

# MIGRATING TRUSTS TO NEW HAMPSHIRE: *The "Why" and the "How"*

---

By Joseph F. McDonald, III

---

## A. INTRODUCTION: WHAT THE GRANITE STATE HAS TO OFFER TO TRUST SITUS-SEEKERS

Moving to New Hampshire has for decades had great appeal for many retirees. This state offers year-round recreation, no state income, sales and estate taxes, and favorable creditor protection laws. These attributes and the intangibles that confer "quality of life" have all played a part in the substantial migration of clients to New Hampshire from other states, particularly our more urban neighbors to the south.

Recent changes to our laws have created other reasons to look at what New Hampshire can provide. The legislature has modernized our trust and trust company laws in several important steps during the last 12 years. New Hampshire's progressive "designer" version of the Uniform Trust Code ("UTC", and sometimes referred to herein as the "Model Act" or "Model UTC") and other trust laws create strong relocation incentives for irrevocable trusts now being administered in less trust-friendly states.<sup>1</sup> The seminal trust and trust company law changes came four years ago with the enactment of the "Trust Modernization and Competitiveness Act of 2006" ("TMCA").<sup>2</sup> The preamble to TMCA states as its purpose "to establish New Hampshire as the best and most attractive legal environment in the nation for trusts and trust services."<sup>3</sup> When he signed the bill, Governor Lynch expressed the hope that it would lay the foundation for New Hampshire to be "... first in the country in the new national market for trust services and the good, high-paying jobs in that industry."<sup>4</sup> Two days after the Governor signed TMCA into law, the *Wall Street Journal* took notice: "the latest entrant in the trust wars is New Hampshire, whose Governor signed into law this week a bill that seeks to surpass most other states in innovative trust features."<sup>5</sup>

Subsequent reforms and technical corrections made since 2006 have built further on TMCA's strong foundation. TMCA will be sterile, and its policy goals will be unrealized, unless as practicing members of our trusts and estates bar we make it our business to thoroughly understand the opportunities TMCA creates and thereby make ourselves available

as valued planning partners with our colleagues in other states. This article is intended to help us do that so that more among us can become competent local counsel and zealous advocates for New Hampshire as a premier trust destination jurisdiction. In addition to continuing in our traditional roles of advising clients who have moved here from other states and want their trusts to move with them, we as New Hampshire attorneys will have new opportunities to advise and assist non-New Hampshire families and their local counsel concerning whether and how to relocate their trusts here. And as part of this pre-migration planning, attorneys may take steps to insulate many of the relocated "legacy trusts" from the taxing jurisdiction of their original state's revenue authorities on certain types of income.

This article discusses those circumstances in which it may be possible for New Hampshire lawyers to help move a foreign irrevocable trust here, and what should be done to assist in accomplishing any given set of trust migration objectives while avoiding the many potential pitfalls in doing so.<sup>6</sup> The primary focus will be on moving from the eight most proximate states in the northeast from which trust migration to New Hampshire is perhaps most likely – the five other New England states and New York, New Jersey and Pennsylvania. The analytical framework described herein for determining what must be done in those states will generally apply if you are dealing with a trust located in another state. For convenience, a trust's current non-New Hampshire jurisdiction will occasionally be referred to as the "original trust state."

A word of caution at the outset: there is tremendous ferment in the various state legislatures as the inter-jurisdictional competition for trust situs continues unabated (indeed, even accelerates).<sup>7</sup> The trust laws in all of the states are evolving, some faster than others.<sup>8</sup> Therefore, this article has a limited shelf life as an accurate resource to practitioners.

## B. THE SIGNIFICANCE OF A TRUST'S SITUS AND GOVERNING LAW

### 1. "Migration" In Context: The Term Can Have Different Meanings Depending on Particular Migration

**Objectives.** Successfully migrating a trust to New Hampshire can be accomplished by different means depending on any given migration objective or set of objectives. Sometimes a mere change in situs will suffice.<sup>9</sup> In other instances more may be needed. The method chosen to migrate the trust will have a bearing on whether the trust will escape continuing income tax jurisdiction of the original trust state and which of New Hampshire's trust law benefits can be made available to the trust.

For example, in one case, it might be possible to get perpetual duration, no state income taxation, avoidance of accounting and beneficiary notice requirements, effective creditor and spendthrift protection, a more favorable total-return unitrust law or equitable adjustments regime, reduction in administrative costs, and a directed trustee structure with a fiduciary trust advisor that directs investments or distributions. In another case, however, it might be impossible to get any one or more of these benefits.<sup>10</sup> These often thorny choice of law principles are discussed in more detail in Section B.4(b), *infra*.

CAVEAT: If an attempt is made to change both the situs and governing law from the original trust state to New Hampshire without approval of a modification by a court of competent jurisdiction in the home state, or preferably under the unambiguous authority of a statute allowing those changes without the expense and delay of court involvement, attorneys should be concerned about the ability of a dissident beneficiary, an aggrieved creditor, a revenue commissioner or another trust stakeholder to successfully petition the courts in the original trust state (or even the New Hampshire probate court) to disregard the attempted change of governing law. This could result in possible drastic consequences, perhaps long after the failed attempt, to all parties involved -- attorneys included -- who took action in reliance on the assumption that the change would be successful. Prudence dictates that when in doubt about any possible challenge to a change in governing law, the attorney should insist on a court-supervised modification or other decree in the original trust state even though it might be expensive and time-consuming. This is certainly a case where you would not rather beg for forgiveness than ask for permission.<sup>11</sup>

**2. Original Trust State's Resident Trustee's Resignation or Removal, Appointment of a New Hampshire Resident Trustee, and Otherwise Satisfying State Choice of Law and Jurisdictional Requirements to Achieve Migration Objectives.** In most cases, achieving the objectives of the migration, be they state income-tax refuge related or the application of one or more of the favorable New Hampshire trust laws, will at a minimum require two things. First, the trustee in the original state must resign or be removed. Second, one or more New Hampshire resident trustees must succeed to the trusteeship and conduct at least a portion of the administration of the trust in New Hampshire.

In many cases, the non-resident trustees will initiate or cooperate in the migration and be willing to voluntarily resign the trusteeship. Succession by a New Hampshire resident trustee will therefore often be easy, at least for non-court supervised *inter vivos* trusts, provided that the governing instrument or the default provisions of the original trust state's trust code<sup>12</sup> provides for the appointment and acceptance by a successor trustee.

If the trustee in the original trust state is not a voluntary participant, review the governing instrument to determine if it provides for the extrajudicial removal and replacement of the trustee. In the absence of such provisions, determine if the instrument confers powers of appointment that might be exercised by the beneficiaries to accomplish the transfer to a new New Hampshire trust with New Hampshire resident trustees without court intervention.

Frequently, however, the governing instrument is silent on the issues of removal, resignation and replacement, or grants no powers of appointment. If that is the case, the beneficiaries must either obtain the trustee's agreement to resign<sup>13</sup> or convince the local probate court to remove the trustee. If the original trust state has adopted the Model UTC, Model Act §706, or the common law or a local statute in a non-UTC state, might provide the local court with a basis for removing the recalcitrant trustee.<sup>14</sup>

**3. Change in Situs is Often Easy; Changing Governing Law Can Be Much More Difficult.** Merely changing the trustee of the original trust from a resident of the original state to a resident New Hampshire individual or corporate trustee will in most cases change an *inter vivos* trust's principal place of administration, provided that: (i) the trust's governing instrument does not expressly prohibit the change (that would be unusual), and (ii) some or most of the important aspects of the administration of the trust are conducted in New Hampshire by the resident trustee(s). It will not, however, necessarily mean that the move has also changed the trust's governing law on issues relating to the trust's validity and construction. A quick reference guide providing some general guidance on distinguishing between matters involving validity and construction, on the one hand, and administration, on the other, is provided in Appendix A.

That begs the question: What can be done to change *both* situs and governing law to New Hampshire? The answer for any given trust will turn on a careful analysis of that trust's provisions and the laws of the original trust state.

#### **4. Possible Methods to Change Governing Law.**

**a. Testamentary Trusts.** Testamentary trusts are trusts created under wills. In most states such trusts created by resident settlors are subject to the continuing or episodic supervision by one of that state's probate courts (or their equivalent). Some jurisdictions require that the trustees of their court-supervised trusts file initial inventories, annual "interim" accountings and final accounts when the trust terminates.

To move a testamentary trust and change its governing law in conjunction with the resignation or removal of the trustee residing in the original trust state, the beneficiaries or the trustee should first file a petition and secure a discharge after submitting a final accounting in the local probate court. A testamentary trust seeking a move to New Hampshire from another state will also file a petition in the probate court for the county in which the New Hampshire resident trustee will reside. That petition will seek the New Hampshire court's approval of the transfer of situs and acceptance of jurisdiction over the trust before the proceeding in the probate court in the original trust state. The petition also should provide that the New Hampshire court conditionally approves any further modifications to the trust described in a nonjudicial settle-

ment agreement attached as an exhibit to the petition.<sup>15</sup> This way the court having jurisdiction will know of the new trustee's willingness to serve and the New Hampshire court's willingness to succeed to jurisdiction upon the local court's approval of the transfer. It will avoid any lapse in court supervision over the trustee.

Generally, a local court in the original trust state will permit a testamentary trust to be moved to New Hampshire if the trust instrument does not express a contrary intent, the administration of the trust will be facilitated, and the interests of the beneficiaries will be promoted.<sup>16</sup> You should not assume, however, that the local court will automatically grant a petition to transfer situs. Two New York Surrogates, for example, denied such a petition when the accomplishment of the stated objective – the avoidance of New York income tax – did not require the change.<sup>17</sup> Working with local counsel in the original trust state will enable a New Hampshire attorney to handicap the prospects of success up front before expending any significant time and resources. A preliminary consultation will allow you to determine the appropriate process in the home state's probate courts and the costs (primarily attorneys' and court fees) likely to be incurred, so that the new situs-seeker can weigh the costs and benefits of proceeding before wasting resources on what might prove to be an expensive exercise in futility.

#### **b. Inter Vivos Trusts.**

**(1) Easiest: Using a "Portability" Clause in the Document.** Some trusts that were created during the past ten years or so incorporate portability provisions. Such provisions expressly empower a trust protector or trustee to amend the trust agreement, decant trust assets to a new trust (this power can be as simply stated as a power to distribute principal among a defined class of beneficiaries or "to other trusts"), or declare a change of the trust's situs and governing law by the simple expedient of executing a document to that effect.

**(2) In the Absence of a Portability Provision: Apply Choice of Laws Principles.** But virtually all older trusts and probably even the majority of modern documents will grant no such authority. In such cases, the trust will continue to be governed by the original state's law if the trust document says that it will be. In the absence of such an express governing law provision in the trust document, determining whether New Hampshire's or the original trust state's law will apply involves an often difficult determination under "choice" and "conflicts" of laws principles. The choice of governing law as between an original and a new situs state will generally depend on whether the issue involves the trust's: (i) validity (for example, whether the trust violates a rule of law such as the rule against perpetuities) and construction (identity of the beneficiaries and their interests); or (ii) administration (generally, matters dealing with trustees).<sup>18</sup>

**(A) Statutory.** As of this writing, the Model UTC has been enacted in 23 states. The only adopting states of our selected eight are Pennsylvania, Maine and Vermont. Model Act §107(2) provides that, in the absence of a designation of governing law by the trust creator, the "meaning and effect" of the terms of the trust will be determined by the laws of the jurisdiction "having the most significant relationship to the matter at issue."<sup>19</sup> If the original trust state has not adopted the UTC it may have a provision in its home-grown trust code that addresses

the issue.

