



The Granite State's Entry into Asset Protection Trusts

By: Gary Holmes, Esq.



New Hampshire, with the adoption of the Qualified Disposition in Trust Act in 2008, has created an attractive alternative for the creation of Domestic Self Settled Asset Protection Trusts (DAPTs). New Hampshire has positioned itself with its very favorable tax climate; its elimination of the Rule Against Perpetuities; and modern, flexible Trust laws, to make itself more attractive than other APT laws including Alaska, Delaware and South Dakota.

Effective January 1, 2009, New Hampshire has created the Qualified Disposition in Trust Act (RSA 564-D). The New Hampshire Legislature declared that “New Hampshire is uniquely positioned to provide the most attractive legal and financial environment for individuals and families seeking to establish and locate their trusts and investment assets. The Act will serve to continue New Hampshire’s firm commitment to be the best and most attractive legal environment in the nation for Trusts and fiduciary services. . .” Together with the enactment of important amendments to the UTC in 2006 and 2008, New Hampshire has fine tuned its law to allow open architecture trust structures which complement the effectiveness of creating APTs in the State.

New Hampshire’s APT is similar in concept and quality to statutes in Delaware and South Dakota. Here is a summary of the important points:

New Hampshire APT Legislation¹

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| Citation | RSA 564-D: 1, et seq. |
| Effective Date | January 1, 2009 (RSA 564-D: 17) |
| What requirements must the trust meet to come within protection of the statute? | <p>The trust instrument must:</p> <ol style="list-style-type: none"> 1. Expressly state that NH law governs validity, construction, and administration of the trust; 2. Be irrevocable; 3. Contain a spendthrift clause; and 4. Appoint a New Hampshire trustee (other than the grantor). |
| What interests in principal and income may the grantor retain? | <p>The grantor may retain:</p> <ol style="list-style-type: none"> 1. The right to actually or potentially receive income; 2. Distributions from a CRUT or CRAT; 3. The right to receive up to 5% of the value of the trust property; 4. The right to actually or potentially receive principal as a result of the trustee’s exercise of its discretion (including discretion exercised resulting from direction of the trust advisor) or compliance with an ascertainable standard; 5. An interest in a QPRT or qualified annuity interest; 6. After the grantor’s death, the qualified trustee can pay the grantor’s debts, expenses of estate administration and estate taxes. |

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| <p>What powers may the grantor retain?</p> | <p>The grantor may retain:</p> <ol style="list-style-type: none"> 1. The power to veto distributions from the trust; 2. A non-general testamentary power of appointment; 3. The power to remove the trustee or trust advisor and replace him with a new trustee or trust advisor who is not related or subordinate to the grantor. |
| <p>Who must serve as trustee to come within protection of the statute?</p> | <p>The trustee must be a "qualified trustee":</p> <ol style="list-style-type: none"> 1. A resident individual (other than the grantor) or a corporation authorized by NH law to act as trustee and whose activities are supervised by the NH banking department, the FDIC, the Comptroller of Currency, or the Office of Thrift Supervision. 2. If the qualified trustee ceases to meet these requirements, it is deemed to have resigned, and the successor trustee named in the trust agreement will become the qualified trustee. |
| <p>May nonqualified trustees serve?</p> | <p>Yes.</p> |
| <p>May the trust have a trust advisor, or trust protector?</p> | <p>Yes. The trust may have one or more advisors. The trust advisor:</p> <ol style="list-style-type: none"> 1. Does not have to meet the criteria of a qualified trustee; 2. May remove and appoint qualified trustees or trust advisors; 3. May direct, consent to, or disapprove distributions from trust; 4. May be the grantor but, as trust advisor, the grantor can only retain the right to veto distributions from the trust. |
| <p>What responsibilities must the qualified trustee have?</p> | <p>The qualified trustee must:</p> <ol style="list-style-type: none"> 1. Have custody of some or all of corpus; 2. Maintain trust records on exclusive or nonexclusive basis; 3. Prepare or arrange for preparation of fiduciary income tax returns; or 4. Otherwise materially participate in administration of trust. |
| <p>What is the statute of limitations for claims against trust property?</p> | <ol style="list-style-type: none"> 1. With respect to claims arising <u>before</u> the grantor made the qualified, disposition: The later of four years after transfer or one year after transfer was or could reasonably have been discovered by creditor; 2. With respect to claims arising <u>after</u> the Grantor made the Qualified disposition: Four years after the transfer; 3. Statute bars enforcement of judgment obtained in another state. |
| <p>May spouses or children of the grantor proceed against the trust?</p> | <p>Yes. Creditors whose claims result from grantor's breach of an agreement or court order as to child support, alimony, or the division or distribution of property to the grantor's spouse or former spouse may proceed against the trust, but (in case of alimony or the division or distribution of assets) only if the ex-spouse was married to the grantor before or on date of transfer. The grantor's surviving spouse may not reach the trust's assets by electing against the grantor's will.</p> |
| <p>May tort creditors proceed against the trust?</p> | <p>Yes. Creditors whose claims arise as result of death, personal injury, or property damage occurring before or on date of the qualified transfer, for which the grantor was liable either directly or through vicarious liability, may proceed against the trust.</p> |

