

McDonald & Kanyuk, PLLC 2003 New Hampshire Law Update

The 2003 legislative session produced several changes in the law affecting estate planning, trust and estate administration and related areas. This newsletter will explain these changes and how they may impact your planning.



Modification of the Rule Against Perpetuities

The rule against perpetuities limits the duration of non-charitable (i.e., “private”) trusts and prevents them from lasting forever. The rule provides that a beneficial interest in a trust is void unless it vests within a certain time period (generally about 100 years). The rule precludes the use of long-term “dynasty” trust arrangements which can accumulate wealth and protect it from creditors, divorces and federal wealth transfer taxes for multiple future generations of the trust creator’s family. In a bid to attract trust assets and generate business and tax revenues, several progressive states have repealed or modified this rule over the last decade and allow trusts to exist for a longer or indefinite period of time.

New Hampshire will join the ranks of these states on January 1, 2004. Beginning on that date, the rule against perpetuities will not apply to New Hampshire trusts which expressly “opt out” of the rule’s application. Clients who have created revocable trusts which may continue for the benefit of their children and future generations should consider amending those trusts to take advantage of this opportunity.



Increase in the Homestead Exemption Amount

The homestead exemption protects a portion of a debtor’s interest in his or her principal residence if the residence is sold to satisfy the claim of a judgment creditor. On January 1, 2004, the amount of the homestead exemption will increase from \$50,000 to \$100,000 per person. (Note that in 1993, the exemption rose from \$5,000 to \$30,000, and in 2002 it increased again to \$50,000.) This increase will give additional creditor protection to anyone with more than \$100,000 of equity in his or her home - regardless of whether he or she owns the home outright or in a revocable trust. Husbands and wives who co-own their homes can protect up to \$200,000 in equity. These changes continue a trend over the last five years of liberalizing New Hampshire’s debtors’ exemption laws to the point where our statutes create more safe harbors than most other states’ - a dramatic change from the prior situation where very little was immune from attachment and forced sale. Contact us if you wish to discuss this further.

Changes to the Rules Regarding Distributions from an Estate to a Minor

As of January 1, 2004, if a minor inherits money or property, the executor or trustee must pay the bequest to the minor's custodian under the Uniform Transfers to Minors Act (UTMA). Under current law, a minor's inheritance is required to be held by a guardian for the minor's benefit until the minor reaches the age of eighteen (18), and the guardian must file annual accountings of the guardianship estate with the probate court. Under UTMA, the minor is not entitled to receive the custodial property until he or she reaches the age of twenty-one (21), and UTMA does not require the custodian to account to the probate court for the assets held in the custodial account for the minor's benefit.

Changes to the Rules Regarding "Intestate" Distributions

The amount that will pass to the surviving spouse of an individual who dies intestate (without a will) will increase on January 1, 2004. For example, under current law, if a decedent is survived by his wife and children, and all of the children are also issue of the decedent's wife, the wife is entitled to receive the first \$50,000 of the probate estate, plus one-half of the balance. Under the new rules, the wife will be entitled to receive the first \$250,000 of the probate estate and one-half of the balance.

Changes to the Effect of Divorce on a Revocable Trust

Under current law, a divorce or annulment will negate a former spouse's beneficial interest under an individual's will. Effective January 1, 2004, a divorce or annulment also will negate any interest the former spouse may have in an individual's revocable trust, and the former spouse will not be eligible to serve as trustee of that trust unless the trust agreement specifically provides otherwise.

Note that a divorce or annulment does *not* alter a former spouse's interest in or powers over an *irrevocable* trust created by an individual – an irrevocable trust agreement therefore should make a spouse's beneficial interests in and powers over an irrevocable trust contingent upon the continuation of the marriage between the grantor and his or her spouse. In addition, a beneficiary designation does not change as a result of a divorce or annulment. Clients should be sure to review and, if necessary, change beneficiary designations for life insurance, retirement assets, annuities and other beneficiary designation assets if they divorce or have their marriage annulled.

Changes to the Rules regarding Gifts and Estate Planning by Guardians

In New Hampshire, an incapacitated individual's (a "ward's") guardian may make gifts of the ward's property and plan his or her estate in order to fulfill the ward's wishes (if they are known), minimize taxes or facilitate the distribution of the ward's estate to family, friends or

charities who would be likely recipients of gifts from the ward. The guardian must petition and receive the approval of the probate court before making any gifts or engaging in any estate planning on the ward's behalf. Effective January 1, 2004, the guardian's petition must state whether a gift by the guardian is being made to qualify the ward for Medicaid and, if so, any resulting period of Medicaid disqualification. The court may approve the petition only if it determines that the proposed gift will not adversely affect the ward's standard of living or care.

Gifts by Agents under General Durable Powers of Attorney

An agent under a general durable power of attorney may not make gifts of the principal's property unless the document specifically authorizes such gifts. The 2003 legislation narrows this rule. As of January 1, 2004, an agent may not make gifts under the power of attorney if the gift would leave the principal with so few assets that he or she would be forced to rely on Medicaid or other public assistance for his or her care, unless the document specifically provides otherwise or the probate court approves the gift in advance. In addition, the new law precludes an agent from gifting the principal's property to the agent himself unless the document specifically provides otherwise or the probate court approves the gift in advance.

Clients should confirm that their general durable powers of attorney specifically authorize the agent to gift the principal's property to natural objects of the principal's affection, including, if appropriate, the agent himself. The agent's authority to make gifts to himself should be limited to certain dollar amounts to avoid adverse tax consequences with respect to the agent. As a general rule, our general durable powers of attorney contain this gifting language, although they do not authorize an agent to make gifts of the principal's property to "defund" the principal in order to qualify him or her for Medicaid or other public assistance.

Content of a General Durable Power of Attorney

As of January 1, 2004, a general durable power of attorney must contain a disclosure statement signed by the principal indicating that the principal understands the nature and extent of the powers conferred by the document. Similarly, the agent will have no power to act under the power of attorney document unless the agent signs and attaches to the document an acknowledgment stating that the agent understands the powers given to him under the power of attorney and that he is bound by a fiduciary duty to act in the principal's best interest.

Since 2002 our powers of attorney have contained the principal's disclosure statement. They also provide the agent's acknowledgment as a separate page attached to the document. Clients who have executed powers of attorney in the past year or so should check their documents and obtain the agent's signature on the acknowledgement page if they have not already done so. Clients whose powers of attorney are more than a year old should sign new documents which contain the required principal's statement and agent's acknowledgement.