in the distribution of money from the Clause VIII Trust.

35. Mary Baker Eddy’s intention was not to maintain, but to grow branch churches, societies, and other arms of her religion and to evangelize the religion to expand the number of people touched by Christian Science globally. In other words, she was more interested in promoting and extending something outside of the Clause VIII Trust than maintaining the Trust itself.

36. Accordingly, the conversion to a unitrust and the application of UPMIFA violates Mary Baker Eddy’s fundamental intention of liberality.

II. The Motion Does Not Make the Trusts Whole For The Prior Bad Acts of The Conflicted Trustees

37. Notably absent from the Trustees’ Motion is the inclusion of a remedy to make the trust whole for the self-interested distributions made by the conflicted Trustees since 1970. And notably present in the Director’s Memorandum is his intent to close his file and review of the administration of the Trusts upon the approval of the Trustees’ Motion.

38. Of course, the Court cannot expect these conflicted fiduciaries to propose a remedy that would adversely affect their true master, The Mother Church, or more to the point, investigate their own transgressions and admit to this Court that the Trustees historically have breached the Trusts.

39. The Second Church agrees with the Director when he states that “Deference to the Free Exercise Clause does not prevent the Court from intervening, if necessary, to address

breaches of fiduciary duty by the trustees. In that situation, the Court would apply “neutral principles” in analyzing the facts.”⁵

40. Unfortunately, the proposal before this Court is devoid of any facts about the historical pillaging of these Trusts that would allow this Court to apply neutral principles of trust law in order to fashion an appropriate remedy.

41. The Director indicated that he was going to conduct a review of the Trustees’:
- a. process for determining the annual amount available for distributions;
 - b. process for deciding between distributions to the Mother Church and “for promoting and extending the religion of Christian Science”;
 - c. use of strategic priorities and goal setting;
 - d. use of requests for proposals;
 - e. use of application from those seeking grants; and
 - f. resolution of their conflicting fiduciary obligations.

42. Second Church hoped that the Director’s investigation would yield an independent report that would be submitted to this Court.

43. The Director’s Memorandum sheds no light on the thoroughness or result of his investigation and, more importantly, offers no factual support for the relief sought in the Motion or any basis for not suggesting a remedy to cure the over forty-five (45) years’ of self-dealing.⁶

44. The Motion and the Director’s Memorandum treat the embedded conflict as an abstract theoretical issue, without recognizing, at least what Second Church has thus far been able to discover, that the conflicted Trustees have looted the Trusts by removing Mary Baker

⁵ See Director’s Memorandum, at Footnote 2.

⁶ After the submission of the Memorandum, Second Church made a Right to Know request regarding the Director’s investigation; that request is pending.

Eddy's copyrights and for over \$26 million in self-dealing distributions to themselves (i.e. The Mother Church) since 1970.

45. The Court is incapable of applying neutral principles of trust law to fashion an appropriate remedy to make the Trusts whole unless facts are submitted to this Court evidencing the extent of the Trustees' breaches.

46. Second Church has gone to great lengths to review the dockets and related materials and has no expectation that this Court or the Director has the resources to duplicate Second Church's efforts to investigate the history of the Trusts and Trustees. It is now more important than ever to allow the Second Church an opportunity to present this information to the Court so it may learn the full extent of the embedded conflict, how the proposal articulated in the Motion is fundamentally deficient, and why the need for the appointment of an independent trustee, charged with investigating and *reporting* to this Court, is so critical to the restoration of the integrity of these Trusts.

47. Even so, the Second Church acknowledges that it does not have all the facts because The Mother Church and the Director have not been forthcoming except when Second Church illuminates the issues and shines light on the shadows of the context and omissions of the Trustees or the Director.

48. For example, the un-docketed letter from the Honorable Gordon S. Lord to the Trustees dated August 10, 1949, informing of his decision not to fill the vacancy created by the death of Josiah E. Fernald was never provided to Second Church. What else is out there that, if disclosed, would raise or resolve concerns? The appointment of an independent trustee would cure these issues; until such time, Second Church presents these materials to the Court to

demonstrate the relevant information it has in an attempt to give greater context that what has been disclosed thus far on the very important matters pertaining to the business of these Trusts.

WHEREFORE, Second Church of Christ, Scientist, Melbourne, respectfully requests that this Honorable Court:

- A. Grant Second Church leave to file the Brief *Amicus Curiae*; and
- B. Grant such other and further relief as justice so requires.

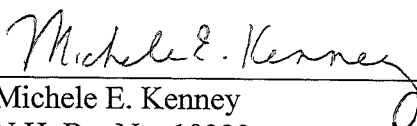
Respectfully submitted,

SECOND CHURCH OF CHRIST,
SCIENTIST, MELBOURNE,

By its attorneys,


PIERCE ATWOOD LLP

Dated: August 28, 2017

By: 
Michele E. Kenney
N.H. Bar No. 19333
One New Hampshire Avenue, Suite 350
Portsmouth, NH 03801
(603) 433-6300
mkenney@pierceatwood.com

DLA PIPER LLP (US)

Dated: August 28, 2017

By: 
Stuart Brown
Admitted *Pro Hac Vice*
1201 North Market Street, Suite 2100
Wilmington, Delaware 19801
(302) 468-5640
Stuart.brown@dlapiper.com

and

FOEHL & EYRE, PC

Dated: August 28, 2017

By: Robert B. Eyre/MEK
Robert B. Eyre
Admitted *Pro Hac Vice*
27 East Front Street
Media, Pennsylvania 19063-0941
(610) 566-5926
rob@foellaw.com

CERTIFICATE OF SERVICE

I hereby certify that I have on this 28th day of August, 2017, forwarded a copy of the foregoing document to the following by electronic mail and first class mail:

James F. Raymond, Esquire
Upton & Hatfield LLP
10 Centre Street
PO Box 1090
Concord, NH 03302-1090

Michael Courtney, Esquire
Upton & Hatfield LLP
10 Centre Street
PO Box 1090
Concord, NH 03302-1090

Thomas J. Donovan, Esquire
Director of Charitable Trusts
Office of the Attorney General
33 Capitol Street
Concord, NH 03301-6397

Michele E. Kenney
Michele E. Kenney
NH Bar #19333