

Spring 2015 Newsletter-New Hampshire Estate Planning Law Update

By: Michael L. Wood

New Hampshire enacted legislation in 2014 that enhances and makes more accessible its flexible trust laws and provides new opportunities for both New Hampshire residents and nonresidents 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 donor.

Here's a brief summary of the 2014 changes to New Hampshire trust and estate laws, which are contained in Senate Bill 289. These changes took effect on July 1, 2014.

Enforcement of No Contest Clauses

A No Contest Clause is intended to discourage a beneficiary or heir at law from contesting a provision in a will or trust. These clauses are also known as In Terrorem Clauses (to strike terror). The new law 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 due to a no-contest clause contained in the trust. The trustee is protected from any liability for exercising these powers in good faith. The new law contains similar provisions for executors of wills containing no-contest clauses (RSA 551:22). The new law allows clients greater opportunity to discourage their beneficiaries from contesting provisions in a will or trust.

Proof of Wills During Life

The new law allows an individual to petition the court for an order confirming the validity of his will. Under prior law, a will's validity could be determined only after the testator's death. Allowing a will to be proved during the testator's lifetime permits the most important witness (the testator) to testify before the court. I expect that this new procedure will be used in situations in which 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.

Testators who are domiciled in New Hampshire or who own real property in New Hampshire can use this procedure. The procedure must be initiated by the testator himself – it can't be commenced by someone (for example, a guardian or agent) 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 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 (UTC) 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

*Admitted to practice in both New Hampshire and Massachusetts

beneficiaries of a trust when the fiduciary has sought legal advice regarding the administration of the trust. Prior to the enactment of the new law, New Hampshire had no explicit law on this subject.

The new law confirms that, if an attorney's client is an executor, trustee, trust advisor or trust protector of an estate or trust that's governed by New Hampshire law, the attorney-client privilege applies to communications between the attorney and the fiduciary/client. A successor fiduciary doesn't 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 doesn't waive the attorney-client privilege between the original fiduciary and his lawyer.

Nonjudicial Dispute Resolution

The new law created 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 can't be used to determine whether a trust or a trust provision is valid, a trust's material purpose, or any matter involving a charitable trust. Clients may want to add arbitration clauses to their trusts to limit the high cost of litigation.

Validity of Trusts

The new law creates limitation periods for contesting the validity of a trust. A person may contest the validity of a trust within the earlier of: (1) three years after the donor's death, with respect to a trust that was revocable at the time of the donor's death; (2) three years after the trustee sends the beneficiary a notice containing certain information about the trust, with respect to an irrevocable trust, including a revocable trust that's 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's become irrevocable.

The new law also provides a procedure by which a donor can commence a judicial proceeding to determine the validity of a trust that he 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

The new law repeals and re-enacts New Hampshire's decanting statute. Decanting is a procedure whereby the assets of an old defective trust are transferred to a new modern trust. 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. As a result, the vested beneficiary could end up with different rights under the new modern trust.

A trustee doesn't 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 court, the donor 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

The new law adds RSA 564-B:4-419 to the New Hampshire Uniform Trust Code. 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 can't modify the trust to defeat a material purpose or eliminate a beneficiary's vested interest. I anticipate that trustees will use this modification power to update trust administrative provisions and resolve ambiguities without court involvement.

A trustee doesn't have a duty to modify, or consider modifying, the trust. The trustee of a non-charitable trust can modify the trust without the approval or consent of the court, the donors 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. Independent trustees such as Trust Companies or Lawyers will need to consider the intent of the donor of the trust when exercising these significantly expanded powers.

Disposition of Claims

The new law 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 donors 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 donors 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, 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 in which the prudent investor rule does apply, the new law 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, 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 isn't 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 in 2008 and updated it in 2011. The new law further updates the statute by authorizing the donors 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 non-grantor trusts, both for asset protection and state income tax refuge purposes, but which is an incomplete gift for Federal gift tax purposes. New Hampshire imposes no tax at all on (and has no tax filing requirement for) non-grantor trusts. The ability to create a New Hampshire non-grantor, incomplete gift trust that isn't 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.

Please let me know if you have any questions regarding these changes to Estate Planning Law in New Hampshire, their impact on your estate plan or the options and opportunities they present to further your estate planning objectives.