Steve Leimberg's Estate Planning Email Newsletter - Archive Message #1884
Date: 25-Oct-11
From: Steve Leimberg's Estate Planning Newsletter
Subject: **Kanyuk & McDonald: New Hampshire 2011 Trust Law Update**

"New Hampshire's trust and trust banking laws are among the most progressive in the nation. Legislation enacted in 2011 further enhances 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 opportunities."

Now, **Amy Kanyuk** and **Joe McDonald** provide members with their analysis of the recent changes made to New Hampshire's trust law that became effective on September 11, 2011.

Joe McDonald and **Amy Kanyuk** founded **McDonald and Kanyuk, PLLC** in 1998 as a trusts and estates boutique with a mission to provide multi-generational estate planning services to high net worth individuals and families. They are both Fellows with the American College of Trust and Estate Counsel, and have been at the forefront of the initiative to modernize New Hampshire's trust and banking laws. In addition, they recently chartered Concord Trust Company, a non-depository trust company that offers directed trustee and private trust company organization and support services.

Here is their commentary:

EXECUTIVE SUMMARY:

New Hampshire's trust and trust banking laws are among the most progressive in the nation. Legislation enacted in 2011 further enhances 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 opportunities.

FACTS:

The following is a brief summary of the 2011 improvements to New Hampshire trust law, which are contained in Senate Bill 50, effective on September 11, 2011.

No Contest Clauses (RSA 564-B:10-1014). Senate Bill 50 codifies the enforceability of no-contest clauses in wills and trusts. New Hampshire will enforce a no contest clause without regard to probable cause or the good faith of the beneficiary challenging the trust. However, a trust cannot override a beneficiary's right to seek a court's instructions regarding whether any contemplated action will trigger forfeiture under any given set of circumstances.

This will give a disappointed beneficiary a limited opportunity to call the court's attention to any suspicious circumstances surrounding the execution of the governing document (undue influence, duress, questionable capacity, etc.) that otherwise might not be known to the court, without first conducting an extended proceeding on the merits to determine the beneficiary's probable cause, good faith or whether he or she will substantially prevail. Any attempt by a beneficiary to institute proceedings beyond a petition for construction or instruction will trigger the forfeiture provision and should be summarily dismissed at the outset – a result consistent with the grantor's presumed intent that the forfeiture provision will prevent acrimonious and expensive probate litigation and nuisance settlements, preserve privacy, and protect the integrity of the grantor's chosen dispositive plan.

Benefit of the Beneficiaries (RSA 564-B:1-105(b)(3); B:1-112; B:2-

201(b); and B:4-404) . Senate Bill 50 amended several sections of the UTC to codify the emerging "benefit of the beneficiaries" rule. Although trust law historically has honored the intent of grantors who impose restrictions on investment management, some would read the UTC to codify a different rule.

Under this emerging doctrine, sometimes referred to as the "benefit of the beneficiaries rule", the enforceability of a trust investment restriction would hinge upon objective notions of prudence and efficiency, without regard to a settlor's subjective intent. Some commentators advocate a construction of the UTC that could influence a court to disregard a settlor's express authorization or direction for a trustee to retain in the trust a concentrated position or special asset in a manner that is inconsistent with the dominant settlor intent-serving default theme of New Hampshire's prudent investor standards. Accordingly, New Hampshire revised its UTC to clarify that a trust must be interpreted in a manner that is consistent with the settlor's intent, and that the settlor generally is free to decide which trust terms and investment restrictions will best serve the trust's beneficiaries.

Limitation of Actions against Trustees (RSA 564-B:1-1005 and 1-1005A). Senate Bill 50 amended section 10-1005 of the UTC to address issues surrounding the limitations period for actions against trustees. Before the 2011 amendment, the UTC provided one and three year limitations periods for actions by a beneficiary against a trustee.

