


**New Hampshire
Will & Trust Contests
& Other Litigation Claims**
February 14, 2018
Ralph F. Holmes

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COMMON CAUSES OF ACTION

Types of cases:

1. Guardian / Conservatorships
2. Will/Trust Contests
3. POA Accounting Claims
4. Breach Of Fiduciary Duty Claims
5. Unjust Enrichment Constructive Trust Claims


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ProbateTrial.com

1. Pleadings bank
2. Court orders
3. Law summaries
4. Commentary

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**Incapacity And Exploitation
Of The Elderly**


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Most Common Pivotal Issues

- Capacity
- Undue Influence
- Family Dynamics
- Financial Exploitation

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Exploitation of the Elderly

Vulnerabilities to exploitation:

1. Loneliness
2. Dementia or other mental impairments
3. Psychological impairments
4. Poor physical health
5. Dependency on others for housing, transportation, or other assistance

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Progression of Decline

The process of decline is often gradual.
 Functional limitations are sometimes difficult to establish at a particular moment in time.
 May even vary from moment to moment.
 At early stages, likely to be disagreement among observers.



Physical Decline

Multiple hospitalizations or ER visits, increasing frequency of hospitalization, etc.
 New diagnosis of chronic illness likely to impact ability to live independently or diagnosis of terminal illness (e.g., cancer, Parkinson's, dementia, stroke, etc.)
 Acute serious illness (e.g., heart attack, stroke, emergency surgery, any ICU stay, etc.)



Financial Indicators

Sudden depletion of assets
 Change in beneficiaries
 Transfer of title in real estate (including joint title)
 Substantial "gifts"
 Request for POA for caregiver to handle financial matters



Emotional Decline

Emotional instability
 Depression
 Paranoia
 Mood swings
 Increased forgetfulness




Financial Indicators

Difficulty:
 paying bills
 keeping appointments
 responding to important correspondence
 planning or scheduling



Personal Relationships


Death of spouse, divorce, relocation, etc. can trigger rapid decline.
 "Mission creep" of family or care providers or staff.



Personal Relationships

Exploiter usually is a family member, most commonly a child
Care providers is next most common
There are serial predators

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Grounds for Contesting Transactions

Grounds for Contesting:


1. Incapacity
3. Undue Influence
4. Lack of due execution (Will only)
5. Fraud
5. Revocation
6. Mistake

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Guardianship and Conservatorship

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Capacity

To be capacitated, a testator/settlor must:


1. Understand the act of making a will/trust;
2. Understand the property to be disposed of and its general nature;
3. Understand his or her natural objects of affection, usually the testator's/settlor's nearest relatives;
4. Understand and intend to carry out the will's dispositional scheme; and
5. If capacity is present, the will/trust must not be the offspring of a delusion.

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Contesting Estate Plans & Other Transactions

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Capacity

For an *inter vivos* irrevocable trust, argument might be made that the relevant capacity standard is contractual, not donative/testamentary capacity.

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Undue Influence Defined

Undue influence "exists only when the willpower of the testator is destroyed and his own will is worn down. His freedom of will must be so destroyed as to substitute the will of another for his own."

Bartis v. Bartis, 107 N.H. 34 (1965)

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Undue Influence Conceptual Framework

Susceptibility to undue influence:

Generally Undue Influence Will Occur
Only In The Context Of Absent Or
Diminished Capacity

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Undue Influence Conceptual Framework

1. An "unnatural" disposition;
2. Principal was "susceptible to" undue influence;
3. Transaction benefitted someone with an opportunity to exercise undue influence; and
4. Donee exploited that opportunity through improper means to procure the disposition

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Undue Influence Conceptual Framework

The exception: *Gaffney v. Coffey*, 81 N.H. 300 (1924):

Brother disapproving of sister's relationship with Arthur Pappachristo ("the damn Greek") intimidated mother to cut the sister from the Will:

1. Threatened to withhold money from his mother;
2. Slapped his sister and blackened her eye in front of the mother; and
3. Threatened to evict mother and sister.