**(B) Common Law.** Many of the states without the UTC or a similar non-Model UTC statute providing comprehensive default rules will rely on their common law of trusts to resolve choice of trust law questions. That law can vary in several important respects from state to state. It generally determines which state's laws govern by reference to several factors. Those factors can include, among others, the location of any trust-owned real estate, the residence of the trust creator when the trust becomes irrevocable, and the trust's principal place of administration.<sup>20</sup> A determination whether any specific issue involving a trust fits within the definition of validity, construction, administration, or meaning and effect, can, however, itself be difficult and require careful analysis.<sup>21</sup>

**(3) Alternative Strategies if Choice of Laws Principles Require Application of Original Trust State's Laws.** There are several options to consider under these circumstances.

**(A) Decanting Under the Original Trust's State's Laws.**

**i. Statutory.** "Decanting" involves the transfer of assets from an existing trust to a new trust, either preexisting or newly created. Decanting can often be accomplished by the trustee's action alone. Many states' decanting statutes do not require court approval or consent of the beneficiaries. Decanting statutes are being enacted or considered in many states. Unfortunately, however, at the time this article went to press, statutory authority was still quite limited. When our legislature enacted RSA 564-B:4-418, effective January 1, 2009, New Hampshire joined nine other states that had previously adopted decanting statutes.<sup>22</sup> All of them impose conditions, most notably a significant amount of discretionary authority with the trustee to make distributions,<sup>23</sup> and the restriction that the beneficiaries of the new trust must include some (although not necessarily all) of the beneficiaries of the original trust.<sup>24</sup> Neither New Hampshire nor any of the other adopting states' statutes allow a decanting to a new trust that adds to the class of beneficiaries defined in the decanting trust (although New Hampshire's statute and a few others allow the distributee trust to grant powers of appointment to beneficiaries, the exercise of which may benefit persons other than the beneficiaries of the decanting trust). As of this writing, New York is the only other state in the northeast with a decanting statute. But stay tuned: the law in this area is changing rapidly, as decanting is lately a popular topic for state trust law reformers.

**ii. Common Law.** Some commentators have suggested that if a decanting statute is not available under the laws of the original trust state, that state's common law may be used as the basis for decanting. If the original trust gives the trustee discretion to distribute principal, common law decanting might be allowed under the theory that such a power to distribute principal is the equivalent of a power of appointment allowing distributions in further trust; it appears, however, that Florida and New Jersey are the only states with direct precedents.<sup>25</sup> Any practitioner considering relying on a common law decanting should consult local counsel in the original trust state.

**(B) Be Careful About Decanting un-**

**der the New Hampshire Statute Without First Changing the Governing Law of the Trust.** Assuming the migrating trust agreement provides the discretion necessary to decant required under the New Hampshire statute, the author has heard anecdotally some suggestions that it may be possible to: (i) change the trust's principal place of administration from the original state to New Hampshire by replacing the current trustees with New Hampshire trustees, and moving the assets, books and records to New Hampshire; and (ii) once the place of administration is changed to New Hampshire, use New Hampshire's decanting statute to transfer assets to a newly created trust containing the desired provisions. If the original trust state has adopted the Model UTC, Model Act §1-108 allows a trustee to transfer the trust's principal place of administration to another state upon notice to the qualified beneficiaries if none of the qualified beneficiaries object during a waivable 60-day objection period.<sup>26</sup> So far, so good.

For trusts with express provisions directing that the laws of another state will govern, the principal problem with this line of reasoning is that it assumes that the trustees can rely on a New Hampshire statutory provision to take actions that would not be permitted under the trust's governing law. The trustee will have a fighting chance if the settlor did not include an express governing law provision and the application of the choice influencing factors discussed in Section B.4.b.(2), *supra*, do not clearly mandate that the other state's laws should apply. It is quite doubtful, however, that even in that case a mere change of the place of administration would necessarily authorize a revision of the trust beyond administrative matters, such as the right to delegate investment authority and avoid liability. Anyone considering this maneuver to make a substantive change to a trust's dispositive provisions or to accomplish any other change that is not clearly administrative in nature should proceed with extreme caution.

**(C) A Successful Decanting Might (But Might Not) Achieve the Migration Objectives; Consider Court Approval When in Doubt.** In any event, if a decanting is successful, governing law as to matters other than administration, such as creditors' rights against the trust or perpetuities limitations, would continue to be the law of the jurisdiction having "the most significant relationship to the matter at issue."<sup>27</sup> If, however, the original trust state's trustee is willing to obtain court approval, there is some support in the law for the proposition that a decanting statute can authorize the change of governing law beyond mere administrative matters.<sup>28</sup> In addition, a change of administration may be enough to accomplish the transfer of governing law as it relates to the desired revisions in the new trust.<sup>29</sup>

**(D) Modification/Reformation of the Original Trust.** If decanting is unavailable and a more certain change of governing law is desired, consider modifying the trust's governing law provision under the original trust state's laws to substitute New Hampshire law for the original trust state's laws. Modification by consent alone or coupled with court approval in an original trust state that has adopted the Model UTC will usually require varying degrees of settlor and/or beneficiary consent.<sup>30</sup> If the settlor's consent is not obtained in a Model UTC state, the modification cannot be contrary to the material terms of the trust (the common law *Claffin* standard applicable in those states

without a trust code provision governing modifications).<sup>31</sup> If, however, the appropriate consents can be obtained in a Model UTC-based state, modification in the original trust state can often be the most certain method of revising the trust. Reformation<sup>32</sup> may be of limited utility because of the necessity of showing a court that the settlor's intent and the terms of the trust were affected by a mistake of fact or law.

**(E) Merging the Original Trust Into a New Hampshire Trust.** The ability to create a new trust and merge the original trust into the new one may be a remedy for trust revision in the absence of decanting or modification. The trust agreement may grant the trustee a broad authority to merge the trust. In the absence of such a provision, the original trust's state laws will control the merger issue.

If the original trust state has adopted the Model UTC, the combination of separate trusts is permitted "after notice to qualified beneficiaries", if no qualified beneficiary objects and "the result does not impair rights of any beneficiary or adversely affect the achievement of the purposes of the trust."<sup>33</sup> If you are operating in the original trust state under a merger regime similar or identical to the Model Act's, the rights of the beneficiaries in both the existing and new trust must remain the same. A new trust might be created, perhaps in New Hampshire if a change in administration or governing law is desired, and the original trust could be combined with the surviving New Hampshire trust. The non-dispositive terms of the two trusts need not be identical. Merger will be unavailable, however, if the administrative terms of the two trusts vary to such a degree



**WHO'S WATCHING YOUR FIRM'S 401(k)?**

To find out more information please contact us.

- ● ● ● ABA Retirement Funds™
- ● ● ● Unique 401(k) Plans for Law Firms

Phone: (877) 947-2272 • Web: [www.abaretirement.com](http://www.abaretirement.com)  
 • email: [contactus@abaretirement.com](mailto:contactus@abaretirement.com)

The American Bar Association Members/Northern Trust Collective Trust (the "Collective Trust") has filed a registration statement (including the prospectus therein (the "Prospectus")) with the Securities and Exchange Commission for the offering of Units representing pro rata beneficial interests in the collective investment funds established under the Collective Trust. The Collective Trust is a retirement program sponsored by the ABA Retirement Funds in which lawyers and law firms who are members or associates of the American Bar Association, most state and local bar associations and their employees and employees of certain organizations related to the practice of law are eligible to participate. Copies of the Prospectus may be obtained by calling (877) 947-2272, by visiting the Web site of the ABA Retirement Funds Program at [www.abaretirement.com](http://www.abaretirement.com) or by writing to ABA Retirement Funds, P.O. Box 5142, Boston, MA 02206-5142. This communication shall not constitute an offer to sell or the solicitation of an offer to buy, or a request of the recipient to indicate an interest in, Units of the Collective Trust, and is not a recommendation with respect to any of the collective investment funds established under the Collective Trust. Nor shall there be any sale of the Units of the Collective Trust in any state or other jurisdiction in which such offer, solicitation or sale would be unlawful prior to the registration or qualification under the securities laws of any such state or other jurisdiction.

029-1105-035 (07/10)

that the interests of any beneficiary may be negatively impacted. For example, a merger into a New Hampshire trust to take advantage of our equitable adjustments regime under RSA 564-C: 1-104 *et. seq.* might be troublesome if the original trust state's laws had no similar provision and our laws will give the New Hampshire trustee a power to shift beneficial interests among income and remainder beneficiaries that did not exist before the move. In addition, the same limitations as to your ability to change governing law as they relate to validity and construction will apply in a similar fashion to those discussed above relating to decanting.

#### **(F) Using Non-Judicial Settlement Agreements (“NJSAs”) or Their Equivalents.**

**i. Under the Original Trust State's Laws.** Model UTC §111(b) provides that the “interested persons” may enter into a binding NJSA “. . .with respect to any matter involving a trust.” Interested persons who are necessary parties to the NJSA are defined under subsection (a) of Model Act §111 as “. . .persons whose consent would be required in order to achieve a binding settlement or the settlement to be approved by a court.” Subsection (d) provides a non-exclusive listing of six matters that may be resolved by an NJSA, including the transfer of a trust's principal place of administration.

If the original trust state has adopted the Model Act, has a statutory provision drawn from or similar to UTC §111, or has comparable common law authority, consult with counsel in the original trust state concerning potential problems and issues in using such an agreement to achieve the purposes of the proposed migration. If an NJSA (in some states referred to as a “family” or “private” settlement agreement) is available, and all interested persons are willing to participate, this can be the quickest, easiest and least expensive option available. It can be particularly useful if the sole purpose is to approve the resignation of the original trust state resident trustees, the appointment of successor New Hampshire resident trustees, and the transfer of the trust's principal place of administration to New Hampshire to discontinue the obligation to pay state income taxes on accumulated income and capital gains if a trust is migrating from a state that treats the residence of the trustee as its primary or exclusive taxation factor, as described in Section C., *infra*.

Tread carefully, however, if the migration purposes are more substantive in nature. Such purposes would include, for example, a modification to the non-administrative provisions of the trust agreement or a change in the governing law to New Hampshire. Model UTC §111(c) invalidates any NJSA that violates a “material purpose” of the trust or includes terms and conditions that could not properly be approved by the original trust state's courts. These are undefined standards; the Model Act's Official Comments to §1-111 are not particularly helpful in resolving the ambiguity concerning the permissible scope of a NJSA. Model Act §111(e) allows any interested person to request that the court approve the NJSA to determine any issues concerning the adequacy of any party's representation, whether the agreement contains terms and conditions that the court could properly approve, and presumably whether the NJSA violates any material purpose. Suggest to local counsel that judicial approval be sought in the original trust state if there are any doubts as to enforceability, even though that might cost time and money.

#### **ii. Be Careful About Using a New**

**Hampshire NJSA to Modify a Trust That is Not Governed by New Hampshire Law.** On its face, our NJSA provision, RSA 564-B:1-111, is broader than §111 of the Model Act. Our subsection 1-111(d) (7) includes trust modifications and terminations as proper subject matters of a NJSA, provided that the modification satisfies the “material purpose” and “properly approved” requirements of subsection 1-111(c). The corresponding Model Act section does not include modifications and terminations in its listing.

