



Trust attorneys turning to New Hampshire for solutions

Clients drawn by asset protection, tax benefits

By: Pat Murphy June 14, 2018



Local estate planning attorneys say they are increasingly turning to New Hampshire's trust laws to help clients achieve their wealth preservation goals.

New Hampshire's progressive shift on trust law has prompted some to label the state as a "mini-Switzerland" in terms of enabling wealthy clients to protect their assets. Others see New Hampshire becoming the trust law version of what Delaware is to corporate law.

"New Hampshire has deliberately gone out in the last 10 years and gotten very aggressive in trying to take trust business away from Massachusetts by modifying their laws," says Andover attorney Timothy D. Sullivan.

Meanwhile, Providence's David T. Riedel has for years been urging the Rhode Island General Assembly to enact laws to help make the Ocean State the kind of trust magnet that New Hampshire has become.

Riedel, who chairs the Probate & Trust Committee of the Rhode Island Bar Association, says the state is missing an opportunity to attract trust business by failing to take a more systematic approach in updating its laws.

"When I go up and testify for the bar association, my argument to the House or the Senate is to improve Rhode Island as a trust-friendly jurisdiction," he says. "Unfortunately, there is no unified approach to getting the sort of trust provisions that would increase trust business."

No rule against perpetuities

New Hampshire began systematically revising its trust laws in 2004. That first effort culminated in the enactment of the Trust Modernization and Competitiveness Act in 2006. The state has been diligent in updating its laws ever since then.

Boston lawyer Sheila B. Giglio has advised some of her clients to set up trusts under New Hampshire law. However, she points out that jurisdiction-shopping isn't an issue for the vast majority of clients who are looking to do basic trust planning to address issues such as the disposition of assets to minor children.

"When it comes to choices about jurisdiction, you're generally talking about higher net-worth clients who are looking to do some irrevocable planning," Giglio says.

One aspect of New Hampshire law that might appeal to wealthier clients is the state's abolition of the rule against perpetuities, according to Ryan J. Swartz.

"In New Hampshire, one can create a so-called 'dynasty trust' that is perpetual and doesn't have a set termination date," he says. "That's attractive for some clients."

The Woburn attorney is a firm believer in the advantages of New Hampshire trusts, which should come as no surprise as Swartz heads the trusts and estates department at New Hampshire-based McLane Middleton.

In addition to helping the firm's Massachusetts clients set up New Hampshire trusts, Swartz says McLane Middleton regularly receives referrals from other Massachusetts attorneys seeking help in establishing New Hampshire trusts for their clients.

Giglio says she typically might recommend a New Hampshire trust to a client who, for example, plans to make large gifts into an irrevocable trust and those gifts do not involve Massachusetts-generating assets.

Meanwhile, Riedel says that while he has set up New Hampshire trusts, it has mainly been for clients with existing contacts with that state.



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Fixing 'broken' trusts

One example of New Hampshire being ahead of the curve involves a trustee's power to decant a trust. Decanting involves the distribution of assets from an existing trust into a new trust subject to new terms.

New Hampshire recognized the authority of trustees to decant in a 2008 law, N.H. Revised Statute §564-B:4-418, which was amended in 2014 to clarify that the terms of any new trust must preserve a beneficiary's vested interest.

In contrast, the authority of trustees of an irrevocable trust to decant trust assets to a new irrevocable trust with different terms was recognized only at common-law in Massachusetts in a 2013 decision by the Supreme Judicial Court, *Morse, trustee v. Kraft, et al.*

Swartz views decanting as an important tool for fixing "broken" trusts, such as those that no longer achieve intended tax results because of a change in the law. In addition to the decanting statute, Swartz says New Hampshire law has other advantages over Massachusetts in terms of the flexibility afforded interested parties in repairing broken trusts.

In particular, Swartz points to §564-B:4-419 of the New Hampshire trust statute, which grants trustees certain powers to modify trust terms for specific purposes, such as preserving favorable tax treatment for the trust or beneficiaries.

Sullivan, who is also licensed in New Hampshire, says that in addition to writing into the terms of a trust that it is subject to New Hampshire law, attorneys should not forget to designate a New Hampshire trustee.

