

## **NEW HAMPSHIRE: WHY THE GRANITE STATE PROVIDES A SOLID FOUNDATION FOR TRUSTS**

New Hampshire has always been known for its beautiful lakes and snow-capped mountains. But over the past decade, New Hampshire has become known for something else: it is now widely recognized as one of the premier jurisdictions in the nation for establishing and administering trusts.

Since 2006, the New Hampshire legislature has modernized the state's trust and tax laws to give trusts that are administered in New Hampshire a clear advantage over trusts administered in other states. Some of the advantages include:

- ***State Tax Advantages.*** As of 2013, New Hampshire trusts are no longer subject to state income tax. This allows the trust funds to grow more quickly because the trust assets are not depleted by payment of income tax. The trust would still be subject to federal income tax, and a beneficiary who receives a distribution from a New Hampshire trust may owe income tax to the state in which he or she resides, but there is no state tax at the trust level on capital gains or accumulated income.
- ***Dynasty Trusts.*** Unlike in most states, New Hampshire law allows an individual to create a perpetual or “dynasty” trust. This means that an individual may create a trust that can continue for an indefinite amount of time, and the trust need not terminate within some time frame mandated by statute.
- ***Efficient Administration of Trusts.*** New Hampshire's trust laws facilitate the efficient administration of trusts. Through concepts like virtual representation (which allows certain beneficiaries to represent the interests of other beneficiaries), trustees often can resolve administrative issues, such as the interpretation of ambiguous trust provisions, without having to seek court involvement. The ability to utilize the concept of virtual representation minimizes, and in some cases, eliminates, the need for a court-appointed guardian ad litem to represent the interests of persons who are unborn, unascertained, or legally incapacitated. Instead, a parent with the same interests as his or her children and more remote descendants can represent their future and potential interests and thus streamline certain procedures, such as the approval of a trust modification.
- ***Flexibility in the Administration of Trusts.*** New Hampshire law permits the use of non-judicial settlement agreements (“NJSAs”) to modify and clarify trusts. NJSAs are agreements between trustees and beneficiaries that allow those parties to compromise on a variety of issues (and enter into a binding agreement) relating to trust administration, distribution, termination and procedural issues (such as appointment of successor trustees) without court involvement.
- ***Directed Trusts.*** New Hampshire law allows for investment and administrative responsibilities to be clearly divided among trustees and third parties. For example, in a directed trust, an investment manager can have the exclusive duty to invest the trust's assets while the trustee is only responsible for the other aspects of administering the trust.

- ***Asset Protection Trusts.*** New Hampshire law allows for the creation of trusts that protect trust assets against a settlor's or beneficiary's creditors. While there are limits to the types of creditors (and claims) these trusts can protect against, absent proof of intent to defraud, a creditor's claim will generally be barred against property held in an asset protection trust four years after property is transferred into the trust or, if later, within one year after the transfer could reasonably have been discovered by the creditor.
- ***Decanting.*** New Hampshire trust law allows decanting, a process by which a trustee creates a new trust and transfers assets from the old trust to the new trust. Usually a trustee would exercise the power to decant for purposes of improving the administrative provisions governing the trust. Of course there are some restrictions on decanting; for example, a trustee cannot decant the first trust into a second trust that has new beneficiaries or reduces any current fixed income interest, annuity interest or unitrust interest of a beneficiary of the first trust.
- ***Trust Protectors and Trust Advisors.*** New Hampshire law recognizes trust protectors and trust advisors who can oversee or advise the trustees or investment managers, and provide valuable input to the trustee in making decisions about discretionary distributions or administrative matters.
- ***Greater Flexibility in Investment Decisions.*** When establishing a New Hampshire trust, the donor can specify the kinds of investments to be held in the trust and give the trustee discretion to manage only those trust assets and not diversify. For example, a trust can permit the trustee to hold only one kind of asset or concentrated stock positions.

With these types of provisions written into New Hampshire's laws, it is no surprise that individuals looking to establish new trusts, or "migrate" a trust to a jurisdiction with better trust laws, are considering New Hampshire. You do not need to be from New Hampshire to benefit from these laws, as residents of all states are able to establish a New Hampshire trust. In order to take full advantage of all of New Hampshire's trust and tax laws, however, the trust needs to be administered in New Hampshire by a New Hampshire-based trustee. Accordingly, the demand for New Hampshire trustee services has grown significantly over the past few years.

In order to make the benefits of New Hampshire trust and tax laws available to our clients, Fiduciary Company Incorporated (the parent company of Fiduciary Trust Company) has established a New Hampshire subsidiary, Fiduciary Trust Company of New England. The new company recently received its charter as a nondepository trust company (see Note from Our President). Similar to its sister company in Boston, Fiduciary Trust Company of New England will provide corporate trustee, investment management, and wealth advisory services to its clients. Establishing a New Hampshire affiliate allows Fiduciary to offer New Hampshire corporate trustee services to our clients in all states.

**Should You Establish a New Hampshire Trust or "Migrate" Your Current Trust to New Hampshire?**

Whether or not you should establish a New Hampshire trust (or "migrate" your trust to New Hampshire) is a question that you should discuss with your wealth and estate planning advisors, including your advisors at Fiduciary. There are a number of factors to consider, including:

- ***The size of the trust.*** The larger the trust, the greater the benefits to be derived from New Hampshire's progressive trust and tax laws. If there is any additional expense to migrating the trust to New Hampshire, that expense is less significant in larger trusts.
- ***The trust's terms.*** If a trust's terms require a relatively early termination (e.g., at the donor's death or within the next few years from that time), it may not be worth any additional expense to establish a New Hampshire trust or "migrate" the trust to New Hampshire from another jurisdiction.
- ***Whether the trust will likely accumulate most of its income.*** If a trust is likely to accumulate its income (or pay very little income out to the trust beneficiaries over the life of the trust), the income tax savings at both the trust and beneficiary level are maximized. If a trust is likely to pay out income to its beneficiaries, the income paid out may not be taxed at the trust level, but the beneficiary would likely pay income tax in the state where he or she resides.
- ***The additional expense and effort (if any) involved in establishing a New Hampshire trust.*** If the trust being established has not been created yet or is a revocable trust, there should be little or no additional expense in naming a New Hampshire-based trustee such as Fiduciary Trust Company of New England. For trusts that are already established and irrevocable, the extent of any cost of changing the trustees of trusts depends on what is required by the trust instrument in order to change trustees and the applicable law (if possible and desirable). For example, if the trust has a clear mechanism for appointing a new trustee and does not require court approval, then there may not be any additional cost to making the change. If, however, the trust requires court approval of a new trustee or perhaps there is no clear mechanism for appointing a new trustee, the assistance of an outside attorney may be required, and thus the additional expense would be the lawyer's time in drafting the necessary documents and filing them with the probate court (if necessary).

We would be happy to talk with you about our New Hampshire affiliate and whether establishing a New Hampshire trust or moving your trust to New Hampshire might be right for you. For more information about Fiduciary Trust Company of New England and the services it provides, please visit our website at [fiduciarytrustNE.com](http://fiduciarytrustNE.com).

#### **IRS Circular 230 Disclosure:**

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*This article was first published in Fiduciary Trust's Summer 2014 Perspective, and was authored by Thanda F. Brassard, Esq., Vice President and Trust Counsel.*

*If you would like to learn more about Fiduciary Trust Company and its wealth management services, please contact **Randy Kinard** at 617-574-3432.*

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