



Division of Trust and Other Inherited and Gifted Assets in a New Hampshire Divorce: How Can I Best Protect My Children's Family Assets?

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A Common Concern: Protection of "Family Wealth". When considering the concept of divorce, many people think of child custody disputes, child support and alimony. The division of property, however, is often one of the most contentious issues that can arise in a divorce case. Addressing the possibility of a child's or grandchild's divorce is very important for many of our estate planning clients who want to structure their descendants' inheritances to insulate them from risks related to property settlements or awards.

Most parents and grandparents have no problem with the concept that in a divorce context their descendants' spouses have a legitimate claim to any savings and assets accumulated during their marriage as a result of the married couple's efforts in and outside the home. They accept the notion that it is only fair to allow an equal or equitable sharing of the fruits of the economic partnership of marriage irrespective of whether the marital assets are technically owned by one or the other spouse or both of them together.

Gifted or inherited assets are not, however, the products of an economic partnership. Many parents and grandparents feel that an in-law should have no legal or moral claim against the family legacy. This is a particular concern for our wealthy clients who own family businesses or special “heirloom” type assets which will pass to their descendants via lifetime gifts and deathtime inheritances. Unfortunately, we all know there are some cases in which results-oriented suitors marry for money and not love, seeking a post-divorce life of leisure subsidized by wealth to which they can claim no birth rights. Such concerned clients often ask us: “Are ‘family’ assets protected under the New Hampshire divorce laws, and if not, will a trust or other structure achieve our protective purposes?” Answering that question requires us first to explain the basics of the New Hampshire laws concerning the division of marital property.¹

New Hampshire’s “All Property”, “Equitable Division” Marital Property

Regime. Under New Hampshire law, a judge has broad discretion in ordering an “equitable division” of the “marital estate” between husband and wife. Unlike many other states, New Hampshire is not a “separate property” jurisdiction. This means that all assets of the divorcing parties, including those acquired prior to the marriage, assets titled in the name of one party alone, and assets acquired by gift or inheritance, are included in the marital estate and potentially subject to division. There is a presumption that an equal division of the parties’ properties will be equitable. A judge ordering an unequal division

¹ This memorandum assumes that the client lives in New Hampshire, and his or her children will also live here with their spouses, such that New Hampshire law will govern their marital property rights in the event of divorce. If a divorcing child lives in a state other than New Hampshire, the laws of that state will probably govern the division of gifted or inherited assets. Most other states offer more protection for gifted or inherited assets – held in trust or owned outright by a divorcing heir or donee -- than does New Hampshire, either by placing them completely off-limits as the separate property of the donee or inheritor spouse, or protecting only gifted or inherited assets acquired prior to the marriage. Because New Hampshire’s rules offer less protection, any steps you or your children take as described in this memorandum to protect family wealth under our laws should provide protection (or at least not sacrifice any protection otherwise available), regardless of where the children may settle, marry and divorce.

must make specific findings based on the judge's consideration of any one or more of 12 enumerated factors.

Perhaps the most important among these 12 "division" factors are the duration of the marriage, the extent to which the parties' efforts as breadwinner and/or homemaker contributed to the acquisition, appreciation or maintenance of the value of the marital estate, and whether all or any portion of the parties' assets were acquired by gift or inheritance.

Very generally speaking, the longer the marriage's duration, the more vulnerable gifted and inherited assets become. Any given property settlement decree which the trial judge supports by reference to the application of one or more of the 12 factors is given the benefit of any doubts should the disappointed spouse (translated: usually the more propertied donee(or) inheritor spouse) appeal to the New Hampshire Supreme Court. This is why many such disgruntled parties forego appeals of property division orders (except in those relatively infrequent cases when the lower court's order manifestly misapplies the law or is unsupported by specific findings). The deference given to the trial judge's findings accounts for the high failure rate of those who do appeal.

The Application of the Equitable Division System to Gifts and Inheritances, and How Certain Trusts can Help. The divisibility of assets acquired by gift or inheritance -- whether owned outright or in trust -- is therefore a complicated and fact-driven analysis. It is difficult to reconcile the results of many of the reported cases or to refer to them in predicting how a any given trial court judge might apply the 12 factors to a case involving the division of a spouse's gifts or inheritances.

