

RECEIVED

APR 6 - 2017

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

7th Circuit - Probate Division - Dover
259 County Farm Road, Suite 203
Dover NH 03820

CHARITABLE TRUSTS UNIT
Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

THOMAS J. DONOVAN, ESQ
NH ATTORNEY GENERALS OFFICE - DOJ
33 CAPITOL STREET
CONCORD NH 03301-6397

Case Name: Trust of Mary Baker Eddy (Clause VI & VIII)
Case Number: 317-1910-TU-00001

On April 04, 2017, Judge David D. King issued orders relative to:

Trustee's 25th Account.

Accounts for Clause VI & VII are allowed, with amended Financial Statement - Exhibit "C" attached to Index #267 - See order of April 4, 2017. Enclosed.

Assented-to Motion Under the Will of Mary Baker Eddy, Clauses VI and VIII to Approve Amended Account and Amend 2001 Order. Granted in Part. See enclosed Order.
Motion for Leave to File Brief Amicus Curiae. Motion is Denied Without Prejudice. See enclosed Order.

Any Motion for Reconsideration must be filed with this court by April 15, 2017. Any appeals to the Supreme Court must be filed by May 05, 2017.

April 05, 2017

Cheryll-Ann Andrews
Clerk of Court

C: James F. Raymond, ESQ; Michele E. Kenney, ESQ; Stuart Brown,, ESQ; Robert B. Eyre, ESQ;
Judkins D. Richard, ESQ; Theodore E. Dinsmoor, ESQ; Russell F. Hilliard, ESQ; Patrick O'Brien
Collins, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

TRUST DOCKET
6TH CIRCUIT COURT
PROBATE DIVISION

TRUST OF MARY BAKER EDDY (CLAUSE VI & VIII)

317-1910-TU-00001

ORDER

On March 20, 2017, the Court held a non-evidentiary hearing to consider the *Assented-to Motion Under the Will of Mary Baker Eddy, Clauses VI and VIII to Approve Amended Account and Amend 2001 Order*, see Index #267 ("*Assented-to Motion*"), filed by the Trustees of the Trust of Mary Baker G. Eddy (Clause VI)(the "Clause VI Trust"), and the Trustees of the Trust of Mary Baker G. Eddy (Clause VIII)(the "Clause VIII Trust")(collectively the "Trustees" and the "Eddy Trusts") and a *Motion for Leave to File Brief Amicus Curiae* concerning the *Assented-to Motion*, see Index # 269, filed by Second Church of Christ, Scientist, Melbourne (Australia) (the "Second Church"). Attending the hearing were: Thomas J. Donovan, Esq., the Director of Charitable Trusts (the "DCT") and Terry Knowles, Assistant Director of Charitable Trusts; James F. Raymond, Esq., Michael Courtney, Esq.; Richard D. Judkins, Esq. and Kevin Ness, Esq. on behalf of the Trustees; and Michele E. Kenney, Esq., Patrick Collins, Esq., Stuart Brown, Esq., Robert B. Eyre, Esq., and Graeme Strang, Esq. on behalf of the Second Church.

Upon consideration of the pleadings and discussion at the hearing, the Court **GRANTS IN PART** the *Assented-to Motion Under the Will of Mary Baker Eddy, Clauses VI and VIII to Approve Amended Account and Amend 2001 Order*. See Index #267. It **DENIES WITHOUT PREJUDICE** the *Motion for Leave to File Brief Amicus Curiae*. See Index #269.

I. Assented-To-Motion

The issues before the Court originate from a pleading filed by the DCT in October 2016, see *Director of Charitable Trusts' Objection to Trustee's Account* (Index #259), setting forth certain concerns or errors it found in the *Accountings* filed by the Trustees. See Index ##257 (Clause VI); 258 (Clause VIII); see also *Trustee's Response* (Index #261). In his *Objection*, the DCT asserted three general objections to the *Accountings*, premised largely on a 2001 Order of the Probate Court. See *Objection Attachment - Order dated August 24, 2001* (Index #259).¹ In that Order, the Court (Hampe, J.) allowed the Mother Church to pool funds/assets held by the Trusts with others held by the Mother Church in an investment fund, the "Christian Science Trusts for Gifts and Endowments" (the "Trusts for G&E"). The Order also included a provision mandating that there be annual "independent audits" of the Eddy Trusts. See id.

The first objection asserted by the DCT is that the Trusts for G&E was liquidated at least by 2009 and the proceeds invested in a different "TMC General Investment Pool" without Court approval. See id. ¶5. The Trustees admit that the funds were so allocated in 2008, after it expanded the size of its oversight committee from three to five managers – three trustees of the Trusts for G&E and two non-employee members of the

¹ This Order was issued pursuant to a distinct docket number from the matter before the Court today. See id.

