

What Troubles May Lurk Ahead When It Comes to Treatment of Trust Interest in Divorce

Jacqueline A. Leary, Esq. | February 4, 2022

Brief Overview of Property Division

- **Doctrine of Equitable Division – RSA 459:16-a**
 - Division up to the date of a decree of legal separation or divorce. See *In the Matter of Gordon and Gordan*, 147 N.H. 693, 697(2002).
- **Property division is non-modifiable** (absent duress, fraud, mistake, misunderstanding of facts, etc.)
- **Marital Property is defined as:**
 - “all tangible and intangible property and assets, real or personal, belonging to either or both parties, whether title to the property is held in the name of either or both parties.” See *In the Matter of Goodlander & Tamposi*, 161 N.H. 490, 495.

Factors for Equitable Division

- Length of the marriage
- The spouses' ages, health, social or economic status, occupation, vocational skills, employability, separate property, amount and sources of income, and needs and liabilities
- The spouses' opportunities for future acquisition of capital assets and income
- The ability of the custodial parent to engage in gainful employment without substantially interfering with the interests of any minor children
- The need of the custodial parent to live in the family home
- Actions of either spouse during marriage which contributed to growth or diminution in value of property



Factors for Equitable Division

- Significant disparity between the parties in relation to contributions to the marriage, including contributions to the care and education of the children and care and management of the home
- Contributions by one spouse to educate or develop the career of the other and any interruption of a spouse's education or career to benefit the other's career, the marriage or children
- The expectation of pension or retirement rights acquired prior to or during the marriage
- Tax consequences
- Value of property that is allocated by prenuptial contract
- A spouse's fault in causing the marriage to fail
- Value of any property acquired prior to the marriage or in exchange for property acquired prior to the marriage
- The value of property acquired by gift, devise, or descent
- Any other relevant factor

Questions to consider when reviewing a trust.

- **Who created the trust?** A trust created by a spouse, which might be seen as trying to shelter assets in anticipation of divorce.
- **What control power does the beneficiary have?** A trust where the spouse has almost all the control (can compel distributions) is more likely to be considered a marital asset.
- **When can the trustee make distributions?** If a trustee is given broad authority to make distributions in his sole discretion, the timing and the amount of distributions will be uncertain.
- **Who are the beneficiaries?** Class of beneficiaries (less likely the spouse will receive distributions)
- **Who is the trustee?** Independent trustee v. family member
- **Is there a spendthrift provision?** See RSA 564-B:5-502(e)
- **Is the beneficiary certain to get trust assets whether dead or alive?**

Key trust case: In re Goodlander, 161 N.H. 490
(2011)

In re Goodlander, 161 N.H. 490 (2011)

- The New Hampshire Supreme Court held that the interest of a beneficiary in a discretionary trust is a mere expectancy and pursuant to RSA 564-B:8-814(b) is not to be considered marital property.
- The statute specifically provides: “[I]f a distribution to or for the benefit of a beneficiary is subject to the exercise of the trustee’s discretion, . . . then the beneficiary’s interest is neither a property interest nor an enforceable right, but a mere expectancy.”
- The analysis does not change whether or not there is a discernible standard for the trustee to use in making distributions.
- However, if the beneficiary possesses the right to compel distributions, the trust interest will likely be deemed marital property.

Always review the trust and check for a spendthrift provision.

- See RSA 564-B:5-502(e)
- (e) To the extent that a beneficiary's interest in a trust is subject to a spendthrift provision, the beneficiary's interest:
 - (1) Is not property for purposes of RSA 458:16-a, I.
- **A spendthrift provision prevents a beneficiary from assigning her interest in the trust and provides that a beneficiary's interest is not subject to that person's debts or liabilities. In essence, what happens is that a creditor has to wait until a distribution is made to that beneficiary to assert a claim against those assets.

“I do not want to disclose my parent’s private trust documents.”