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Undue Influence Conceptual Framework

Considerations whether gift is "natural" vs. "unnatural" include principal's:

1. Current and past relationship with donee;
2. Current and past relationship with persons harmed;
3. Prior statements of intent; and
4. Nature and value of gift.

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Undue Influence Conceptual Framework

Transaction benefitted
someone with an opportunity
to exercise undue influence

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Undue Influence Conceptual Framework

Donee procured the benefit through improper means.



Will Execution Requirements

"The term 'credible' ... means, simply, that the witness must be competent, or not disqualified at the time of the attestation to be sworn and to testify in a court of justice." *Lord v. Lord*, 58 N.H. 7 (1876)

See *Ross v. Carlino*, 120 N.H. 489, 490 (1980) (Will witnesses (a hospital patient) "lacked the requisite mental capacity to attest that the deceased executed the will [and] that she neither had knowledge of its contents nor possessed the mental capacity to sign")



Undue Influence NH Trust Code 406(a)

"A trust is void *to the extent* that... its creation was induced by fraud, duress, or undue influence"

Depending on the facts, can the remedy be reformation, not just rescission?



Will and Trust Contests: Fraud

For fraud to affect the validity of a Will (or Trust), the deception must be such as to induce the testator to make some disposition of his property that he would not otherwise have made.

Knox v. Perkins, 86 N.H. 66, 68 (1932)(allowance of Will benefiting widow with prior marriages upheld on finding that the testator "either knew of [her] former marriages, or if he did not know, would have made the same disposal of his property after learning the facts")



Will Execution Requirements

Will Execution Requirements:

1. The testator must be married or at least 18 years old, RSA 551:1;
2. The will must in writing, RSA 551:2, II;
4. The will must be signed by the testator or by some person at his or her express direction in his or her presence, RSA 551: 2, III; and
5. The will must be signed by 2 or more "credible" witnesses at the request of and in the presence of the testator attesting to the testator's signature, RSA 551:2, IV.



Will and Trust Contests: Mistake

"[A]ccording to the prevailing view, if the testator knew and approved the contents of his will, it is immaterial that he mistook the legal effect of the language used or that he acted upon the mistaken advice of counsel, provided that advice 'was given in an honest belief that it was sound.'" *Leonard v. Stanton*, 93 N.H. 113, 115 (1944) (quoting *Elam v. Phariss*, 289 Mo. 209, 217 (1921)).



Will and Trust Contests: Mistake

To set aside a Will on grounds of mistake, the error must be so substantial as to be tantamount to a failure of capacity, such as a mistaken belief that the document is other than a Will.



Will and Trust Contests: Procedure

A Will/Trust Contest If Successful Will
Revive A Prior Will/Trust Revoked
Expressly Or By Implication By The
Contested Document



Will and Trust Contests: Mistake

To correct a mistake, a Trust can be reformed against plain meaning by clear and convincing evidence of settlor intent, RSA 564-B:4-414



Will and Trust Contests: Procedure

A Will Contestant Must Surrender
Any Legacy Received
Holt v. Rice, 54 N.H. 398 (1874)



Will and Trust Contests: Procedure


An Executor Has A Duty To Defend A
Contest Of The Will And A Trustee Has A
Duty To Defend A Contest Of The Trust



Will and Trust Contests: Procedure


A capacitated party of majority age within the country has six-months from allowance of a Will to file a Motion to Re-Examine Will to seek that it be proved in solemn form. RSA 552:7.