Mother Church with investment expertise. They assert that the name of the investment pool has changed, but the “nature of the pooled investments” have not. See Response ¶¶ 5-8 (Index #261). They offered to file a *Motion to Amend* the Court’s 2001 Order, but contend that because “these account changes were adequately disclosed,” in the notes to earlier filed *Accountings*, and were not materially in violation of the “purpose of the Pooled Investment Motion and Order” dated August 24, 2001, their actions were not improper. Id. ¶9.

The DCT next alleged that since 2003, the Mother Church has not filed audited financial statements with the Court. See Objection ¶6 (Index #259). The Trustees respond that although independent audits were routinely filed with the Court before 2003, in order to “reduce the costs of administering the Trusts,” preparations and approval of the financial statements were brought in-house and completed by the Mother Church’s financial department and signed by its Audit and Tax Services Manager. Response ¶¶ 10-12 (Index #261). Although the Mother Church asserts that before 2001 there was no order or rule requiring independent audits, and that Circuit Court – Probate Division Rule 108 does not require them, id. it is undisputed that Judge Hampe’s August 2001 Order clearly requires independent audits. See Objection Attachment - Order dated August 24, 2001 ¶7 (Index #259). The Mother Church asserted that although it did not seek court approval of the changed audit procedures, internal audits were disclosed in the notes to the *Accountings* beginning in 2003. Response ¶11 (Index #261). It offered to file a *Motion to Amend* the 2001 Order to allow for internally reviewed statements. Id. ¶12.

The DCT also objected to certain technical notes in the *Accounting(s)*. He first observed that in footnote 1 that the Eddy Trusts are improperly classified as subsidiaries of the Mother Church. *Objection* ¶7 (Index #259). The Trustees respond that it actually refers to the Eddy Trusts as “*accounted for* as subsidiaries” which is consistent with characterizations by a former independent auditor, and that later notes properly reflect the legal status of the Eddy Trusts. *Response* ¶13 (Index #261). The DCT also objected to a characterization of the Clause VIII Trust as “unrestricted,” alleging that because the 2001 Order restricted investment to the Trusts for G&E pool, they are “permanently restricted.” *Objection* ¶7 (Index #259). The Mother Church responded that the notes to the statements define “restricted” funds as those with donor-imposed restrictions, not court-ordered restrictions and thus the designation is appropriate. *Response* ¶14 (Index #261). Finally, the DCT objected that footnote 6 improperly states that the Massachusetts Uniform Prudent Management of Institutional Funds Act applies to the Eddy Trusts, when in fact, the New Hampshire version applies. *Objection* ¶7 (Index #259). The Mother Church responded that this: “reference was intended to explain the accounting presentation, and in that context is permissible, as the form of accounting presentation is not governed by the Act.” They acknowledge, however, that to the extent the Eddy Trusts are subject to the Act, the New Hampshire version applies. *Response* ¶15 (Index #261).

On December 9, 2016, the Court, deferred ruling on the *Accounting(s)*, see Index ##257-258, following a hearing during which both the Trustees and DCT requested that the Court so defer to allow them to discuss, and possibly resolve, the DCT's concerns. See December 9th Order at 2 (Index #264). The Trustees, after discussion with the

DCT, filed the *Assented-to Motion*, see Index #267, in which they seek amendment of the 2001 Order of this Court. Id. ¶3. Specifically, the *Assented-to Motion* seeks Court approval to: (1) allow Trust assets to be held in a discrete investment account, the “Trust investment Account,” id. ¶11, and that a “Statement of Investment Policy *acceptable to the [DCT]*” be filed annually with the DCT, id. (emphasis added); (2) authorize the DCT to approve the transfer of assets from the Trust Investment Account back to the “Church’s General Investment Pool,” id. ¶12; (3) allow financial statements submitted with annual accountings to be prepared by the Mother Church’s “financial department . . . in accordance with generally accepted accounting principles, and not audited financial statements,” id. ¶14-15; and (4) allow amended financial statements addressing the DCT’s objections to certain characterizations in the notes to be submitted with the *Accounting(s)*. See id. ¶16. The DCT assented to the Trustee’s requests, however, he reportedly “continues to review other matters related to the management of the Trusts, and by his assent . . . does not waive or restrict that review.” Id. ¶17.

Although the *Assented-to-Motion* carried the assent of the DCT, the Court held a hearing to address concerns and questions it had regarding the request to amend the 2001 Order. See Scheduling Order (Index #272). Specifically, it was concerned about: (1) the lack of independent audits, despite a court order, in 13 years; and (2) the provision in the *Assented-to-Motion* authorizing the DCT, without Court approval, to bless movement of Trust(s) assets from segregated funds back into the general fund.

