



New Hampshire 2014 Trust Law Update

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New Hampshire's trust and trust banking laws are among the most progressive in the nation. New Hampshire's Uniform Trust Code applies to administrative matters of a trust that has its principal place of administration in New Hampshire. Consequently, many of the advantages of New Hampshire's innovative trust laws (including the ability to create a directed trust, decanting, trust modification and waiver of prudent investor restrictions) are available not only to trusts that are governed by New Hampshire law, but also to trusts that are administered in New Hampshire, even if they are governed by the law of another state. Because New Hampshire imposes no state income tax on non-grantor trusts, establishing or moving a trust to New Hampshire can provide significant tax-saving opportunities for residents of states with narrow definitions of resident trusts.

Legislation enacted in 2014 further enhances and makes more accessible New Hampshire's flexible trust laws, and provides new opportunities for both New Hampshire residents and out-of-staters seeking income tax refuge and trust customization alternatives. The legislation also provides a procedure for proving the validity of wills and trusts during the lifetime of the testator and settlor, and amends its self-settled trust laws to allow settlors to retain lifetime special powers of appointment.

The following is a brief summary of the 2014 improvements to New Hampshire trust and estate laws, which are contained in Senate Bill 289, effective on July 1, 2014.

Enforcement of No Contest Clauses. Senate Bill 289 enhances the statutory no-contest rules for trusts by authorizing a trustee to suspend distributions to a beneficiary if the beneficiary has taken action that might trigger the reduction or elimination of the beneficiary's interest in the trust under a no-contest clause. RSA 564-B:10-1014. The trustee also can refuse to distribute property in accordance with a person's exercise of a power of appointment or withdrawal over the trust property if the person's actions might reduce or eliminate the power of appointment or withdrawal under the no-contest clause. The trustee is protected from any liability for exercising these powers in good faith. Senate Bill 289 contains similar provisions for executors of wills containing no-contest clauses (RSA 551:22).

Proof of Wills during Life. Senate Bill 289 allows an individual to petition the probate court for an order confirming the validity of his or her will. Under prior law, a will's validity could be determined only after the testator's death. RSA 552:18. Allowing a will to be proved during the testator's lifetime permits the most important witness (the testator) to testify before the court. We expect that this new

procedure will be used in situations where the client anticipates a probable challenge of the will (based on undue influence or lack of capacity), and the attorney is confident that no such influence or incapacity exists.

This procedure can be used by testators who are domiciled in New Hampshire or who own real property in New Hampshire. The procedure must be initiated by the testator himself – it cannot be commenced by someone (e.g., a guardian, agent, etc.) on the testator’s behalf. A testator has no obligation to prove his will during life, and the testator’s failure to do so can’t be used as evidence or an admission that the will is invalid.

To prove a will during life, the testator must file a petition with the probate court, and provide notice to certain “interested persons,” including the testator’s spouse and heirs (as of the date of the petition), the legatees and devisees under the will, the executors named in the will, and the director of charitable trusts, if the will contains any charitable bequests. The virtual representation rules of New Hampshire’s Uniform Trust Code (RSA 564-B:3-301 et seq.) apply, so minor, unborn and incapacitated parties can be bound in the proceeding without the appointment of a guardian ad litem. The court will hold a hearing on the petition to determine whether the will is valid. After the testator’s death, the court must admit a pre-validated will to probate, except to the extent that the testator modified or revoked the will after the court validated it.

Attorney-Client Privilege between Lawyers and Fiduciaries. The attorney-client privilege protects confidential communications between a client and attorney made in connection with professional legal services provided to the client. The privilege is intended to encourage clients to seek, and attorneys to give, full and frank legal counsel. In some jurisdictions, however, a “fiduciary exception” applies to the attorney-client privilege and precludes a fiduciary from asserting the attorney-client privilege against beneficiaries of a trust where the fiduciary has sought legal advice regarding the administration of the trust. Prior to the enactment of Senate Bill 289, New Hampshire had no explicit law on this subject.

Senate Bill 289 confirms that, if an attorney’s client is an executor, trustee, trust advisor, or trust protector of an estate or trust that is governed by New Hampshire law, the attorney-client privilege applies to communications between the attorney and the fiduciary/client. (See RSA 556:31 (wills) and RSA 564-B:2-205 (trusts)). A successor fiduciary does not become the attorney’s client solely by reason of succeeding the prior fiduciary with whom the lawyer had an attorney-client relationship. However, a fiduciary and the fiduciary’s successor may agree to share communications relating to matters involving the estate or trust, and this sharing does not waive the attorney-client privilege between the original fiduciary and his or her lawyer.

Nonjudicial Dispute Resolution. Senate Bill 289 created new RSA 564-B:1-111A, which provides that if the terms of a trust require trust disputes to be resolved exclusively by reasonable nonjudicial procedures, such as arbitration or mediation, then the interested parties must resolve a dispute in accordance with the terms of the trust. Nonjudicial procedures cannot be used to determine whether a trust is valid, or a trust’s material purpose, or any matter involving a charitable trust.

Validity of Trusts. Senate Bill 289 creates limitation periods for contesting the validity of a trust (RSA 564-B:4-406). A person may contest the validity of a trust within the earlier of: (1) three years after the settlor’s death, with respect to a trust that was revocable at the time of the settlor’s death; (2) three years after the trustee sends the beneficiary a notice containing certain information about the trust (described in RSA 564-8:813(c)), with respect to an irrevocable trust, including a revocable trust that has become irrevocable; and (3) 180 days after the trustee sends the person a copy of the trust agreement, certain

information about the trust, and the time allowed for commencing a proceeding to contest the validity of the trust, with respect to an irrevocable trust, including a revocable trust that has become irrevocable.