For " [a] minor, insane person or person out of the United States," the statute of limitations does not run until "one year after the removal of the disability." RSA 552:9



Will Contests


Guardians must be appointed for all minors and other incompetents and agents must be appointed for interested parties who are out-of-state or are unknown, RSA 552:11


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Will and Trust Contests: Trial


Unless Due Execution Of The Will Is Stipulated, The Executor Must Prove Due Execution By Presenting The Witnesses To The Will Or Evidence Sufficient To Explain Their Unavailability


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Will and Trust Contests: Procedure


The Statute Of Limitations For Contesting A Trust Can Be Accelerated


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Will and Trust Contests: Trial

The Proponent Of A Will Has The Burden Of Proof


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Will and Trust Contests: Procedure

Notice which can be sent to potential contestants:

"Pursuant RSA 564-B:6-604(a)(2), you: are on notice of the existence of the Trust; have been provided a copy of the Trust; are on notice that Jane Doe, of [address] and [phone number], is the Trustee of the Trust; and are on notice that you have 180 days from the date of this letter to commence a judicial proceeding to contest the validity of the Trust."


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Will and Trust Contests: Trial

Trust Contestant Has The Burden Of Proof
Unless Evidence Is Presented That The Trust Proponent (or Beneficiary) Procured The Trust Through Undue Influence In A Confidential Relationship With The Settlor

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Confidential Relationship

"A confidential relationship exists if there is evidence of a family or other personal relationship in which one person justifiably believes the other will act in his or her interest"

Cadle Co. v. Bourgeois, 149 N.H. 410, 419-20 (2003)

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Will and Trust Contests

Tips for Estate Planners

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Will and Trust Contests: Trial

Key Issues Will Include:

1. Variance Between The Current Plan And Prior Ones
2. Relationship Between The Testator And The Principal Legatee
3. Relationship Between The Testator And The Contestant
4. Testator's Management of her Affairs
5. Medical Testimony
6. Involvement of Counsel


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Will and Trust Contests Tips for Estate Planners

Family Pathology Is A Key Predictor Of Litigation

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Will Contests and Trust Contests: Trial

Evidence

- a. Non-subscribing lay witnesses may testify to observations regarding competency of testator. Hardy v. Merrill, 56 N.H. 227 (1875).
- b. "Witnesses may testify as to whether the testator was a person easily influenced by others." 7 DeGrandpre, Wills, Trusts and Gifts, § 8-10, p. 79 (3rd ed.) (citing Patten v. Cilley, 67 N.H. 520 (1893)).
- c. "[W]hen undue influence is an issue, 'the field open to investigation is very broad.'" 7 DeGrandpre, Wills, Trusts and Gifts (3rd ed.), § 8-10, p. 78 (quoting Cobb v. Follansbee, 79 N.H. 205,206 (1919)).

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Will and Trust Contests Tips for Estate Planners

Mental Capacity Is Usually The Key Issue

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Will and Trust Contests: Tips for Estate Planners

Capacity Is Not
Always Easy To Evaluate

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Will and Trust Contests: Tips for Estate Planners

There is no attorney-client privilege “[a]s to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.”

Rule 502 of the New Hampshire Rules of Evidence. *See also Stevens v. Thurston*, 112 N.H. 118, 119 (1972)

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Know Who Your Client Is

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Will and Trust Contests: Tips for Estate Planners

Aspects of the attorney-client relationship of frequent concern include:

1. The longevity of the attorney-client relationship
2. The role played by the principal legatee in introducing counsel and/or facilitating communications between the testator and counsel;
3. The number and duration of the meetings between counsel and testator; and
4. Communications by counsel with others, such as accountants and caregivers.

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Will and Trust Contests: Tips for Estate Planners

If Your Plan Is Challenged, You Will Be
A Key Witness

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Will and Trust Contests: Tips for Estate Planners

Counsel’s Notes and/or File
Memorandum Will Be Important
Evidence

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**Will and Trust Contests:
Tips for Estate Planners**

May 29, 2007

Bob [redacted] died on the afternoon of [redacted] at approximately 12 a.m. and left the estate of [redacted]. When [redacted] died, the residue of his estate was to be divided in equal shares between his three children, [redacted], [redacted] and [redacted]. The will was signed by Bob. He said he had a question about his lawyer's proposal. He stated that they had to have a meeting first with all of them from a year. They had property in some home, some vehicles, jewelry, books, watch. These go to follow.

Bob [redacted] set to the part about each nephew. He asked when in the next meeting they had been [redacted]. This will have to be the meeting.