In particular, prior to its amendment, the UTC provided that a beneficiary could not commence a proceeding against a trustee for breach of trust more than one year after the trustee sent the beneficiary a report "that adequately disclosed the existence of a potential claim for breach of trust *and informed the beneficiary of the time allowed for commencing a proceeding*." (emphasis added) The three year limitations period provided the trustee with repose only if (1) the trustee resigned, died or was removed, (2) the beneficiary's interest terminated, or (3) the trust terminated.

Accordingly, practitioners were concerned that complying with the mandate of the italicized language above, which essentially requires a trustee to explicitly state that (a) the trustee believes it has breached its duty, and (b) the beneficiary has one year to sue the trustee, was the only way to give the trustee certainty regarding when the clock would start to run for purposes of the limitations period if the trustee remained in office. Senate Bill 50 added a fourth circumstance under which the three year limitations period would apply.

Now, the beneficiary must bring an action against the trustee within three years of the date on which the trustee sends a beneficiary a report that adequately discloses the existence of a potential claim for breach of trust, if the report doesn't inform the beneficiary of the time allowed for commencing a proceeding. For purposes of the three year limitations period, there is no requirement that the trustee inform the beneficiary of the time allowed for commencing a proceeding. In addition, Senate Bill 50 provides that the limitations period cannot be tolled, except by written agreement of the trustees and qualified beneficiaries, or by a court order.

Senate Bill 50 also added a new three year limitations rule for actions against a trustee by a co-trustee, trust protector or trust advisor. The limitations period begins when the party bringing the action receives a report that adequately discloses the existence of a potential claim for breach of trust, or the removal, resignation or death of the trustee against whom the action is brought. The limitations period cannot be tolled except by agreement of the parties or a court order. Senate Bill 50 added similar three year limitations periods for actions by beneficiaries and

fiduciaries against trust advisors and trust protectors.

Accountings of Testamentary Trusts (RSA 564:19). Senate Bill 50 provides the option for parties to opt out of probate accountings for testamentary trusts. Trusts created under wills admitted to probate in 2012 and later will be exempt from the accounting requirement if the testator expressly waives the requirement in the will. In addition, the interested persons of any testamentary trust can agree to waive the requirement, if the court finds that the waiver doesn't violate a material purpose of the trust. Testamentary trusts that migrate to New Hampshire from other jurisdictions will be required to account to the New Hampshire probate court on the same basis as they were required to account in the jurisdiction from which they migrated.

Trust Advisors of Self-Settled Trusts (RSA 564-D:5). New Hampshire is one of few states where directed trusts and excluded fiduciaries (trust protectors and trust advisors) are recognized by statute. New Hampshire also has a self-settled trust statute.

Senate Bill 50 clarified the rights a grantor may retain when serving as trust advisor of a self-settled trust. Before this change, the grantor, when serving as trust advisor of a self-settled trust, could only veto distribution decisions and consent to a trustee's action or inaction regarding the investment of the trust's assets.

Now, the grantor, acting as trust advisor, can: (1) direct, consent to or veto a fiduciary's actual or proposed investment decisions, and (2) retain additional the rights and powers over the trust property, other than any power that would enable the grantor, acting as trust advisor, to participate in a decision to distribute trust property to or for the benefit of the grantor, his creditors, his estate, or the creditors of his estate.

Private Unitrusts. In 2003, New Hampshire began to allow trustees to convert income-only trusts to unitrusts, which allow the trustee to pay the income beneficiary a fixed percentage of the trust assets each year, rather than the trust's actual accounting income for that year. Senate Bill 50 made clarifying and technical corrections to the unitrust provisions.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Joe McDonald
Amy Kanyuk

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CITES:

RSA 564:19; RSA 564-B:1-105(b)(3); 564-B:1-112; 564-B:2-201(b); 564-B:4-404; RSA 564-B:10-1005; 564-B:10-1005A; RSA 564-B:10-1014; RSA 564-B:12-1206; RSA 564-C; RSA 564-D:2; RSA D:5.