Upon questioning by the Court, counsel for the Trustees stated that the decision to discontinue audited statements was premised on a concern about incurring additional

costs to the Trusts of approximately \$10,000 per-year given that currently financial statements can be prepared less expensively “in-house” and in accordance with GAAP principles. The Court observes, however, that according to the most recently filed *Accounting(s)*, assets in the Clause VI Trust total \$466,520.08, see Index #257, while assets in the Clause VIII Trust total \$22,648,456.11. See Index #258. Income received was reported as \$95,974.42 and \$408,791.21 for the Clause VI and Clause VIII Trusts respectively. See Index ##257, 258. Notably, the Clause VIII Trust reported paying \$121,318.01 in “Investment Management Fees” during the period from April 1, 2015 to March 31, 2016. See Accounting Schedule 5 (Index #258).²

“While the authority of the probate court to reopen its decrees is undoubted, it will not be exercised except for good cause.” Indian Head Nat. Bank v. Theriault, 96 N.H. 23, 27 (1949); see also Merrimack Valley Wood Prod., Inc. v. Near, 152 N.H. 192, 203 (2005)(“[T]here can be no question of the inherent power of the Court to review its own proceedings to correct error or prevent injustice”); Adams v. Adams, 51 N.H. 388, 396 (1872)(“[a]s a general proposition, courts have power to set aside, vacate, modify, or amend their judgments for good cause shown”). The Court concludes that although it is grateful to the DCT and his staff for their oversight of the Eddy Trusts, it is not convinced that a blanket amendment of the 2001 Order to allow for submission of unaudited statements is justified. First, given the size of fund principal and the fees already paid for administrative expenses, the cost of procuring an audited statement is not unduly burdensome. More important, however, is the continued existence of an inherent conflict, or to use terms propounded by the DCT “embedded conflicting

² Investment fees charged the Clause VI Trust totaled \$2,960.65 for the same period. See Accounting Schedule 5 (Index #257).

fiduciary obligations,” arising from the fact that “the [T]rustees . . . are also the Board of Directors of the Mother Church,” see Memorandum of Law Concerning Standing of Second Church of Christ, Scientist (Index #252), and certain tensions created by fact that the beneficial purposes of the Clause VIII Trust, namely, (1) repair of the Mother Church; and (2) “promoting and extending the religion of Christian Science,” inherently pits the interests of the Board of the Mother Church against other churches seeking funding for their religious activities.³ See id. This conflict highlights the need, in the Court’s view, for an independent review of the Trusts’ financial statements. It therefore sees no occasion for a blanket modification of the 2001 Court Order as it concerns audited statements.⁴ That said, it does not make sense to order retroactive audits for all of the accounts that have been processed and approved. The DCT has reviewed the pending accounts and assents to them. These accounts (Index ## 256, 257) cover the time period ending March 31, 2016 and thus the information contained within the accounts is at least one year old. For this reason, and with the assent of the DCT, the *Accountings* filed by the Trustees, see Index ##257 (Clause VI); 258 (Clause VIII), are **ALLOWED**.

Given the prior order of the Court relative to audits, and in light of the ongoing conflict caused by having the trustees also serving as directors of the Mother Church, the Court determines that an outside audit of the next accounts is warranted. As such, the *Assented-to-Motion* is **DENIED IN PART**. For the next accounting cycle, ending

³ As the DCT pointed out in his *Memorandum*, before 1949, the Trustees included the Board of the Mother Church and one independent member. Id. at 2. The Trustees currently is comprised exclusively of Mother Church board members. Id.

⁴ Indeed, although the Court recognizes that the lack of audited financials was previously disclosed, *in the notes* to prior accountings, no affirmative relief was ever requested until an objection was raised by the DCT notifying it of the violation of a direct court order.

March 31, 2017, The Trustees are **DIRECTED** to submit an independent audit for each account, at the time the account is filed. Whether that requirement remains in place for all accounts moving forward will depend, in part, on whether a solution is found to the present conflict between the duties of the Trustees and their co-existing roles as directors of the Mother Church.

Next, the Trustees propose, and the DCT supports that proposal, that the assets of the Trust(s) be removed from the "TMC General Investment Pool," where they were improperly deposited, and create a single "Trust Investment Account" to hold assets for both the Clause VI and Clause VIII Trusts and that the Trustees provide him with certain information concerning the investment policy of the fund managers. See Assented-to-Motion ¶11 (Index #267). They also request that if the assets are moved back into a general investment pool, the DCT has the authority to approve that transfer. The Court notes that the assets already have been improperly transferred in violation of the 2001 Court Order. It concludes, however, that the current proposal is a reasonable resolution of the DCT's objection and **GRANTS** this requested modification of the 2001 Court Order subject to one condition. Should the DCT approve transfer of assets, the parties shall notify the Court, within **thirty (30) days** of approval, and provide to it the details of the transfer(s) including the reasons for the transfer.