Then he got to the part about the Trust. He stated that this trust is for the benefit of [redacted] and [redacted]. When they die, the trust is to [redacted]. [redacted] said [redacted].

My son [redacted] gets \$10,000 and his wife gets \$10,000. \$1,000 to [redacted]. Can [redacted] challenge? I think he will challenge it.

When [redacted] first goes to [redacted] and [redacted] set [redacted] probably will challenge it.

John [redacted] asked the Trust. There's [redacted] will was in effect. He wants to know if I thought it happened when I did.

When signing the will the ones who recognized that [redacted] had typed it for him. He voluntarily signed and kept and knew it was the result of their own sign. He voluntarily stated "I am the donor" was his will. This is to represent me then say yes. Yes, I want everything to follow. Proceeding by those enough [redacted] and not contest."

When asked if his signing was voluntary he stated "yes" and said clear.

When asked if he was ill he stated he was not and he mentioned [redacted] asked him when his brother was well he mentioned October 3, 2002.

When asked if he was ill he stated he was not and he mentioned "I thought of what I said and then I was in a car."

How did you acquire property in Pennsylvania. My wife's family had a home in Pennsylvania and she lives there. When I was in college around 1970 I was in Pennsylvania. When did you go to college there? I graduated from [redacted]. I went to [redacted] Penn State University. Please, on a relationship and was on the [redacted]. However, I was not good enough to make the most of [redacted]. Also, do you [redacted].

[redacted] did a lot of studying at Green Mountain College. When he died in Vermont.

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**Will and Trust Contests:
Tips for Estate Planners**

Meet With The Client Without Other Family Members

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**Will and Trust Contests:
Tips for Estate Planners**

Date	Medical Record Event
3/3/01	He asked staff over and over again: "Where is his wife? Where is his home and all his furniture? Why was he here? Was he bad? Has he lost his mind?"
3/4/01	He asked about arrival time of his wife (deceased)
3/8/01	He asked when his wife (deceased) would arrive
3/15/01	He was up most of the night hollering for help and kept trying to answer his phone when no one was on the phone
3/23/01	He stored dirty, moldy coffee cups in his drawers
3/26/01	He did not recognize his own furniture and had no idea of the place or date
3/28/01	He had no insight into his mental problems
5/31/01	The day after a six-day trip with his daughter, he said, "What trip? I've been right here."
6/3/01	He asked for wife (deceased) often
6/10/01	He asked for wife (deceased) frequently

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**Will and Trust Contests:
Tips for Estate Planners**

Assess For Capacity Again On The Day The Plan Is Signed

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**Will and Trust Contests:
Tips for Estate Planners**

Not All Dementias Are Equal

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**Will and Trust Contests:
Tips for Estate Planners**

Consider Asking The Client To Write A "Letter Of Reasons"

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28 August 2007

In whom I may confide!

Regarding my 2 sons -
 I had them and their father always
 coming to me for funds. What
 probably I neglected. I want
 to not be sure nothing
 is just paying for their employment
 of being a medical device.
 I see home to me for
 money.

My daughter [redacted] came
 over to visit me in the
 U.S. at her own expense!
 And - she never leaves
 empty-handed!! Always
 carrying goods from the
 U.S.

True [redacted]

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Will and Trust Contests: Tips for Estate Planners

In the event that the Donor's son, **JOHN DOE**, shall contest the probate or validity of the Donor's will or shall contest the validity of this trust instrument or any provisions of it or join in any proceeding to contest the validity of the Donor's will or to prevent any provision of it from being carried out in accordance with its terms, ...then ...all such benefits for the issue of **JOHN DOE**, including but not limited to the benefits provided in Article 3.02 and 3.04, shall cease and this instrument shall be interpreted as if **JOHN DOE** and his issue had predeceased the Donor. For purposes of this clause, the filing of an appearance shall constitute the filing of an objection.