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| Are there any other circumstances under which creditor may proceed against the trust? | No. |
| Are there provisions for moving the trust to NH and making it subject to RSA 564-D? | Yes. The trust may become subject to RSA 564-D if the trust is moved to New Hampshire, as long as the trust meets the statute's other requirements (irrevocability, spendthrift clause, NH trustee), except that the trust instrument does not have to state that NH law applies. If the trust is moved from another state, for purposes of the statute of limitations, the transfer is deemed to be made on the date property was originally transferred in trust, whether before or after effective date of NH statute. |
| Does the statute provide that the trustee automatically ceases to act if court has jurisdiction and determines that law of trust does not apply? | No. |
| Does the statute provide that express or implied understandings regarding distributions to the grantor are invalid? | Yes. |
| Does the statute provide protection for attorneys, trustees, and others involved in creation and administration of trust? | Yes. Creditors have no claim or cause of action against the trustee, trust advisor, or any person involved in drafting or funding the trust, except under the Uniform Fraudulent Transfer Act. A NH court will not enforce a foreign judgment against the trust if the judgment would have been barred in NH. |

What Else is Attractive about New Hampshire?

New Hampshire is also attractive to individuals and trustees for a number of other reasons:

- The Rule Against Perpetuities has effectively been abolished, leading to multi-generation or private 'Purpose Trusts' which can last indefinitely.
- New Hampshire has no income tax, sales tax or death tax.
- New Hampshire has adopted significant amendments to the UTC which provide greater recognition of directed and delegated trusts and clarity with the use and roles of investments advisors, distribution advisors, and trust protectors.
- New Hampshire now provides cover for trustees holding undiversified trust investments. Most states require by statute or common law that trustees diversify as a requirement to prudent investing. Drafting attempts to relax these normal diversification requirements have not relieved trustees from court scrutiny under the prudent investor standards. New Hampshire has adopted a "good faith" standard for judging the trustee's conduct. If the trust document allows a trustee to retain a concentrated position, a challenge to the trustee for following instructions not to diversify must now show that the trustee acted in bad faith in following these instructions.²
- Finally, "the New Hampshire Supreme Court is noted for its judicial restraint and its sensitivity to the judiciary's limited role under the separation of powers doctrine."³ Public policy is left to the legislature. Although the State's recent entry into ADPTs is untested in the Courts, New Hampshire's two hundred-year tradition of judicial restraint and deference to legislative prerogatives suggests that the Courts would support this new legislation from an activist approach based on "bad" public policy or inconsistency with traditional fiduciary concepts.

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¹ Based on material created by Attorney Amy Kanyuk, Chairman of the Trust Sub-Committee 2008

² See generally McDonald, *open Architecture Trust Designs under New Hampshire Law provides flexibility and opportunities*, *New Hampshire Bar Journal*, Autumn, 2008.

³ *Id.*

Gary Holmes received both his BA and LLM degree from Boston University. He has practiced for over 38 years in Hampton, New Hampshire with a concentration in estate planning, charitable planning, asset protection and settlement of trusts and estates. He was a member of the bar subcommittee studying the New Hampshire Qualified Disposition in Trust Act in 2008. Gary can be reached at gholmes@holmesandells.com.