The reported cases do, however, offer some clues as to several factors a judge is likely to particularly carefully consider:

➤ ***The contributions of each party to the marriage.*** Such contributions will include both financial contributions (i.e., from employment), and less quantifiable factors such as each party's efforts as homemaker and caretaker of the children. In an era when many families now have two working spouses, there may be a trend towards a more careful review of both spouses' domestic contributions. Generally, a stay-at-home spouse's non-economic contributions as child-rearer and homemaker will be accorded equal weight with the other spouse's earnings.

➤ ***The shorter the marriage, the safer the gifted or inherited assets.*** Absent special circumstances, for short marriages (i.e., less than 2 years) a judge is less likely to divide the partners' gifts, inheritances and other readily identifiable separate properties, awarding them exclusively or primarily to the donee or inheritor spouse.

➤ ***For longer marriages, the judge will consider the source of the assets, each party's participation in managing the assets, and whether the assets were kept separate from the parties' joint assets.*** An examination of these factors will help a judge determine how the parties treated the assets during the marriage and whether those assets were part of the "fabric" of the marriage affecting the parties' day-to-day lifestyle and standard of living. If a judge determines that both parties had an active role in maintaining or managing any inherited or gifted asset, or that the parties clearly relied upon the asset or its income for the payment of marital expenses or to maintain a certain lifestyle, it is more likely that such asset will be divided in some way between the parties,

or will, at the very least, be considered in an enhanced award of alimony to the non-inheritor spouse.

➤ ***Whether the inherited or gifted assets are owned by the inheritor or donee spouse outright, or in an irrevocable trust. And, if the asset is owned by a trust, the judge will consider the nature of the beneficiary spouse's interests in and powers over the trust.*** Generally speaking, gifted and inherited assets are clearly included in the marital estate and can be awarded in whole or in part to the other spouse. Trust interests which ***are required to vest*** in the future (i.e., when the spouse who is the beneficiary reaches a certain age) can be divided between the spouses via a “deferred distribution order” -- the beneficiary spouse is ordered to share the trust distributions with the other spouse when the future distribution is made. The most property-settlement proof trust is, therefore, designed as a fully “***discretionary trust***” in which the spouse has no “ascertainable” beneficial interest which will vest on a date certain, and where the beneficiary spouse’s lifetime use and enjoyment of the trust property is controlled by a third-party trustee.²

➤ ***The existence, or non-existence, of other jointly-held assets, or individual assets of the other spouse.*** A judge is more likely to leave gifted or inherited assets undivided if there are other assets available to assign to the other spouse.

Conclusion. Since New Hampshire law concerning the division of inherited or gifted assets is so subjective and fact intensive, it is extremely difficult to completely protect an outright inheritance or gift from a property settlement. If you are concerned

² In New Hampshire the law is now clear that the assets of such trusts are not subject to division because the beneficiary spouse has no “property rights” or “enforceable interests” in the trust. Our law also provides some insulation of such assets from alimony and child support claims. Careful drafting is important to limit the child’s interests in and powers over the trust and its administration to give the child’s divorce lawyers the most ammunition to defend the trust assets from attack.

about this uncertainty, consider broaching the subject of a pre-nuptial agreement with your children well before they reach adulthood and begin serious relationships so that they can be prepared psychologically to take it up with their partners if it looks like things are getting serious. A pre-nuptial agreement should offer the best protection of gifted or inherited assets acquired both prior to and after the marriage (even though all or some portions of such agreements may be difficult to enforce in New Hampshire or another state if enforcement would be deemed “unconscionable”). If this is a non-starter, or even as a “belt and suspenders” approach to address the enforceability risks and the gaps in many pre-nups, a significant measure of protection may be achieved by using a discretionary trust of the type described above, and keeping any owned gifted or inherited assets owned outside of the trust separate from those of the other spouse. Any such assets should be: (i) segregated from those that are jointly held; (ii) controlled and maintained exclusively by the donee or inheritor spouse, and (iii) not used (or at least minimally used) for the payment of marital expenses or to maintain a lifestyle in the marriage the parties could not otherwise afford.

For more information on this topic, call Joe McDonald or your other McDonald & Kanyuk contact.