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Will and Trust Contests: Tips for Estate Planners

Consider Video Recording Or A
Medical Evaluation

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Constructive Trust

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Will and Trust Contests: Tips for Estate Planners

Consider Broad In Terrorem
Provisions

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Unjust Enrichment

"A person may be unjustly enriched if he or she obtain title to property by fraud, duress, or undue influence, or violates a duty that arises out of a fiduciary relation to another"

Cadle Co. v. Bourgeois, 149 N.H. 410, 419-20 (2003)

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Burden of Proof

The Contestant Has The Burden Of Proof Unless Evidence Presented that Benefit Received For Less than Fair Value in the Context of a Confidential Relationship



PRETERMITTED HEIRS



Key Issues

Key Issues Will Include:

1. Variance Between The Current Plan And Prior Ones
2. Relationship Between The Donor And The Principal Donee
3. Relationship Between The Donor And The Contestant
4. Donor's Management of her Affairs
5. Medical Testimony
6. Involvement of Counsel



PRETERMITTED HEIRS

RSA 551:10:

Every child born after the decease of the testator, and every child or issue of a child of the deceased not named or referred to in his will, and who is not a devisee or legatee, shall be entitled to the same portion of the estate, real and personal, as he would be if the deceased were intestate.



Transitive Application

Transferee of property who pays no value and receives it from a party who holds it in (constructive) trust holds it in constructive trust.

Marcucci v. Hardy, 65 N.H. F.3d 986, 990 (1st Cir. 1995) (applying New Hampshire law)



PRETERMITTED HEIRS

Requirements for Application:

1. Child is born after decease of the testator; or
2. Child is not named in Will;
3. Child is not referred to in Will; and
4. Child is not a legatee under the Will

PRETERMITTED HEIRS

Wills

Chart page 109 (and ProbateTrial.com)

Trusts

In re Theresa Craig on interlocutory appeal
before NH SupremeCourt

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Powers Of Attorney Can Be Licenses To Steal

It's common:

For POA to be released to a child for a parent who has limited
or essentially no capacity to monitor the agent's activities

For there to be no accountability to any other family member

Agent starts treating the money as his own

Invitation to steal

By the time anyone finds out, money long gone

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PRETERMITTED HEIRS

Unresolved question if child who is referenced or named in trust
that is beneficiary of pour-over Will may assert statutory share
claim against the Will

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POA Accounting Actions

Agent's duties under RSA 564-E:114 to act:

1. With loyalty to the Principal's best interest;
2. In good faith;
3. To avoid conflicts in interest;
4. With the same care as a similarly situated agent; and
5. To "keep a record of all receipts, disbursements, and transactions made on behalf of the principal."

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POA Accounting Actions RSA 564-E (RSA 506:7 prior law)

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POA Accounting Actions

Exculpatory provision in POA under RSA 564-E:115 will be
honored except to the extent:

1. Relieves the Agent for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the POA or the Principal's best interests; or
2. Was inserted as result of an abuse of confidential relationship with Principal.

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POA Accounting Actions

Accounting action may be brought under RSA 564-E:116 by:

1. Agent
2. Principal
3. Spouse, descendant, or parent of principal
4. Intestate heirs
5. Any person named in principal's will
6. Treating health care provider

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POA Accounting Actions

Agent may held liable for attorneys' fees if the Court finds he/she "failed without any reasonable cause or justification" or "clearly violated the agent's fiduciary duties"

RSA 564-E:116(e)

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POA Accounting Actions

Agent has 60 days to comply with a request by one of these persons for an accounting and, upon his/her failure to comply, the accounting action can be filed, RSA 564-E:114(h)

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POA Accounting Actions

Factors for evaluating proposed/contested gift under 564-E:217:

1. Terms of POA;
2. Principal's interests and intent;
3. His/her gift history;
4. His/her estate plan;
5. His/her future needs; and
6. Tax considerations.

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POA Accounting Actions

"Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney." RSA 564-E:116(c)

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POA Accounting Actions

Gift shall be presumed lawful if POA expressly grants the authority to make the gift and is accompanied by statutory disclosure statement; "otherwise agent shall be required to prove by a preponderance of the evidence that the gift was authorized and was not a result of undue influence, fraud, or misrepresentation."