"A trust is generally domiciled where the instrument says it is domiciled, but for that to be true, you also need to have a trustee who is domiciled in that jurisdiction," Sullivan explains. "You should be using either a New Hampshire institution or New Hampshire professional trustee to get it up there."

In terms of trust administration, Riedel says Rhode Island has already adopted certain provisions similar to New Hampshire law, such as the enforceability of no-contest clauses. However, he is urging the General Assembly to take further steps — along the lines of the Granite State — such as adopting procedures for non-judicial dispute resolution.

Asset protection

One of New Hampshire's key advantages is that the state recognizes asset protection trusts whereas Massachusetts does not, Swartz says.

"In Massachusetts, under current law you cannot put your assets into a trust for your own benefit and put those assets beyond the reach of your creditors," he says.

The chances of a creditor getting to the corpus of a New Hampshire asset protection trust are significantly reduced, according to Sullivan.

The New Hampshire asset protection law, until its repeal and replacement last year by new §564-B:5-505A, required appointment of a New Hampshire trustee. The new statute does not require a New Hampshire trustee for an asset protection trust to withstand creditors. However, Swartz says he would still recommend a New Hampshire trustee for an out-of-state resident establishing such trusts.

According to Swartz, the ideal assets for transfer into an asset protection trust are intangible assets, such as marketable stocks and bonds.

“Massachusetts would not have an argument that those are Massachusetts-sitused assets or that it is Massachusetts-sourced income,” he says, adding that it’s less clear if Massachusetts courts would honor a New Hampshire asset protection trust that included real property situated in Massachusetts.

But whether Massachusetts would protect from creditors Massachusetts real property transferred into a limited liability company that was itself transferred into a New Hampshire asset protection trust would be an interesting legal question, Swartz says.

“At least you would be giving yourself a bit more of an argument that this asset protection trust should be honored because it holds an LLC interest rather than a direct interest in real estate in Massachusetts,” he says.

Rhode Island has its own asset protection trust statute, Riedel points out, making New Hampshire trusts less appealing to clients whose main priority is obtaining protection against creditors.



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— Ryan J. Swartz, Woburn



Avoiding taxes

New Hampshire enjoys some built-in advantages in that the state has no income tax, Riedel says. Though that may not matter much for trusts that pass out income to be taxed at the individual level, Riedel points out that there are important income-tax consequences for trusts in terms of capital gains.

“If that happens for a New Hampshire trust that is administered in New Hampshire, then there wouldn’t be any [income] tax, whereas in Rhode Island, because there is an income tax, realized capital gains would end up being taxed, even if the ordinary income is passed out to the beneficiaries,” Riedel explains.

Swartz says the same holds true with respect to Massachusetts clients.

“When the trustee distributes the money or the income out to a Massachusetts beneficiary, then it is absolutely subject to Massachusetts income tax,” Swartz says. “But if the income is accumulated in the trust over a particular number of years and not distributed to a Massachusetts beneficiary, then there will be no state income tax as that accumulation occurs.”

Swartz also observes that New Hampshire irrevocable trusts are not subject to the state tax on interest and dividend income, meaning the client would have a trust that was essentially free from state income tax.

There is one caveat, however. Though a Massachusetts resident can transfer certain assets into a New Hampshire trust and achieve state income-tax savings, should the trustee distribute money or income to a Massachusetts resident, that individual would be subject to Massachusetts income tax.

Swartz says it is also critical to note that a trust cannot have a Massachusetts trustee and still receive New Hampshire tax treatment.

“If you have a Massachusetts trustee, you have what is called a ‘resident trust’ for Massachusetts fiduciary income-tax purposes,” Swartz says. “Regardless of distributions, that income will be taxed by Massachusetts.”

New Hampshire also has the advantage over Massachusetts in terms of not having an estate tax.

“There are a good number of people who come to us and want to know the benefits of moving to another state like New Hampshire that doesn’t have an estate tax,” Swartz says.

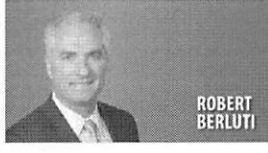
He notes that Massachusetts has a progressive estate tax that maxes out at 16 percent. That means that a wealthy client could realize hundreds of thousands or even millions of dollars in tax savings by moving to a state like New Hampshire.

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