Finally, as to resolution of the DCT's technical objections to the notes to the *Accounting(s)*, the Court has reviewed the Trustee's address of them, see Assented-to-Motion Exhibit B (Index #267), and concludes, as does the DCT, that the Trustees' changes are reasonable. As such, it **APPROVES** those amendments to the *Accounting(s)* and **ORDERS** that they be incorporated into the *Amended Accounting(s)*

by reference. In its order approving the accounts, the Court will incorporate the amendments into the Order by reference.

II. Motion for Leave to File Brief Amicus Curiae

Next, the Second Church filed a *Motion for Leave to File Brief Amicus Curiae* concerning the *Assented-to Motion*, requesting permission to file an *amicus* brief on the basis that the Court should not consider the *Assented-to-Motion* “in a vacuum, but in its historical context and in light of the Trustees/Directors’ embedded conflict of interest.” See id. ¶2 Index # 269. The Trustees have objected, asserting that court rules only allow briefs *amicus curiae* to be filed with the New Hampshire Supreme Court. See Index #270; see generally, N.H. Sup. Ct. R. 30. The Second Church filed a responsive pleading stating that New Hampshire courts allow *amicus* briefs in the absence of a statute. See Index #271. The Court did not docket the *Brief Amicus Curiae* and *Appendix* attached thereto, submitted by the Second Church, however, it entertained argument on this issue at the hearing.

Although the Court agrees with the Second Church that it has the discretion to accept an *amicus curiae* brief, in the cautious exercise of that discretion, it declines to do so at this time. It is true that the rules of the Circuit Court-Probate Division do not address submission of *amicus curiae* briefs. However, even where the rules are silent it has been recognized that “[p]ermission to appear as amici curiae . . . rests in the sound discretion of the trial court.” Witty v. Planning & Zoning Comm'n of Town of Hartland, 784 A.2d 1011, 1018 (2001)(Conn. Ct. Ap. 2001); see, e.g., Parsons v. State, Dep't of Soc. & Health Servs., 118 P.3d 930, 934 (2005)(Wash. Ct. App., Div. 1, 2005); State ex rel. Com'r of Transp. v. Med. Bird Black Bear White Eagle, 63 S.W.3d 734, 758 (Tenn.

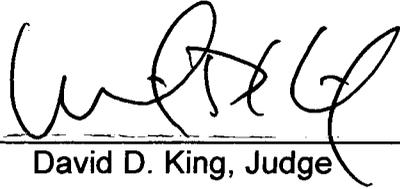
Ct. App. 2001)(“courts have inherent authority to appoint an amicus even in the absence of a rule or statute”)(collecting cases). New Hampshire courts recognize the useful role *amici* can play in assisting courts to reach the proper result. See e.g. In re Peterson’s Estate, 104 N.H. 508, 510 (1963)(courts are “not averse to wisdom in any form, from any source” (quotations omitted)). Parties seeking to submit *amicus curiae* briefs, however, “bear the burden of demonstrating that they specifically could contribute expertise and arguments not presented by the parties.” 4 AM. JUR. 2D *AMICUS CURIAE* §3 (Supp. 2017).

The Court declines to exercise its discretion to allow submission of the *amicus curiae* brief at this juncture. The Court, however, does encourage the Second Church to share their information with the DCT who, by statute, represents their interests in this matter. See RSA 7:19-7:32; see generally, Family Federation for World Peace v. Hyun Jin Moon, 129 A.3d 234, 244 (D.C. Ct. App. 2015); RSA 550:12, V (defining “beneficially interested person” to include “[t]he attorney general in estates involving charitable trusts”). Although it appreciates the effort expended by the Second Church in preparing its brief, it does not require the Second Church’s insights and research to appropriately determine the issues presented by the *Assented-to-Motion*, in particular, whether circumstances warrant modification of the 2001 Order. It will, however, not be adverse to accept future *amicus curiae* submissions should it decide that in light of the questions before it, the “amicus curiae presentations assist the court by broadening its perspective on the issues raised and facilitate informed judicial consideration” of that controversy. . . .” 4 AM. JUR. 2D *AMICUS CURIAE* §1 (Supp. 2017). Consequently, the

Second Church's *Motion for Leave to File Brief Amicus Curiae*, see Index #269, is respectfully **DENIED WITHOUT PREJUDICE**.

SO ORDERED

Dated: 4/4/2012



David D. King, Judge