This expansion of the permissible objects of a New Hampshire NJSA has inspired a lot of loose talk and sloppy thinking about the NJSA as a panacea, the New Hampshire trust lawyer's equivalent of a Swiss army knife. Some people feel that our statute's inclusion of modifications and terminations creates a safe harbor for an NJSA to make any changes to a trust irrespective of the material purpose and proper court approval limitations of subsection 1-111(c). They see the NJSA as the ticket to achieving any objective or addressing any problem involving an irrevocable trust without the need for judicial intervention. Such wishful thinkers may conclude that a migrating trust that has changed its situs to New Hampshire can be modified under our NJSA statute to achieve any given migration purpose without first changing the trust's governing law.

Entertaining any such notion is potentially dangerous. It suffers from the same fundamental flaw described in the discussion of decanting in Section B.4.b.(3)(B), *supra*: the assumption that the trustee of a trust not governed by New Hampshire law can apply the tools made available by our trust code to retrofit any trust provision, be it substantive or administrative in nature. If the original trust state's laws allow a NJSA to modify a trust, perhaps a NJSA under that law can be structured before the move to accomplish both the change of situs and governing law, provided that local counsel opines that the NJSA would be enforceable under the original trust state's laws. Only after the trust moves here and changes its governing law can New Hampshire counsel consider making any substantive changes non-judicially through a New Hampshire NJSA, reformation, decanting or merger.

**(G) Quick Reference Guide for Selected States' Options for Changing Governing Law and Otherwise Retrofitting Substantive Trust Provisions.** Appendix B summarizes the legal authority (statutory and common law) in eight northeastern states facilitating the movement of trusts and changes to governing law, with and without the need for court intervention or the formal appointment of guardians *ad litem*.

### **C. STATE INCOME TAX ISSUES**

#### **1. In General: A Mosaic of 50 Different Rules for Asserting Taxing Jurisdiction and Taxing Trust Income and Gains.**

**a. Taxation Systems.** Seven states impose no trust income tax. The remaining states impose a tax at top rates from 3 percent to almost 13 percent.<sup>34</sup> The state fiduciary income tax will usually apply to accumulated income and capital gains on intangible assets of trusts that are not treated as “grantor trusts” for federal income tax purposes.<sup>35</sup> The income and gains of grantor trusts will generally be taxed to the

grantor.<sup>36</sup> In most cases, trust distributions received by beneficiaries of non-grantor trusts will be taxed to the recipient and deductible by the trust under rules similar to those applicable under Code §§661 *et. seq.*<sup>37</sup> The accumulated “source” income (consisting of income from real estate or tangible personal property, or the operation of a business, located in the original trust state) will normally be taxed by the original trust state regardless of which actions may be taken with respect to the trust.<sup>38</sup>

**b. Jurisdiction: The Taxation Factors.** Compounding the difficult choice of law questions are the often more complex issues relating to state income taxes. Each state has its own separate body of law for determining whether a trust with some connection to the state will be taxed by its revenue commission. The general rules applicable to governing law do not apply in determining the states that have taxing jurisdiction over a trust with connections, however subtle or obvious, to more than one state. There is no legal impediment in the federal constitution or otherwise to subjecting a trust’s income and gains to taxation by several different states, or no state at all.<sup>39</sup> One commentator posits a hypothetical case involving a trust subject to the income tax jurisdiction of eight different states.<sup>40</sup> Any attorney who allows that to happen may be making a nervous call to his or her carrier. This is yet another reason why careful consideration and planning and administration are important when considering a move of a trust from one jurisdiction to another.

All states that tax the income of trusts base their jurisdiction to tax trusts on one or a combination of two or more of the following four factors: (i) the residence of the testator of the trust at the time of death for a testamentary trust (resident testator), or the residence of the settlor at the time the trust becomes irrevocable for a living trust (resident settlor); (ii) the residence of the trustee; (iii) place of administration, and (iv) residence of the beneficiaries.<sup>41</sup> New Hampshire imposes a tax on an irrevocable, non-grantor resident trust’s accumulated net interest and dividend income based on a *pro ration* system that exempts that income from taxation according to the percentages of current beneficiaries who are New Hampshire residents during any given taxable year. Therefore, if a trust migrating to New Hampshire has no New Hampshire resident beneficiaries, it will pay no interest and dividends tax.<sup>42</sup>

New York, New Jersey, and Massachusetts are the only three of our eight selected states that base their taxing jurisdiction in part or primarily on the residence of the trustee or the place of administration. These states will afford the best opportunity for planning for trusts with no current New Hampshire resident beneficiary that are considering a move to New Hampshire for state income tax refuge. Changing trustees to those residing in New Hampshire, moving the trust’s tangible and intangible personal property to New Hampshire, and keeping books and records here can be easily achievable objectives.<sup>43</sup> For trusts migrating from these states there is no need to change the trust’s governing law or otherwise modify the trust (unless, of course, there are substantive modifications needed to access our trust law benefits). Conversely, states such as Pennsylvania, Maine and Vermont base their tax solely or primarily on resident testators or resident settlors. It will be difficult or impossible to accomplish an original trust state income tax avoidance motivated migration from these jurisdictions, unless accumulated income or capital

gains can be distributed to beneficiaries who do not reside in the original trust state.

**2. The Selected Eight Northeastern States’ Taxation Factors.** The following is a survey of the laws of our eight northeastern states that the New Hampshire lawyer is likely to encounter when working with foreign trustees, beneficiaries and their local attorneys who are considering a migration.

**a. New York/New Jersey.** New York will generally tax a New York “resident trust” on the sole basis of the resident testator or resident settlor, unless: (i) all trustees are domiciled outside of New York; (ii) all trust assets are located outside of New York; and (iii) there is no New York source income.<sup>44</sup> Avoiding continuing New York state and local taxation of a migrating trust’s accumulated income and capital gains would require two actions: (i) the replacement of all New York resident trustees with trustees who reside in New Hampshire, and (ii) the movement of all of the trust’s personal property -- both tangible and intangible -- to New Hampshire.<sup>45</sup> One dollar of New York source income will in itself be sufficient grounds for New York to assert its continuing jurisdiction. Therefore, before the move, a careful portfolio review should be undertaken to be sure that there is no New York source income deeply imbedded in any trust-owned private equity funds, REITs or other non-publicly traded investments.<sup>46</sup> If there is both New York-situed real property and immovable personal property in the trust, it may be possible to first divide the trust<sup>47</sup> pursuant to an express authorization in the trust document

## DOUGLAS, LEONARD & GARVEY, P.C.

*Experienced • Effective*

Plaintiff’s Litigation & Employment Law

- Employment Law
- Human Rights Commission/ EEOC
- Wrongful Termination

- Sexual Harassment
- Medical Malpractice
- Supreme Court Appeals
- Federal Litigation

*Please contact us to discuss a referral or co-counsel arrangement.*

*Fee Division Available for Referrals*

*Fee Division Available for Referrals*

6 Loudon Road, Suite 502  
 Concord, New Hampshire 03301  
 603-224-1988  
 www.nhlawoffice.com

or upon approval of the New York Surrogate having jurisdiction over the trust. The divided trust containing the New York real estate or tangibles will continue to be taxed in New York. Moving the trustees and assets of the divided trust containing the intangible personal property (*i.e.*, cash and marketable securities and movable tangible personal property) to New Hampshire should allow that trust to enjoy New York tax-exempt status.<sup>48</sup> New Jersey has a similar rule that creates the same planning opportunities as those available in New York.<sup>49</sup>

**b. Massachusetts.** The tax can be avoided by assuring that all Massachusetts resident trustees resign and are replaced with New Hampshire residents.<sup>50</sup> For corporate trustees, a transfer of the trusteeship to a trust company with its principal place of business in New Hampshire would be necessary.<sup>51</sup>

**c. Pennsylvania, Maine and Vermont.** Each of these states will tax a trust if the state's sole connection to the trust is a resident testator (in the case of a testamentary trust), or a resident settlor (in the case of a living trust).<sup>52</sup> The only options for a Pennsylvania, Maine or Vermont trust relocating to New Hampshire and wishing to avoid paying income taxes to the original trust state are to confine trust investments to those producing tax-free income or growth.

**d. Connecticut and Rhode Island.** Connecticut will tax the income of a testamentary trust based on a resident testator. As was the case under the laws of the states listed in the preceding Section C.2.c., transferring a Connecticut testamentary trust to the New Hampshire probate courts, and replacing the former Connecticut resident trustee with a New Hampshire resident trustee, will not eliminate the Connecticut income tax. However, in the case of a living trust with a Connecticut resident settlor, and with respect to the Rhode Island trust (testamentary trust or living), for the state to assert its continuing tax jurisdiction if the former resident trust no longer has a resident trustee.<sup>53</sup> In Connecticut, that resident beneficiary must not be "contingent".<sup>54</sup> Where there are Connecticut resident and non-resident mandatory income beneficiaries, it may be possible for the trust to be divided into two trusts: a trust with only Connecticut income beneficiaries that will remain subject to Connecticut income tax, and a second trust with no Connecticut resident income beneficiaries that is not.<sup>55</sup> The income of a trust migrating from Rhode Island that has a Rhode Island settlor or testator will avoid Rhode Island income taxes to the extent that the current and remainder beneficiaries are not residents of Rhode Island.<sup>56</sup>

**3. Achieving Closure With The Original Trust State's Taxing Authorities.** At a minimum, New Hampshire practitioners should consult with the migrating trust's state income tax return preparer in the original trust state to determine whether the last return filed in the original trust state should be clearly marked "final", and contain disclosures of the legal basis for concluding that the move to New Hampshire terminates the original trust state's taxing jurisdiction under that state's laws. In many cases it will not be entirely clear whether a migrating trust must continue to pay taxes. In these instances, the New Hampshire practitioner might suggest that the advisors in the original trust state request a ruling from that state's taxation department if it has a procedure for such guidance. To minimize interest and penalties, consider advising the successor New Hampshire resident trustee to segregate funds to pay taxes, penalties and interest if the filing position is unsuccessful.<sup>57</sup>

## D. FEDERAL TAX ISSUES.

**1. GST Tax.** Care must be taken to ensure that any decanting, modification, or merger of a trust does not destroy exempt status for those trusts that are permanently exempt from generation-skipping tax because they are either: (i) grandfathered (trusts that were irrevocable on September 25, 1985, and wills executed before October 22, 1986, if death occurred prior to January 1, 1987); or (ii) those trusts to which GSTT exemption has been allocated.<sup>58</sup> As a practical matter, most modifications to trusts that extend the vesting of beneficial interests to later ages than those provided in the original trust will cause a shift in beneficial interests to beneficiaries in lower generations and destroy the GSTT exempt status of the trust property. This would negate the ability to extend the time for outright distributions to beneficiaries in those trusts.<sup>59</sup>

