

PRIMER ON NH LAW OF TRUSTS

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In order to understand the issues related to Bankruptcy of Trusts, a brief outline of what they are:

- A "trust" is defined as a fiduciary relationship with respect to property to which one person is the holder of title to the property subject to an equitable obligation to use the property (or hold it) for the benefit of another. 7 NH Practice (DeGrandpre) 4th Ed. 3 2601.
- The Parties to the Trust are:
 - (i) The Trustee (or Trustees). They are the holders of the "legal title" to the asset (or assets).
 - (ii) The "Beneficiaries" are the person(s) for whom the property is being held or used.
 - (iii) The Grantor (or Settlor or Trustor) is the party who provides the property to the Trustee. In many cases, the Grantor also serves as the Trustee.

- The property held by the Trustee is often referred to by its Latin name "corpus". (Also "principal"; "trust estate", or "trust res").
- Trusts can first be classified in one (1) of two (2) ways:
 - (i) A "testamentary trust" is established by a Last Will and Testament, and is overseen by a Trustee through the Probate Court process.
 - (ii) An "inter vivos" (during lifetime) trust is a trust agreement made by a Granter while living. It can be written or verbal. However, if not written, the "terms of the trust must" be clearly expressed in some way, either by language or by conduct". 7 NH Practice, Supra. Additionally, any trust involving real estate must be in writing. RSA 477:17.
- Both testamentary trusts and "inter vivos" trusts can be "charitable" or "private" depending on the intended beneficiaries of the Trust. Charitable Trusts can come under the supervision of both the Superior and Probate courts, and are regulated through the Attorney General's Charitable Trust Division.
- Inter vivos Trusts can be further classified as:
 - (i) "Revocable" meaning that the original Grantor (or Settler) retains power to amend the terms of the Trust.
 - (ii) "Irrevocable" meaning that the Granter (Settler) has waived or "given up" the ability to modify the terms of the Trust. Depending on who the beneficiaries are, this can often be equated to a "gift" in that the Granter has essentially made an "irrevocable" disposition of the assets in the Trust to the beneficiaries.

- The Probate Court has exclusive jurisdiction over matters related to Trusts (RSA 547:3) except Charitable Trusts.
- The primary source of New Hampshire law on trusts is the New Hampshire Trust Code, RSA 564-8. It was adopted in 2004. See, Chapter 130, Laws of 2004. It is built on the Uniform Trust Code which has been enacted in nearly two-thirds (2/3) of all states.
- When a Court is attempting to construe (interpret) the terms of a trust, the intent of the Grantor "shall be sovereign to the extent that the intent is lawful, not contrary to public policy and possible to achieve". RSA 564-8:1-112 (b), RSA 564-8:4-404..
- A trust can be created without notice to the beneficiaries, although they may disclaim the trust once they received notice. 7 NH Practice, supra at§ 28.05.
- A Trustee is obligated to administer, invest and manage the trust property and distribute the trust property in good faith, in accordance with the terms of the trust, and provisions of law. RSA 564-8:8-801. Included are duties of "loyalty" (8-802); impartiality (8-803) and the requirement to use "reasonable care" (8-804). There is also a duty to inform and report in all cases other than a revocable trust, where the Granter has power to revoke (8-813).
- Generally Trustee powers are set forth by statute (RSA 564-8:8-816), but additional specific powers can be set forth in the Trust (8-815 (a) (1)).
- There are complicated rules about creditor claims against property in a trust.
 - (i) If the trust is revocable by the Grantor, creditors of the Granter may reach property for debts of the Granter. RSA 546-13:5-505 (c).

- (ii) If the trust was revocable up to the death of the Granter, certain estate debts may be a charge against the trust. RSA 546-B:5.,505 (b).
- (iii) If a trust is irrevocable, creditors of the Granter can only reach that property which could be "distributed" to the Granter. RSA 564-B:5-505 A (1).
- (iv) Creditors of a beneficiary may be able to reach the beneficial interest of a beneficiary unless:
 - (a) The trust has a "spendthrift" provision. RSA 564-B:5-502, or
 - (b) Distributions to the beneficiary are "discretionary". RSA 564-B:5-504.
- According to New Hampshire Title Standards, a conveyance of property to be held in trust should be made to a named Trustee, and conveyed out by the named Trustee (or Successor). The title to trust assets is held in the Trustee, not in the trust itself. NH Title Standards (2016) Section 5-18. However, by statute enacted in 2009, a conveyance to a named trust can be presumed valid. RSA 477:25-a.