RSA 564-B:4-406 also provides a procedure by which a settlor can commence a judicial proceeding to determine the validity of a trust that he or she created. This procedure can be used for trusts that are governed by New Hampshire law and administered in New Hampshire. The rules governing this procedure are substantially similar to those governing the determination of the validity of a will during the testator's lifetime.

Decanting. Senate Bill 289 repeals and re-enacts New Hampshire's decanting statute (RSA 564-B:4-418). In addition to clarifying the provisions of the prior decanting statute, the new provisions allow a trustee to decant if a beneficiary has a vested interest in the original trust, so long as the terms of the new trust preserve the beneficiary's vested interest. In addition, regardless of whether the original trust imposed a standard on the trustee's discretion to distribute income or principal, the new trust may give the trustee discretion to distribute income and principal, and may impose a standard (or no standard) on the trustee's discretion.

A trustee does not have a duty to decant, or to consider decanting. The trustee of a non-charitable trust can exercise the decanting power without the approval or consent of the probate court, the settlor or the beneficiaries. As under the prior decanting statute, no notice to beneficiaries is required unless the trust has vested charitable beneficiaries. However, a trustee is authorized to notify the beneficiaries of a proposed decanting, and this notice triggers a 60 day objection period for the beneficiaries.

Decanting is an administrative power, and a trustee can decant the assets of any trust with a principal place of administration in New Hampshire. A trust has its principal place of administration in New Hampshire if: (1) the trustee's principal place of business is located in New Hampshire, or, if the trustee is an individual, the trustee is a resident of New Hampshire; and (2) all or part of the administration of the trust occurs in New Hampshire. RSA 564-B:1-108.

Trustee Modification. Senate Bill 289 adds RSA 564-B:4-419 to the New Hampshire UTC. It authorizes an "independent" trustee to modify the terms of a trust for any reason. There are some restrictions on this power. For example, the trustee cannot modify the trust to defeat a material purpose, or eliminate a beneficiary's vested interest. We anticipate that trustees will use this modification power to update trust administrative provisions and resolve ambiguities without court involvement.

A trustee does not have a duty to modify, or to consider modifying the trust. The trustee of a non-charitable trust can modify the trust without the approval or consent of the probate court, the settlor or the beneficiaries. However, a trustee is authorized to notify the beneficiaries of a proposed modification, and this notice triggers a 60 day objection period for the beneficiaries.

Like decanting, the trustee modification power is administrative in nature, and a trustee can modify a trust if the trust has a principal place of administration in New Hampshire.

Disposition of Claims. Senate Bill 289 creates new RSA 564-B:5-508 and 564-B:5-509, which establish a process by which a trustee can resolve "known" and "unknown" claims against the settlor and an irrevocable trust upon its termination. If a trustee provides the required notice (either by sending it to known creditors, or publishing it in the newspaper), then claims will be barred unless the creditor commences a proceeding to enforce its claim within one year of the date on which the trustee sends or publishes the notice.

Compliance with the Prudent Investor Rule. New Hampshire law has long provided that investment provisions in trusts are administrative in nature, and allowed settlors to waive the prudent investor rule. It protects trustees from liability for failing to diversify to the extent that the trustee acts, inter alia, in good faith reliance on the terms of the trust or pursuant to a court order. This imposes a formidable evidentiary burden on beneficiaries who challenge a trustee's actions taken in reliance on broad investment powers. For example, in order for a court to surcharge the trustee for losses incurred from lack of diversification, the beneficiaries must demonstrate that the trustee acted in bad faith in following a direction or authorization not to diversify. Even if a court finds that a trustee's determination not to diversify was inappropriate, the bad faith standard will take the surcharge remedy out of play in all but the most egregious cases.

In cases where the prudent investor rule does apply, Senate Bill 289 provides that, for purposes of determining a trustee's compliance with the rule, the court will evaluate the trustee's conduct, rather than the return realized from the investment of the trust assets. This provision enhances the current standard (found in RSA 564-B:9-905), which focuses on the trustee's decision-making process at the time the decisions are made (not in hindsight). In addition, the legislation provides that a trustee's failure to realize a return that equals or exceeds any financial index is not evidence of a trustee's failure to comply with the prudent investor rule.

Self-Settled Trusts. New Hampshire passed its self-settled (asset protection) trust statute (RSA 564-D) in 2008, and updated it in 2011. Senate Bill 289 further updates the statute by authorizing the settlor of the trust to retain a lifetime limited power of appointment over the trust property. This provides clients with another option (in addition to the power to veto distributions, which was part of the original 2008 law) to ensure that transfers to a self-settled trust are incomplete for gift tax purposes. This is important for clients who wish to create New Hampshire incomplete gift, non-grantor trusts, both for asset protection and state income tax refuge purposes. New Hampshire imposes no tax at all on (and has no tax filing requirement for) non-grantor trusts (RSA 77:10). The ability to create a New Hampshire non-grantor, incomplete gift trust that is not subject to any state tax at the trust level provides a significant income tax planning opportunity for clients who live in states that tax non-grantor trusts on some basis other than the client's residence in that state.

~ The full text of Senate Bill 289 can be found at <http://www.gencourt.state.nh.us/legislation/2014/SB0289.html> ~