**2. Gift and Estate Tax.** Any change to a trust's dispositive provisions could result in a taxable gift if there is a shift in beneficial interest from one beneficiary to another.<sup>60</sup> Decanting or modification by a trustee, however, is not an act of the beneficiary even if there is a shift in beneficial interest. This is so because a voluntary act on the part of the transferor is required for a taxable gift to occur.<sup>61</sup> In the event the beneficiary's consent is required (or even if not required, if the beneficiary fails to object), and a shift in beneficial interest occurs, the issue is less clear but the voluntary act required to impose a taxable transfer would still appear to be absent. If there is no gift because of a lack of shift of beneficial interest or lack of voluntary action by the beneficiary, there should be no estate tax unless the new trust otherwise gives the beneficiary taxable powers that would cause inclusion. An argument the IRS might make that a settlor who exercised direct or indirect control over the trustee who implemented a change in the trust would create inclusion under Code §2038 might not be successful because such a power would have to be present in the document. The mere opportunity to persuade others to act should not rise to the level of a §2038 power.<sup>62</sup>

Gift or estate tax issues will also arise when: (i) a beneficiary exercises a power of appointment granted under the original trust to appoint in further trust (including decanting), and (ii) the appointment in further trust extends the vesting of any interest in a new trust for a period ascertainable without regard to the date of the creation of the first power in a state that does not measure the vesting period by reference to the original trust. This is known as the "Delaware tax trap."<sup>63</sup> Because the Code sections imposing gift and estate tax were enacted before perpetual trusts were allowed under any state's laws, they are difficult to apply when a trust is moved from a state with a perpetual trust law. How does one extend the duration of a trust that had an unlimited duration to begin with? The risk of a gift or estate tax inclusion should be minimal if the second trust provides that the vesting of its beneficial interests are tested with reference to the creation of the first trust.<sup>64</sup>

**3. Income Tax.** A decanting to a further trust, a modification or a merger should not result in a recognition event for income tax purposes because there is no exchange of interests.<sup>65</sup> In the event of a decanting, or moving assets, as opposed to a modification or merger, the transfer to the new trust should carry out distributable net income from the old

trust to the new trust.<sup>66</sup>

## E. CONCLUSION

Simply changing a trust's situs to New Hampshire can provide several benefits. They include, in some cases, potentially significant state income tax savings and access to those of our favorable trust laws relating to trustee functions that are clearly administrative in nature. However, should the New Hampshire lawyer find that a trust considering a migration requires either modification, change of governing law, or both, and there are no provisions in the trust instrument that would authorize an extrajudicial remodeling, there are actions that the lawyer might take to help achieve this result. Because each state from which any given trust might be moved will offer its own array of migration options (judicial and nonjudicial) and will impose different requirements, there will be no avoiding a careful review of the tax and trust laws of the original trust state and a thorough consultation with local counsel before proceeding.

The important trust law reforms our legislature has painstakingly made during the past five years give New Hampshire a compelling opportunity to be the destination of choice in the northeast for large trusts now situated in less income tax friendly and trust law favorable jurisdictions. Some among us in the estate planning community will be willing to invest the time and effort necessary to achieve a thorough understanding of the issues and complex legal and tax principles that must be resolved and applied in any given case. Those who do so stand to provide helpful guidance to non-New Hampshire trustees and their home state advisors, and in the process reap rewards for themselves and the trustees and beneficiaries of the successfully migrated trusts.

## ENDNOTES

1. Changing a trust's situs and/or governing law can be the gateway to remodeling a migrating trust to access one or more of the benefits of New Hampshire trust laws. Those benefits might include, without limitation: (i) avoiding any statutory or common law requirements in the settlor's home state relating to beneficiary information and reporting, as our statutory beneficiary notice and reporting requirements are default rules that allow for what have colloquially been referred to as "quiet trusts"; (ii) using NH's robust directed trustee statutes, RSA 564-B: 12-1201 *et. seq.* and 7-711, which provide that a directed trustee is an "excluded fiduciary" and protect the directed trustee from surcharge liability for implementing the instructions of the directing party; (iii) achieving enhanced creditor protection for both discretionary self-settled asset protection trusts, RSA 564-D, and discretionary trusts settled by third parties, RSA 564-B: 8-814(b) (beneficiary interests are not property interests or enforceable rights); (iv) avoiding a home state's rule against perpetuities, as we allow perpetual trusts, RSA 564:24; (v) accessing our comprehensive "total return trust" laws, including conversion of an income beneficiary's interest to a 3-5% unitrust interest, RSA 564-C:1-106, and permission for the trustee to make annual "equitable adjustments", RSA 564-C:1-104, with extensive protections for trustees' good faith decisions whether or not to consider or adopt a total return strategy, RSA 564-C:1-104 (g), (h) and 1-105; (vi) using our accessible decanting statute, RSA 564-B:4-418, discussed in more detail in Section B.4.(b)(3) of this article, *infra*; (vii) creating non-charitable "purpose trusts" for any purpose and for an unlimited duration, RSA 564-B:4-409; (viii) avoiding the need to appoint guardians *ad litem* in probate proceedings and employing one or more new options for non-judicial means for achieving finality in settling trust issues and resolving issues of fiduciary liability through enhanced provisions for beneficiary representation (parental, fiduciary and virtual) of minor, unborn, incapacitated and unascertained beneficiaries, RSA 564-B:3-301, *et. seq.*, and through non-judicial settlement agreements that can cover a surprisingly broad range of matters involving a trust, RSA 564-B: 1-111, supplemented by rules for providing notice to beneficiaries and obtaining binding consents from adult, competent beneficiaries and those whose interests they are empowered to represent: RSA 564-B:1-104(a)(1) (defining when a person has actual knowledge of a fact), 1-109 (describing methods and waiver of notice) and 1-103(12) and 1-110 (defining "qualified beneficiary" generally as a limited class of current beneficiaries and first line remainder beneficiaries entitled to receive notices, give binding consents, etc.); and

(ix) accessing our nuanced prudent investor standards, which, among other benefits, can avoid any effectively absolute duty to diversify trust investments that might exist under another state's common law principles, and the resulting potential for fiduciary surcharge liability.

Incorporating those prudent investor standards in a migrated trust can allow a trustee to confidently maintain a concentrated or single asset in trust (see RSA 564-B:9-901(b), absolving a trustee from surcharge liability "...to the extent that the trustee acted ...in good faith in reliance on the express terms of a trust or a court order in choosing not to diversify trust investments", and avoid application of any common law rule in the home state that otherwise might require the trustee to petition a probate court to eliminate a trust's retention direction to avoid loss or damage to the trust estate irrespective of whether such retention was a material purpose of the trust settlor. A discussion of the duty of diversification and the common law duty to seek authority to deviate from the terms of a trust to eliminate a retention direction is provided in Cline, *Do Trustees Have an Absolute Duty to Diversify?* 31 Tax Mgmt. Est., Gifts & Tr., J. 140, 145 (2006) (discussing *Matter of Pulitzer*, 139 Misc. 575, 578; 249 N.Y.S. 87, 92 (Sur. Ct. 1931), and its progeny). *Pulitzer* involved the Joseph Pulitzer trust. The presiding Surrogate invoked the doctrine of "equitable deviation" to effectively grant the trustees' petition to eliminate Mr. Pulitzer's trust's retention direction relating to the stock of the corporation that published the *World* newspapers. An extensive discussion of the New Hampshire statutes that address the diversification and retention issues is provided in McDonald, *Open Architecture Trust Designs Under New Hampshire Law Provide Flexibility and Opportunities*, 48 N.H. Bar J. 34, 37-41 (2008). A migration made to access our liberal and forgiving investment diversification provisions and our prudent investor standards in general may be easier and more certain than migration designed to achieve more "substantive" changes to a migrating trust, as discussed in notes 10 and 18-21, *infra* and the accompanying text, and Appendix "A", because RSA 564-B:9-907, added in 2009 to our version of Model UTC Article 9, the Model Act's prudent investor provisions, specifically characterize as "administrative" in nature all of the provisions of our Article 9. The author has found no similar provision in any other state's Model UTC-based statute.

2. See Senate Bill 394 (2006 NH Laws, Ch. 320).

3. TMCA, §1, II.

4. *Lynch Makes Trust Reforms Law to Attract Finance Jobs*, Manchester Union Leader, June 21, 2006, p.B7.

5. Silverman, *States Court Family-Trust Business*, Wall Street Journal, June 22, 2006, p. D1. For a detailed description of TMCA, a comprehensive history of New Hampshire trust law reforms, and the policy and demographic context, see Arruda and Ardinger, *The Policy and*

# POLYGRAPH EXAMS



**JAMES A. JOHNSON, JR., Esq.**  
**603-424-6365**  
**[www.johnsonpolygraph.com](http://www.johnsonpolygraph.com)**

*Provisions of the Trust Modernization and Competitiveness Act of 2006*, N.H. Bar J., August, 2006, at p. 16.

6. The subject matter is confined to migrating *existing* irrevocable trusts to New Hampshire. The article does not cover the much easier question of whether and how a non-New Hampshire resident settlor can create a new irrevocable trust with New Hampshire resident trustees and/or New Hampshire governing law to access any one or more of the benefits of New Hampshire situs and trust laws that are discussed herein. Generally, there are very few obstacles to accomplishing this under the applicable choice and conflicts of laws principles. A good discussion of those principles and how a non-resident can create a trust in another state in general is provided in Nenko, *Relieving Your Situs Headache: Choosing and Rechoosing the Jurisdiction for a Trust*, 40 U. Miami Inst. on Est. Plan. 3-11-13 (2006) (hereinafter, cited as "Nenko, *Situs Headache*"). See also NH RSA 564-B:1-108(a)(1) and (2) (a trust provision designating the principal place of administration will be valid if the trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction, or all or a part of the administration occurs in the designated jurisdiction); 1-107(1) (allows designation of governing law in a trust instrument unless it is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue). These provisions of New Hampshire's version of the Model UTC are identical to the corresponding provisions of the Model Act and incorporate many of the applicable common law principles.

7. An empirical study of the effect of several states' repeal of their rules against perpetuities ("RAPs") on trust migration to and creation in those states demonstrates the significant impact of trust law reform. See Sitkoff and Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Study of Perpetuities and Taxes*, 115 Yale L.J. 356, 359 ("...interstate competition for trust funds is both real and intense. Our analysis indicates that a state's abolition of its (RAPs) increased its reported trust assets by about \$6 billion and its average trust account size by roughly \$200,000"). Extra motivation for non-New Hampshire resident trustees to consider a move to New Hampshire, or for their local counsel to recommend it, is the notion that a failure to do so would expose them to claims of breach of the fiduciary duty to protect and preserve trust assets (the trustee), or professional malpractice (their counsel). See generally Myers and Samp, *South Dakota Trust Amendments and Economic Development: The Tort of "Negligent Trust Situs" at its Incipient Stage*, 44 S. D. L. Rev. 662 (1998). There is a general common law duty that requires a trustee to "use reasonable care and skill to preserve the trust property." Restatement (Second) of Trusts §176 (1959); see also the recognition of this duty in *In re: Joseph Heller Inter Vivos Trust*, 613 N.Y.S. 2d 809 (Sur. Ct. N.Y. Co. 1994), and in §7-305 of the Uniform Probate Code ("UPC"), which has been adopted in at least six states (including Massachusetts, effective July 2011). Model UTC §108(b) imposes on a trustee a "...continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries". §108(c) allows (but does not direct) a trustee to further that duty by transferring the trust's principal place of administration to another state. The Official Comments to Model Act Section 108 state that the change might be desirable "to secure a lower state income tax rate". The risk that a trustee might be found to have breached the continuing duty to move the administration of a trust to New Hampshire may be especially acute in cases involving trusts now situated in high state income tax states such as New York and Massachusetts, which base their income tax jurisdiction primarily or exclusively on the home state residence of the trustee(s), as described in some detail in Section C., *infra*. Although the author is not aware of any reported case in which a trustee has been surcharged for failing to minimize income taxes, he has heard anecdotal evidence that such cases are pending in New York State. It seems likely that a successful surcharge case is inevitable. All of this should create its own positive momentum for us in New Hampshire to realize TMCA's potential.