New Hampshire

- Letter to opposing counsel explaining trust language (i.e. spendthrift)
- Affidavit of Trustee
- Request in camera review of trust

Massachusetts

- Vaughan Affidavit
 - *Vaughan v. Vaughan*, 91-485 (1991) (Greaney, J.).
 - Disclose parent’s net worth, and provisions made in their wills and trusts for the benefit of the child involved in a divorce.

Question: Do you advise your clients to disclose their parent’s trust?

In the Matter of Jonathan Merrill and Lea Merrill, 174 N.H. 195(2021)

- A beneficial interest in a trust that is subject to a valid spendthrift provision is not marital property subject to award by the divorce court under the property settlement statute.
- However, “[t]o the extent that a beneficiary’s interest in a trust is subject to a spendthrift provision, the beneficiary’s interest is not [marital] property for purposes of RSA 458:16-a, I.” RSA 564-B:5-502(e)(1) (2019).

In the Matter of Wm. Michael Earley and Ryanne Earley, 174 N.H. 220 (2021).

- The New Hampshire Supreme Court has specifically held that a party's beneficial interest in a trust containing a valid spendthrift provision is not marital property subject to equitable division in a divorce action under the property settlement statute, RSA 458:16-a.

In the Matter of Wm. Michael Earley and Ryanne Earley, 174 N.H. 220 (2021).

- The trust in *Earley* contained the following spendthrift provision:
- Except as herein otherwise provided, the interest of any beneficiary hereunder, either as to income or principal, shall not be anticipated, alienated or in any other manner assigned or pledged or promised by such beneficiary, and shall not be reached by, or be subject to, any legal, equitable or other process, including any bankruptcy proceeding, or be subject to the interference or control of creditors or others in any way or manner, and all payments to or interest of any beneficiary shall be free from the control or claim of any spouse.

***Matter of Bournival*, No. 2019-0537, 2021 WL 3013456, at *3 (N.H. July 16, 2021).**

- The New Hampshire Supreme Court found that a Husband's interests in both of his trusts constitute marital property even though the "trusts may be potentially independent of [Husband] 'on paper,' in practice, he has so much control over the trusts that they do not appear to be fully independent 'discretionary' trusts."

***Matter of Bournival*, No. 2019-0537, 2021 WL 3013456, at *1-3 (N.H. July 16, 2021).**

- Requirements of the trusts were not being followed
- There were no annual accountings
- One of the two trustees did not play any role in administering the trust, which made the accountant the effective sole trustee
- Trustee acted on behalf of the husband (beneficiary)
- The husband was managing the assets of the trust

***Matter of Bournival*, No. 2019-0537, 2021 WL 3013456, at *3 (N.H. July 16, 2021).**

The Court cited several examples of how the accountant, trustee, acted on behalf of husband, rather than independently, including:

- The accountant's refusal to provide an accounting to Husband's estranged adult child, despite the child's entitlement to one
- The accountant's decision to invest all of the trust funds with Husband's investment firm
- Discussions between the accountant and Husband about sharing clients
- Discussions between the accountant and Husband about distributions
- The fact that Husband is the broker of all portfolio amounts of the trusts
- Husband's active role in the investment of trust funds
- Husband's admission on cross-examination that the accountant does not know how any of the trust funds are invested
- The inference from Husband's testimony and the accountant's deposition testimony that the accountant encouraged and facilitated Husband's early tax filing in 2017 to claim a \$20,000 overpayment that the parties had made jointly before Wife could claim it

What about “basic alimony”?

- Pursuant to RSA 464-B:5-502(f) a court may authorize a spouse or ex-spouse to attach present or future distributions from a spendthrift trust to or for the benefit of the beneficiary for “basic alimony” meaning:
- the portion of alimony attributable to the most basic food, shelter, and medical needs of the spouse or former spouse if the judgment or court order expressly specifies that portion.
- RSA 464-B:5-502(f)(1)(A) and (B).

Thank You!

The information in these slides is **not legal advice**. For specific situations or advice about the application of these guidelines, laws or rules to your business or industry, you should seek specific legal advice.



Jacqueline A. Leary, Esq. – Vice Chair of Family Law Practice Group at McLane Middleton

Jacqueline.leary@mclane.com | (603) 628-1178