8. New Hampshire has been listed as one of six states across the country that has adopted the most progressive reforms and offers the best environment for migrating trusts. See Worthington and Merrick, *Which Situs is Best*, Trusts and Estates (January 2010) at p. 54. The other five states cited by the authors are: South Dakota, Delaware, Alaska, Nevada and Wyoming. Other than New Hampshire, Delaware is geographically the closest of the favored states to the important financial centers of the Northeast such as the Boston and New York metropolitan areas. Our relative proximity to the large trusts currently situated in those financial centers gives us a natural advantage over the five more remote progressive trust jurisdictions.

The promulgation by the National Commission of Commissioners of Uniform State Laws ("NCCUSL") of the Model UTC in 2000, and NCCUSL's subsequent Model UTC amendments made in 2001, 2003, 2004 and 2005, have significantly contributed to the movement among the states to codify their trust laws. NCCUSL's website, [www.nccusl.org](http://www.nccusl.org), is very useful for those seeking to understand the Model Act, and to read the Official Comments—an important part of the legislative history for any adopting state. The website lists 23 adopting states as of July, 2010, with one state (New Jersey) considering enactment in 2010.

None of the adopting states have enacted the Model Act without changes. Many states have omitted the more controversial provisions (particularly relating to things like beneficiary notices), and substantially modified other provisions. It is very difficult, therefore, to make generalizations about the laws of the various "UTC states"; indeed, since 2006 N.H. RSA 564-B has been so thoroughly worked-over that one wonders whether New Hampshire can still fairly be counted among the UTC adopting jurisdictions. When considering the rules that might be

applied in any given UTC state from which a trust is considering migrating, there is a very useful provision-by-provision comparison sheet on the NCCUSL website entitled *Significant Differences in States' Enacted Uniform Trust Codes*, available at [www.nccusl.org/update/ActSearchResults.aspx](http://www.nccusl.org/update/ActSearchResults.aspx).

9. In some cases, for example, the objectives of any given migration might be accomplished by simply appointing a New Hampshire co-trustee to serve with the original trust state's resident trustee, provided that both states will recognize New Hampshire as the principal place of the trust's administration. Acutely fact-sensitive issues can arise, however, when there are multiple co-trustees, fiduciary trust advisors, and other participants, some of whom are New Hampshire residents and others who reside in (or have their principal place of business in) other states in which they perform some fiduciary duties. Although there is no bright line standard for determining which among such states will be the trust's situs or principal place of administration, some modest guidance is provided to the courts supervising trusts in UTC states. Both Model UTC §108 and our corresponding RSA 564-B:1-108 use the term "principal place of administration" in favor of the traditional term "situs". (This article will use those two expressions interchangeably.) The Official Comments to Model Act §108 state that a trust's principal place of administration ordinarily will be the place where the trust is located. When co-trustees are located in different states or when a single institutional trustee has trust operations in more than one state, "... other factors may become relevant, including the place where the trust records are kept or trust assets held, or in the case of an institutional trustee, the place where the trust officer responsible for supervising the account is located." Perhaps a good proxy for determining the minimum amount of administration that should be undertaken in New Hampshire by a New Hampshire resident trustee to affect a change in situs where there are co-trustees and other participants (trust advisors and trust protectors) performing trust functions in other states can be found in RSA 564-D. This is New Hampshire's Qualified Dispositions in Trust Act ("QDTA"), our self-settled asset protection trust statute. Section 3 of QDTA defines "qualified trustee". It requires that to secure the asset protection benefits of the statute for an out-of-state settlor, there must be at least one trustee who is a New Hampshire resident individual or regulated institutional trustee that maintains a principal place of business in New Hampshire, and that trustee "... maintains or arranges for custody in [New Hampshire] of some or all of the property that is subject to the qualified disposition, maintains records for the trust on an exclusive or non-exclusive basis, prepares for or arranges for the preparation in [New Hampshire] of fiduciary income tax returns for the trust, or otherwise materially participates in [New Hampshire] in the administration of the trust."

To eliminate any confusion most trusts seeking a definitive change in situs will substitute a New Hampshire resident trustee or trustees for the resigning or removed trustees who were residents of the original trust state. This will be an absolute necessity if the original trust state is Massachusetts, New York or New Jersey and the migration objectives include state income tax avoidance, as discussed in notes 45 and 50, *infra*, and the accompanying text.

10. The Scott treatise describes the effect of a migration that effects a change in the law that governs the trust's administration as follows:

Although a change in the place of administration is authorized, any resulting change in the applicable law will presumably include only matters of administration. The law of the new place of administration will probably be applicable to the compensation of the trustee, the scope of the permissible investments, and the powers and duties of the trustee. On the other hand, the change in the place of administration will not affect those matters that pertain to the disposition of the trust property. Thus, the change in the place of administration will not affect the determination of who are the beneficiaries of the trust, or probably the allocation of receipts and expenses to income or principal. Presumably as to these matters, the settlor or testator did not intend to make applicable the law of the place of administration nor did he intend to change the applicable law merely because he permitted a change in the place of administration.

5A Scott & Fratcher, *The Law of Trusts* (4<sup>th</sup> ed. 1989), §615 at 369 (footnotes omitted). See also the discussion in notes 18 and 20-21, *infra*, the accompanying text, and Appendix "A", *infra*.

11. Providing an in-depth analysis of the complex jurisdictional and choice of law issues that might impede or defeat an attempt to change a trust's governing law is beyond the scope of this article. Richard Nenko at Wilmington Trust has identified four obstacles that must be overcome to ensure that dissident beneficiaries will not defeat and the original trust state courts will not disregard a choice or a change in governing law. Mr. Nenko's excellent, up-to-date white paper, *Perpetual Dynasty Trusts: Tax Planning and Jurisdiction Selection* (May 3, 2010), is available on the Wilmington Trust website ([www.wilmingtontrust.com/.../wtc.../lib-wp:PerpetualDynastyTrusts.pdf](http://www.wilmingtontrust.com/.../wtc.../lib-wp:PerpetualDynastyTrusts.pdf)). The Nenko paper describes those four obstacles on pages 135-163.

12. If you are dealing with an original trust state that has adopted the UTC, the Model Act's default provision for the resignation and removal of trustees is §704. §704(c)(2) provides that if the governing instrument is silent, a complete vacancy in the office of trustee of a noncharitable trust can be filled by a successor chosen by the unanimous agreement of the qualified beneficiaries without any court involvement.

13. A reluctant trustee might be convinced to resign if the trustee is made aware that a failure to cooperate might be an actionable breach of duty to ensure that the trust is administered

in the most favorable situs, as described in note 7, *supra*. A corporate trustee with a New Hampshire branch or state-chartered affiliate might simply move the trust's administration to the New Hampshire branch, or resign in favor of the New Hampshire affiliate. If the governing instrument prescribes no procedure for filling the vacancy created by a voluntary resignation, the original trust's state's trust code's statutory default provisions could provide a solution that avoids the local probate court's involvement. See, e.g., Model UTC §704(c)(2). This provision of the Model Act allows a vacancy to be filled by a successor appointed by the unanimous agreement of the trust's qualified beneficiaries. The Official Comments to this Model UTC section make it clear that no court involvement will be necessary in a UTC state.

14. See, e.g., Conn. Gen. Stat. §45a-242. The Model UTC's removal provision is §706. §706(b)(4) allows a court to approve a petition for the involuntary removal of a trustee if all qualified beneficiaries indicate their consent or approval, and the court finds that removal "...best serves the interests of all of the beneficiaries, and is not inconsistent with a material purpose of the trust." If the original trust state has adopted the Model UTC or has similar statutory or common law, a court might find that granting the petition and permitting the appointment of one or more New Hampshire trustees will best serve the interests of the beneficiaries and be consistent with the trustee's duties to administer the trust in a more appropriate situs if, for example, the move might save state income taxes. See generally the discussion in note 7, *supra*, concerning the trustee's common law and statutory continuing duty of administration in an appropriate situs.

15. The use of nonjudicial settlement agreements, or "NJSAs", under RSA 564-B:1-111 is described in detail in subsection b.(3)(F), *infra*, of this Section B.4. The NJSA could, for example, modify the trust agreement to access New Hampshire's laws concerning investment or distribution trust advisors and directed trustees, converting a mandatory income trust to a statutory unitrust or using our equitable adjustments regime, or directing or authorizing the holding of an asset concentration or even a single asset – all changes to the trust's administrative provisions that should not affect beneficial interests and should therefore be proper subjects of a NJSA. The NJSA could also make more substantive modifications that might be more risky and potentially controversial, such as granting, eliminating or changing powers of appointment, extending or accelerating the trust's termination, incorporating special needs provisions for disabled beneficiaries, adding spendthrift protections, or even adding, eliminating or transforming the nature of beneficial interests. The petition should request the court's determinations that: (i) the NJSA satisfies the standards of RSA 564-B:1-111(c) – that its provisions do not violate a material purpose of the trust such that the court could properly approve them, and (ii) the representation of any minor, unborn or unascertained beneficiaries or any other interested party by each signatory of the NJSA who purports to represent the interests of that interested party has adequately done so without any disqualifying conflicts of interest under RSA 564-B:3-302-304, and 305(a).

As you are in court anyway, it makes sense to include in your NJSA all of the modifications that you can conceivably anticipate might better accommodate the trustee and the beneficiaries, immediately and in the future. Having a judge's imprimatur on the NJSA after notice to all interested parties and a hearing will give the NJSA a finality that would not otherwise be available.

16. See *In re Estate of McComas*, 165 Misc. 2d 947, 948 (Sur. Ct. 1995).

17. See *In re Bush*, 2 Misc. 3d 744 (Sur. Ct. 2003); *In re: Estate of Rockefeller*, 2 Misc. 3d 554, 555 (N.Y. Sur. Ct. 2003).

18. See the Scott quote contained in note 10, *supra* and the accompanying text, and the quick reference guide attached as Appendix "A". See also *Nenno, Situs Headache*, note 6, *supra*, 40 U. Miami Inst. on Est. Plan. At 3-11-13; Restatement (Second) Conflict of Laws §§267-282 (1971); Bogert and Bogert, *The Laws of Trusts and Trustees* §§291-301 (Rev. 2d. ed. 1992); Moore, *Choice of Law and Trust: How Broad is the Possible Spectrum*, 36 Miami Inst. on Est. Plan. ¶6 at 2-5 (2002) (hereinafter cited as "Moore"), (suggesting that the term "validity" refers to "substantive matters", while "meaning and effect," (together with "construction" and "administration") refer to "dispositive matters", but admitting to some overlap and blurred boundaries.)

19. New Hampshire's version is NH RSA 564-B 1-107(2). Although Chapter 564-B makes several important additions and changes to the Model UTC, this particular provision is taken *verbatim* from corresponding Model UTC §107(2).

20. For matters involving validity, where the issue involves real estate, the law of domicile of the testator will govern for testamentary trusts, and the law of the place where the real estate is located will govern for living trusts. Where the issue involves personal property, the law of the place of administration will govern for both living and testamentary trusts. For matters involving construction, where real estate is involved, the law of the domicile of the testator will govern in the case of a testamentary trust, and the law of the location of the real estate will govern in the case of a living trust. For personal property, the law of the place of administration will govern for both testamentary and living trusts. For matters involving administration, the law where real estate is located will govern for both testamentary and living trusts, and for personal property, the domicile of the testator will govern for testamentary trusts, and the place where the trust is administered will govern for living trusts. See Moore, note 18, *supra*, at 3-11.13; Restatement (Second) Conflict of Laws §§267-282.

21. The Scott quote in note 10, *supra*, and the quick reference guide attached as Appendix "A", are good places to start, but for the close cases a more detailed analysis of these issues

is required and guidance for doing so is provided in the Nenno white paper cited in note 11, *supra*, at 169-186.

22. As of December 31, 2009, the states were Arizona, Alaska, Delaware, Florida, Nevada, New York, North Carolina, South Dakota, and Tennessee, with additional states (most notably Ohio and Pennsylvania) considering enactment or recently enacting statutes.

23. Florida and New York require "unfettered" and "absolute" discretion, respectively, see Fla. Stat. §736.04117(1) (a) and New York E.P.T.L. 10-6.6 (b) (1), although in New Hampshire and the other states, discretion limited by an ascertainable standard should be sufficient.

24. See Halperin, *You May Not Need to Whine About Problems with Your Irrevocable Trust: State Law and Tax Considerations in Trust Decanting*, 42 U. Miami Inst. on Est. Plan. at 33 (2007) (hereinafter cited as "Halperin"); and Belcher, McCaffery and Schneider, *Recent Developments*, 43 U. Miami Inst. on Est. Plan. at 27-69 (2008) (hereinafter cited as "Belcher, et al.")

25. Restatement (Second) of Property: Donative Transfers 11.1 cmt. d (1986); *Phipps v. Palm Beach Trust Co.*, 196 So. 299 (Fla. 1940); *Matter of Wiedenmayer*, 254 A. 2d 534 (N.J. Super. Ct. App. Div. 1969). See also Belcher, et al., note 24, at 34; McCaffery and Schneider, *Recent Developments*, 43 U. Miami Inst. on Est. Plan. at 34 (2008), suggesting that reliance on common law, without the protection of a court order, should be avoided.

26. New Hampshire's version is RSA 564-B: 1-108. Our section 1-108(d) outlines the requirements for moving the place of administration of a trust from New Hampshire, including the qualified beneficiary notice procedure. Much of Section 1-108(a) – (e) strictly follows the corresponding provisions of Model UTC §108. However, subsection (e) of our statute will allow a move unless a majority of the qualified beneficiaries make a timely objection. By contrast, Model Act §108(e) allows a single objecting qualified beneficiary to prevent the transfer, in which case the trustee must seek court approval for the move, presumably applying the "best interests of the beneficiaries", "material purposes" and "appropriate administration" standards discussed in note 7, *supra*. Be aware, therefore, that our change of situs provision is more accessible than those of the other Model UTC-based states that have adopted the flush language of Model Act §108(e).

27. See NH RSA 564-B 1-108, and the Official Comments to Model UTC §108.

28. See *Matter of Dornbush*, 627 N.Y.S. 2d 232 (N.Y. Sur. 1995).

29. See Restatement (Second) Conflict of Laws §§267-282; Fla. Stat. §736.0107. See also *Nenno, Situs Headache*, note 6, *supra*, at 3-11.13, discussing the difficulty of the original trust state in attempting to challenge the governing law of the new state.

30. See Model UTC §411. The Model Act offers adopting states two alternative approaches for state legislatures considering §411(a). The options are allowing modification by unanimous settlor and beneficiary consent: (i) only with court approval, or (ii) nonjudicially. Importantly, for a trust considering a migration from a Model UTC-based state that has chosen to allow for the nonjudicial option, be aware that Model Act UTC §411(a) permits a non-charitable irrevocable trust to be modified upon consent of the settlor and all qualified beneficiaries without any court involvement "...even if the modification ... is inconsistent with a material purpose of the trust". The Model Act's drafters are effectively allowing the settlor by his or her participation to waive the material purposes restriction that would have prevented the modification under the restrictive common law *Clafin* principles. See English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Mo. L. Rev. 143, 169 (2002) (Professor English is the Model UTC's Reporter).

Our RSA 564-B:4-411 does not allow nonjudicial modification by unanimous settlor and beneficiary consent, presumably out of concern that the settlor's participation in a modification of an irrevocable trust might create estate tax inclusion issues for the settlor under Code §§2036 and 2038. This is one of the few instances where New Hampshire's version of a Model UTC provision is less liberal and less accessible than the Model Act's. Several other Model UTC adopting states have likewise chosen not to adopt Model Act §411(a) at all, so do not assume that this potentially very useful method of nonjudicial modification will be available in all UTC-based jurisdictions.

The Model UTC also allows court-sanctioned modification in a number of other circumstances: (i) with consent of all qualified beneficiaries, if the court "concludes that continuance of the trust [at all, in the case of termination, and in its current form, for modification] is not necessary to achieve any material purpose of the trust", Model Act §411(b); (ii) if not all qualified beneficiaries consent, if the court concludes that the trust could have been modified or terminated under §411(a) or (b) had all qualified beneficiaries consented and "the interests of a beneficiary who does not consent will be adequately protected", Model UTC §411(e); (iii) "because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust", or continuation of the trust on its existing terms would be impractical, Model UTC 412; and (iv) to achieve the settlor's tax objective, even giving it retroactive effect, so long as the modification is not "contrary to the settlor's probable intention", Model UTC §416. NCCUSL's Official Comments to these sections make it clear that the drafters' intentions in giving a court many more bases to approve a modification than were generally available under common law principles was to make court-approved modifications much easier to obtain than

they were under the restrictive “material purposes” test of the common law *Clafin* rule. See generally, Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 Real Prop., Prob. and Tr. J. 692, 709-14 (2001). The Model Act’s modification provisions reflect a similar liberalizing trend in the common law, as reflected in §65(2) of the Restatement of Trusts (Third) (2003). If you are considering a migration from a common law state, be sure to inquire of local counsel concerning any applicable judicial precedents that might help grease the skids.

31. Model UTC §411(b). See generally the discussion in the preceding note 30.

32. See Model UTC §415, the Model Act’s reformation provision. The Official Comment to Model Act §415 is quick to distinguish reformation, which “may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor’s intent[.]” from resolving an ambiguity, which concerns the interpretation of the language of the trust document itself.

33. Model UTC §417.

34. In 2009, the state fiduciary income taxes ranged from a low of 3.07% in Pennsylvania to 10.75% in New Jersey and a combined 12.618% (state and municipal) in New York City. 72 P.S. §7302(b); N.J. Stat. Ann. §§254A:2-1(b)(5), 254A:2-1(a) and (c); N.Y. Tax Law §601(c) (1) and 2009 N.Y. Fiduciary Income Tax Return Instructions, N.Y. IT-205-1 f 22.

35. The federal grantor trust rules are contained in §§671-79 of the Internal Revenue Code of 1986, as amended (the “Code”).

36. *Id.*

37. This applies only to “complex trusts” that are treated by most states that tax trust income under rules similar (or identical) to the rules of §§661-663 of the Code. Unlike a “simple trust”, which requires the trustee to distribute all of the trust’s net income at least annually, a complex trust is a non-grantor trust under which the trustee has the power to accumulate income. Most states with trust income tax statutes will tax any income reported to a resident beneficiary under Schedule K-1 to the Federal Form 1041 under a modified conduit system similar or identical to the rules under Code §641 *et. seq.*, including the “distributable net income” (“DNI”) concept defined in §643(a) and applicable regulations. The regulations under Code §643(b) allow a trustee to allocate gains to income and distribute these gains as distributable net income and achieve a distribution deduction if the allocation and distribution is made pursuant to a reasonable and impartial exercise of discretion by the trustee in accordance with a power granted by the governing instrument or local law, or if allocated to a principal, the trustee treats such gains consistently on the books and records and tax returns of the trust as part of a distribution to the beneficiary. See Treas. Reg. §1.643(a)-(b).

38. See TSB-A-07(1)l (Feb. 7, 2007) (sale of interest in Georgia partnership not New York source income); *In Re: Ittleson*, N.Y. DTA 819283 (Aug. 25, 2005) (non-resident’s gain from sale of painting was New York source income).

39. A discussion of the various states’ and the federal constitutional principles, and the limits of the states’ taxing authority under the Federal constitution’s due process and commerce clauses, is beyond the scope of this article. An excellent discussion of these principles appears in Coleman, *State Fiduciary Income Tax Issues*, ALI-ABA Planning Techniques for Large Estates 93-127 (November, 2009), available at [www.ali-aba.org](http://www.ali-aba.org). See also Fogel, *What Have You Done For Me Lately? Constitutional Limitations on State Taxation of Trusts*, 32 U. Rich. L. Rev. 165 (Jan. 1998); Jacob, *An Extended Presence, Interstate Style: First Notes On A Theme From Saenz*, 30 Hofstra L. Rev. 1133 (Summer 2002).

40. Ms. Coleman’s article cited in the preceding note 39 provides a hypothetical, which Ms. Coleman concedes is “farfetched”, involving a hapless settlor named “Harry”. Harry is a Pennsylvania resident when he creates his trust. He later moves to Oklahoma and funds the trust there. Harry dies a resident of Rhode Island. His four children are residents of Alabama, Tennessee, California and Rhode Island. The trustee is Harry’s sister, Hortense, a resident of Georgia, who has delegated the trust’s administration to her lawyer daughter who is a resident of Hawaii. All eight states with connections to Harry’s trust could assess income taxes on the trust’s income and gains based on their various statutory taxation factors.

41. A state-by-state taxing analysis has been undertaken by several authors and will not be repeated here. See, e.g., Nanno, *Planning to Minimize or Avoid State Income Tax on Trusts*, 34 ACTEC J. 131 (Winter 2008); Gutierrez, Jr., *The State Income Taxation of Multi-jurisdictional Trusts – The New Playing Field*, 36 U. Miami Inst. on Est. Planning (2002) (hereinafter cited as “Gutierrez, Jr.”). The Coleman article cited in note 39, *supra*, provides a quick reference table for all of the states’ taxation factors, but beware: the information may be dated and should be confirmed by reference to the primary sources of the laws in state statutes, regulations and administrative pronouncements. Another convenient quick-reference table appears in Nanno and Zaritsky, *Proposed New York Fiduciary Income Tax Changes: Let My Trustees Go!*, 35 Tax Management Estates, Gifts and Trusts J. 147, 173-184 (May 13, 2010). The author’s quick reference table for the eight selected states is provided in Appendix “B”.

42. See NH RSA 77:3 l (b) and 77:10. A bill passed in the 2010 legislative session, H. B. 1607-FN-A, deals primarily with what has colloquially been called the “LLC tax.” A late-added

provision to that bill also repeals RSA 77:11, l, which before repeal read as follows: “[net interest and dividend] [i]ncome accumulated in trust for the benefit of unborn or unascertained persons shall be taxed as if accumulated for the benefit of inhabitants of this state.” The repealed language was generally ignored by the Department of Revenue Administration in its pertinent regulations. The instructions for preparing trusts’ interest and dividends tax returns prescribes the same *pro ration* methodology described in the text. However, despite the DRA’s liberal, pro taxpayer interpretation, the statutory language generated serious heartburn for trustees and their counsel who were considering a move to New Hampshire. Trustees of many of the larger non-grantor, complex accumulation trusts for which the stakes are particularly high deferred making any move until the ambiguities created by the statutory language issue were resolved. H. B. 1607-FN-A passed the legislature on June 2, 2010, and was signed by the Governor on July 20, 2010, with an effective date of January 1, 2011. The repeal of RSA 77:11, l, eliminates any possibility that a trust with no current New Hampshire resident beneficiaries migrating to New Hampshire after January 1, 2011 will be subject to our 5% tax. It also eliminates any anxiety felt by those who deferred their decisions to move until there was a definitive resolution of that issue.

43. Michaels and Twomey, *How, Why and When to Transfer the Situs of a Trust*, 31 Est. Plan. 28, 29 (Jan. 2004).

44. N.Y. Tax Law §605(b)(3)(B)-(D).

45. In addition to eliminating New York trustees, consider whether any New York advisors, committees or protectors having the authority to direct the trustee on investment, distribution, or other matters, or who may have any veto power over the trustee’s actions, should be eliminated as well, particularly if those powers are exercisable in a fiduciary capacity. See TSB-A-04(7)l (Nov. 12, 2004) (the “Advisory Opinion”), issued by the Technical Services Division (the “TSD”) of the Office of Policy Analysis of the New York State Department of Taxation. In the Advisory Opinion, the TSD refused to issue the rulings requested by the trustees of several New York resident trusts created by John D. Rockefeller. The New York corporate trustee of those trusts proposed, among other things, that the corporate trustee would resign in favor of the corporate trustee’s Delaware-chartered affiliate upon the Surrogate Court’s approval of the transfer of the trusts’ intangible personal property to the corporate trustee’s affiliate such that there would no longer be any New York resident trustees, New York source income, or assets located in New York. There is also disturbingly broad *dictum* in the Advisory Opinion concerning the “domicile” of a non-New York chartered corporate trustee with New York resident affiliates, and how an out-of-state trustee who delegates fiduciary (and even ministerial) functions to Empire State resident agents and other service providers might give the New York taxing authorities sufficient nexus to assert their continuing taxing jurisdiction even if there are no trustees who reside in New York and all of the other New York statutory taxation factors are avoided.

Perhaps the safest course for those considering moving a trust from New York to New Hampshire and wanting certainty on this issue is to avoid having any New York resident advisors, protectors, committee or agents, and ensure that *all* trust administration occurs outside of New York. Using New York resident non-trustee fiduciary trust advisors and protectors might be problematic; the Advisory Opinion relies in part on a Nassau County Surrogate’s published opinion holding that an advisor to an executor who controls and directs fiduciary functions is potentially liable as a co-executor. *In Re: Rubin*, 143 Misc. 2d 303 (Sur. Ct. Nassau Co. 1989). Or the more intrepid who wish to retain the services of New York resident agents, advisors and protectors might consider using a New Hampshire resident “special purpose entity” through which the New York resident would act as described in note 50, *infra*.

In any event, the Advisory Opinion should be required reading for any New Hampshire practitioner providing local (New Hampshire) counsel to help the original trust state trustee and their advisors to facilitate a move from New York to New Hampshire. A successful migration from Manhattan of a large complex trust that makes little (or no) distributions to New York resident beneficiaries can save a bundle, as the combined New York state and municipal income tax rate on that trust’s accumulated income and capital gains is 12.62% for the years 2009-2010—the highest in the nation. For example, a non-grantor trust subject to the New York City and State income taxation that incurred a \$1 million long-term capital gain in 2009 would pay \$126,062 of combined New York state and city income taxes, and \$149,655 of federal income tax on that gain. If prior to realizing the gain the trust had successfully migrated to New Hampshire, it would have owed no state or city tax and the same \$149,655 of federal income tax (the federal tax remains the same because the federal income tax deduction for the state income tax previously paid to New York would be worthless due to the application of the federal alternative minimum tax).

An excellent analysis of TSB-A-04(7)l and its implications for structuring a migration to avoid the risk of continuing New York taxation is provided by Paul Comeau and Jack Trachtenberg in *Corporate Fiduciaries, Advisors and Other “Co-Trustees” – Perhaps Your Trust Isn’t Exempt from New York State Income Tax*, 38 NYSBA Trusts and Estates Law Section Newsletter Seven (Spring, 2005).

46. See Michaels and Twomey, *How, Why and When to Transfer the Situs of a Trust*, 31 Est. Plan. (Jan. 2004), p. 2.

- 47 See N.Y.E.P.T. §7.1-13 for authority to divide the trust.
- 48 See Halperin, note 20, *supra*, at 42.
- 49 See instructions to 2008 Form NJ-1041 at 1, which describe the same exceptions as New York's.
- 50 See *Mass. Gen. Laws Ch. 62, §10(a)(e)*. See also Mass. Dept. of Rev. ("DOR") Letter Rulings 84-13 (1/24/84) and 82-3 (1/4/82).

The Massachusetts DOR has issued no private ruling or provided any other regulatory guidance on what activities conducted in Massachusetts by resident non-trustee trust advisors, protectors, committees and agents might allow the DOR to assert its continuing taxing jurisdiction over a migrating trust that was created by a Massachusetts resident or settlor but no longer has any trustees who reside in the Commonwealth. It is possible, however, that the DOR can employ the reasoning of the New York TSD's Advisory Opinion discussed in note 45, *supra*, to attempt to do so. Despite that risk, it may be important to the parties interested in the migrating trusts' administration that the resigning Massachusetts resident trustee or investment manager play a continuing role as distribution or investment trust advisor. The risk in doing so should be reduced because legal ownership of the trust assets, control and custody of those assets, and the execution of each of the Massachusetts resident empowered party's instructions occur exclusively in New Hampshire by the New Hampshire resident directed trustee. See generally *In Re: Fontanella*, 33 A.D.2d 29, 31 (3d Dep't. 1969) and *Brown v. Spohr*, 180 N.Y. 201, 209 (1904) (emphasizing legal titleholding of trust property as an essential element of "trusteeship").

One way to further hedge any residual risk of continuing Massachusetts taxing jurisdiction is to be sure that the Massachusetts resident advisor does not serve in a fiduciary capacity. That, however, could jeopardize the excluded fiduciary protection for the New Hampshire directed trustee under RSA 561-B:12-1201 *et. seq.*, because there would be no fiduciary exposed to surcharge for breaching the duties of the Massachusetts advisor.

Another possibility is for the Massachusetts resident to perform the duties in a fiduciary capacity, but through a "special purpose entity" – a New Hampshire limited liability company ("LLC") of which the Massachusetts resident is the sole member and manager. The LLC and not the Massachusetts resident himself, herself, or itself would be the fiduciary trust advisor. This structure has perhaps the best chance of successfully defending a DOR challenge if the Massachusetts resident member/manager maintains some physical presence in New Hampshire and conducts at least some of the LLC's fiduciary activities here.

It is unclear whether the New Hampshire Banking Commission would pursue a cease and desist order or regulatory sanctions against any such special purpose LLC on the basis that it is engaging in a regulated activity (fiduciary services) without a charter. The author understands from conversations with attorneys in Delaware that the Delaware regulator has provided informal assurances that it would not seek enforcement against an LLC formed and operating in Delaware, provided that the LLC service a single trust or a finite number of related trusts, and the LLC does not have direct custody of or control over the trust assets. Here again – custody and control in Massachusetts would be avoided if the New Hampshire resident directed trustee, and not the Massachusetts resident investment or distribution trust advisor, was the legal owner of the trust assets and contracted with a third party agent for custody and clearing services. It would probably help if the LLC's principal(s) were also otherwise regulated - *i.e.*, are SEC regulated "registered investment advisors" ("RIAs") or their principals, or are attorneys or accountants whose investment management activities are exempt from registration requirements under §202(a)(11)(A)-(E) of the Investment Advisors Act of 1940.

To further TMCA's policy of improving our laws to make New Hampshire the most hospitable environment for migrating trusts, we should have legislation creating a well-defined regulatory safe harbor for these special purpose entities. The author has drafted a proposed statute for submission in the 2011 legislative session.

51. Mass. Gen. Laws, 62 §§4, and 10, Instructions to 2009 Mass. Form 2.
52. Pa. Code §§101-1, 105.4; 36 Maine Revised Statutes §5 102 4 (a "resident trust" also includes a trust registered in Maine under 18-A M.R.S. §7-101); 32 Vt. S.A. §5811 (11) (B) (an *inter vivos* trust is a Vt. resident trust if the grantor was a domiciliary of Vt. when the trust was

funded, provided the trust was then irrevocable or was and still is irrevocable; or if the grantor was a Vt. domiciliary when the trust became irrevocable, provided that the trust was revocable when funded).

53. Conn. Gen. Stat. §45-488.
54. "Contingent" for this purpose means that the distribution is at the trustee's discretion. See Conn. Agencies Regs. §12-701(a) (4).
55. See Conn. Gen. Stat. §45-488; R.I. Gen. Laws §44-30-5(c)(5).
56. R.I. Gen. Laws §44-30-5; R.I. Division of Taxation Regulation PIT 90-13 II – IV. Rhode Island employs a pro rating system based on the current beneficiaries' residences similar to New Hampshire's described in note 42, *supra* and the accompanying text. Therefore, a migration to New Hampshire of a Rhode Island resident trust with Rhode Island resident beneficiaries will be state income tax neutral, unless the trust accumulates its net interest and dividends and it has one or more New Hampshire resident beneficiaries. In that case the move to New Hampshire will create a New Hampshire interest and dividends tax liability that would not be payable if the trust remained in Rhode Island – a result that should be avoided for obvious reasons.
57. See Nenzo, *Planning to Minimize or Avoid State Income Tax on Trusts*, 34 ACTEC J. 131 (Winter 2008); Hayes, *Opportunity Knocks: Planning Around State Fiduciary Income Tax, Multi-jurisdiction Estate and Income Tax Planning* (Florida Bar CLE outline, Oct. 13, 2006); Gutierrez, Jr., note 41, *supra*. Because the trustees may have assumed the trust was not liable for state taxes, also consider prior filing of returns for any missed years.

The author has made inquiry of several attorneys who practice in states such as Delaware and South Dakota and routinely advise trustees of trusts migrating to those states from high income tax jurisdictions. Neither the author nor any of those attorneys are aware of any case in which the taxation department of one state has sued a trustee in a court in another state to collect a tax allegedly due from the first state.

58. Although there are no regulations defining what actions will taint a trust to which GST exemption has been allocated, the requirements for maintaining GST exempt status should be the similar for both, see note 24, *supra*. See PLR 200607015 (Feb. 17, 2006). See also Halperin, note 24, *supra*, at 33.
59. Treas. Reg. §26.2601-1 (b) (4) (i) (A). Two other safe harbors for safely retaining this exempt status are: (i) the exercise of a special power of appointment to a new trust (if one is granted in the original trust), if the period for measuring the validity of the interest is measured from the date of the creation of the original trust; and (ii) decanting or modification under authority granted in a trust provision or state statute, not requiring beneficiaries' consent, which authority was in existence when the trust became irrevocable (this would be impossible in the case of grandfathered trusts and highly unlikely in the case of allocated trusts since the first decanting statute – New York's – was enacted in 1992). Treas. Reg. §26.2601-1 (b) (4) (i) (A).
60. See Treas. Reg. §25-2511-1 (c).
61. *DiMarco Estate v. Comm'r*, 87 T.C. 653 (1986); see also Halperin, note 24, *supra*, at 36-37. The trustee may not be a beneficiary at the time of the decanting.
62. See BNA Tax Mgt. Portfolio 50-6 §III D. 3 (a) (2). See also the Official Comments to Model UTC §411, asserting that the settlor's right to join the beneficiaries in terminating or modifying a trust under the modification section should not rise to the level of a taxable power.
63. Code §2041(a)(3) and 2514(d).
64. Belcher, *et al.*, note 24, *supra*, at 540.
65. See also Halperin, note 24, *supra*, at 38-43 (generally discussing that a different rule might apply if the decanting involves the transfer from a grantor trust to a non-grantor trust of encumbered property with liabilities in excess of basis, or a modification that changes a trust holding a partnership interest with negative capital accounts).
66. See Code §§ 661 and 662, and PLR 200621715 (a different result might apply on a complete, as opposed to a partial, decanting).



## Author

*Joseph F. McDonald, III, a partner at McDonald & Kanyuk in Concord, is a fellow of the American College of Trust and Estate Counsel and has written numerous articles and has lectured about asset protection, business succession and philanthropic planning. He worked previously as a director and shareholder in the Trust and Estates Department of Cleveland, Waters and Bass in Concord.*

## APPENDIX A

### Quick Reference Guide for Distinguishing Between Trust Matters Involving:

#### (i) Validity and Construction, and (ii) Administration<sup>1</sup>

Choice of Law Principles Support Application of the Law of the Original Trust State	Choice of Law Principles Support Application of the Law of the New Situs State
Validity and Construction	Administration
Capacity of Settlor (validity)	
Effectiveness of Execution (validity)	
Rights of Adoptees (construction)	
Rights of Illegitimates (construction)	
Rule Against Perpetuities (validity)	
Principal versus Income (construction or administration?)	Principal versus Income (construction or administration?)
Unitrust/Power to Adjust (construction or administration?)	Unitrust/Power to Adjust (construction or administration?)
Per Stirpes / Per Capita (construction)	
Entitlement to Distribution (construction)	
	Qualification of Trustees
	Removal and Replacement of Trustees
	Prudent Investor Act (administrative in nature under RSA 564-B 9-907)
	Self Dealing of Fiduciary (i.e., accessing the liberal rules for transactions with a trustee's affiliates under RSA 564-A:8-802 (f) – a much broader and forgiving provision than the corresponding section in the Model UTC).
Failure of Beneficiaries ( <i>i.e.</i> , intestacy; escheat) (construction)	
Marital Rights ( <i>i.e.</i> , election against will; upon divorce) (construction)	
	Rights of Creditors (including under RSA 564-D, the Qualified Dispositions in Trust Act)
	Beneficiary Notice/Reporting Requirements (duty to inform and report under RSA 564-B:A-13 is conspicuously absent from listing of mandatory rules under 564-B:1-105(b)).
	Decanting (administration? construction/ validity? NH RSA 564-B:4-418). See discussion at Section B. 4.b.(3)(B), <i>supra</i> .

1. Note: Appendix "A" is adapted with permission from a similar chart included in materials presented at the 2008 annual meeting of the American College of Trust and Estate Counsel ("ACTEC") authored by Margaret E. W. Sager, Esquire, entitled Give Your Trust a Facelift: Modification, Changes of Situs and Decanting. The author repeats Ms. Sager's caveat that the contents of the chart are by no means exhaustive or even correct; opinions will differ or the proper characterization of any trust matter under any given set of facts.

## APPENDIX B

### Quick Reference Guide to Eight Selected States' Laws that Might Facilitate Nonjudicial Changes in Governing Law and Other Remodeling

State	Uniform Trust Code Enacted?	Modification without Court Approval by Unanimous Consent of Settlor and Qualified Beneficiaries?	Default Rules for Trustee Resignation/ Succession Without Court Involvement?	Default Rules for Designating/ Identifying Trust's Principal Place of Administration?	Default Rules for Designating/ Determining Trust's Governing Law?
Connecticut	No	No	No	No	No
Maine	Yes (Me. Rev. Stat. Ann. ("MRSA") Tit. 18B)	No (MRSA 18B, §411(1) allows modification by consent only with court approval)	Yes (MRSA 18B, §704 (c) (2))	Yes (MRSA 18B, §108)	Yes (MRSA 18B, §109)
Massachusetts	No (UPC – MGLA Ch. 190-B, eff. 7/1/11)	No	No MGLA Ch. 203, §5 (effective until 7/1/11) and Ch. 190-B, §7-308 after 7/1/11	No until 7/1/11, then Yes after that date under MGLA Ch. 190-B, §5	No
New Jersey	No	No	No	No; court approval is apparently required. See <i>Martin v. Haycock</i> , 123 A.2d 223 (N.J. 1956); <i>In re Henderson's Will</i> , 123 A.2d 78 (N.J. Super 1956)	
New York	No	No	No	No; court approval required under E.P.T.L. 7-2.3 and 2.6. See <i>In re: Estate of Rockefeller</i> , 2 Misc. 3d 554 (N.Y. Sur. Ct. 2003)	No
Pennsylvania	Yes (20 Pa. Cons. Stat. § 7700 et. seq.)	Yes (20 Pa. C.S. §7740.1)	Yes	Yes (20 Pa. C.S. §7708 -- all qualified beneficiaries must agree after notice). Note that §7708 (c)-(e) provides explicit procedures for a nonjudicial transfer of situs	Yes, 20 Pa. C.S. §7707, but significant differences from UTC §109
Rhode Island	No	No	No; court approval required. See R.I. Gen. Laws §18-2-1	No	No, but see R. I. Gen. Laws §18-1-1 through 3
Vermont	Yes (Vt. Stat. Ann. Chapter 14A)	Yes (Vt. Stat. Ann. Ch. 14A, §411(a), although a technical correction may be necessary to reconcile the first sentence of subsection (a), which implies that no court approval is necessary, with the second sentence, which appears to state the opposite conclusion)	Yes (Vt. Stat. Ann. Chapter 14A, §704 (c)(2))	Yes (Vt. Stat. Ann. Ch. 14A, §108)	Yes (Vt. Stat. Ann. Ch. 14A, §109)

## APPENDIX B

### Quick Reference Guide to Eight Selected States' Laws that Might Facilitate Nonjudicial Changes in Governing Law and Other Remodeling

State	Virtual Representation Available?	Nonjudicial Settlement Agreements or Equivalent?	Nonjudicial Decanting?	Nonjudicial Merger?
Connecticut	Yes (Conn. Gen. Stat. §45a-487d)	No	No	No
Maine	Yes (MRSA 18B §304)	Yes (MRSA 18B §111)	No	Yes (MRSA 18B §417)
Massachusetts	Yes, but delayed effectiveness until 7/1/11 (MGLA Ch. 190B, §1-403 (Mass. version of Uniform Probate Code))	No	No	No
New Jersey	No	No	No	No
New York	Yes (N.Y. Surr. Ct. Proc. Act § 315)	Yes, but very limited (N.Y. Surr. Ct. Proc. Act § 315(8)) and useless to facilitate migration <sup>1</sup>	Yes (E.P.T.L. 10-6.6(b)(1))	Yes (E.P.T.L. 7-1.13 subsection (a) (2) -- nonjudicial merger by all "interested persons" "for any reason not directly contrary to the purposes of the trust")
Pennsylvania	Yes (20 Pa. Cons. Stat. §§ 7721-26)	Yes (20 Pa. Cons. Stat. §§ 7710.1). Broad list of the proper subject matter of a NJSA includes under subsection (d) (11) the modification or termination of a trust	No	Yes, Pa. Cons. Stat. §7740.7(a)
Rhode Island	Yes (R.I. Gen. Laws § 33-22-17)	No	No	No
Vermont	Yes (Vt. Stat. Ann. Chapter 14A § 304)	Yes (Vt. Stat. Ann. Chapter 14A § 111)	No	Yes (Vt. Stat. Ann. Chapter 14A § 417)

1. Permitted only to settle fiduciaries' accounts, not to achieve any migration-related purposes

**APPENDIX C**  
**Quick Reference Guide to Statutory Factors**  
**for Defining Extent of Taxing Jurisdiction for Eight Northeastern States**

State	Citation	Top 2009 Rate	Trust Created by Will of Resident	Inter Vivos Trust Created by Resident	Trust Administered in State	Resident Trustee	Resident Noncontingent Beneficiary
Connecticut	Conn. Gen. Stat. §§ 12-700(a)(7) (E), (a)(7), 12-701(a)(4)(C), (D), (a)(19); Conn. Agencies Regs. §§ 12-701(a)(4)-1, 12-701(a)(9)-1; Pp. 5, 7 of instructions to 2009 Form CT-1041.	6.5%	✓	✓ <sup>1</sup>			
Maine	Me. Rev. Stat. Ann. Tit. 36 §§ 5102(1-C)(A), (4)(B)-(C), 5111, 5121, 5160, 5403; P. 2 of instructions to 2009 Form 1041 ME	8.50% on inc. over \$20,150	✓	✓			
Massachusetts	Mass. Gen. Laws ch. 62, §§ 4, 10(a), (c), (e); Mass. Regs. Code Tit. 830, § 62.10.1; Pp. 5, 6 of instructions to 2009 Mass. Form 2.	5.30% (12.00% for short-term gains & gains on sales of collectibles)	✓ <sup>2</sup>	✓ <sup>2,3</sup>			
New Jersey	NJSA §§ 54A:1-2(o), 54A:2-1, 54A:2-1a, 54A:5-1, 54A:5-3; P. 1 of instructions to 2009 Form NJ-1041.	10.75% on inc. over \$1,000,000	✓ <sup>4</sup>	✓ <sup>4</sup>			
New York	N.Y. Tax Law §§ 601(c)(1), 605(b)(3), 611-612, 618; N.Y. Comp. Codes R. & Regs. Tit. 20, §§ 105.23, 118.1; P. 2 of instructions to 2009 N.Y. Form IT-205.	8.97% on inc. over \$500,000 (12.618% for NYC resident on inc. over \$50,000)	✓ <sup>4</sup>	✓ <sup>4</sup>			
Pennsylvania	72 P.S. §§ 7301(s), 7302(a), 7305; 61 Pa. Code §§ 101.1, 105.4; Pp. 2, 5 of instructions to 2009 Form PA-41.	3.07%	✓	✓			
Rhode Island	R.I. Gen. Laws §§ 44-30-1(a), (e), 44-30-2(a)(1), (b), 44-30-2.6, 44-30-5(c); R.I. Code R. PIT. 90-13; Pp. 1-1, 1-2 of instructions to 2009 Form RI-1041.	9.90% on inc. over \$11,150	✓ <sup>3</sup>	✓ <sup>3</sup>			
Vermont	32 V.S.A. §§ 5811(11)(B), 5822(a), (a)(5), (b)(2); Pp. 1, 2 of instructions to 2009 Vt. Form FI-161.	9.40% on inc. over \$11,150	✓	✓			

1. Provided that trust has resident noncontingent beneficiary.
2. Provided that trust has Massachusetts trustee.
3. Provided that trust has resident beneficiary.
4. Unless trustees and trust assets are outside state and no source income.