RSA 564-E:116(g)(3)

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POA Accounting Actions

Accounting proceedings shall be closed to the public other than for "good cause" and the final decision of the Court shall be a public record.

RSA 564-E:116(f)

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Elements

Clear and convincing evidence proves:

1. Confidential relationship between transferor and transferee; and
2. Transferee would be unjustly enriched by retaining property (did not pay fair value)

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POA Accounting Actions

POA "is durable unless it expressly provides that it is terminated by the incapacity of the principal."

RSA 564-E:104

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Confidential Relationship

"A confidential relationship exists if there is evidence of a family or other personal relationship in which one person justifiably believes the other will act in his or her interest"


Cadle Co. v. Bourgeois, 149 N.H. 410, 419-20 (2003)

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Constructive Trust

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Unjust Enrichment

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Transitive Application

Transferee of property who pays no value and receives it from a party who holds it in (constructive) trust holds it in constructive trust.

Marcucci v. Hardy, 65 N.H. F.3d 986, 990 (1st Cir. 1995) (applying New Hampshire law)

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Trust Formation

Significant Trust Terms

- In terrorem provisions
- Material purposes
- Sub-trusts


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Breach Of Fiduciary Duty Claims

Breach Of Fiduciary Duty Claims

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Powers Are Not Duties

Powers are tools for carrying out Trustee duties

Power may be exercised only if prudent to do so

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Trust Formation

Significant Trust Terms

- Governing law
- Exculpatory provisions
- Accounting provisions

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Trustee Duties

1. To Carry Out the Terms of the Trust
2. To Exercise Reasonable Care
3. To Be Loyal To Beneficiaries
4. To Give Personal Attention
5. To Account

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The Duty To Carry Out Terms Of Trust

A Trustee at common law could be liable for failure to follow the terms of the Trust, even if the Trustee acted in good faith.

Mistakes as to the law and as to the proper interpretation of the Trust do not insulate the Trustee from a breach of the duty to follow the Trust.

Corollary: Trustee are entitled (and may be required) to obtain counsel at Trust expense.



The Duty Of Loyalty

A transaction involving trust property is presumed to be affected by a conflict of interest if it is entered with:

The trustee's spouse;

The trustee's descendants, siblings, parents, or their spouses;

An agent or attorney of the trustee; or

A business in which the trustee owns a significant interest.



The Duty Of Reasonable Care

A Trustee is required to exercise the degree of care, skill, and judgment as would be exercised by a reasonably prudent Trustee under the circumstances, including the purposes and terms of the Trust.

A Trustee selected for its special skills or expertise must use its skills or expertise.



The Duty Of Loyalty

A transaction affected by a conflict of interest is voidable by a beneficiary unless:

The transaction was authorized by the terms of the trust;

The transaction was approved by the court;

The claim is barred by the statute of limitations; or

The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee



The Duty Of Loyalty

The Trustee must:


Act solely in the interest of the beneficiaries as to matters that directly and indirectly involve Trust property

Treat beneficiaries with fairness and without favor relative to each other



The Duty of Loyalty

For consent or ratification by the beneficiary to be a defense, the Trustee must prove the beneficiary actually understood the material facts, the implications of the conflict of interest, and the beneficiary's own legal rights.




The Duty To Account

The Trustee must segregate and not co-mingle Trust Assets

All doubts are resolved against the Trustee who does not keep accurate accounts.

Co-mingle presumption – fiduciary withdrew own funds first.

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Remedies

- Injunction
- Accountings
- Trustee Removal
- Damages/surcharge
- Trace Trust property/proceeds
- Attorneys' fees (own and beneficiary's)


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Ascertainable Standards

- Health, education and support
- Support and maintenance
- Comfortable support
- Support in reasonable comfort
- Support and comfort

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Fiduciary Duty Claims

Exculpatory Language

A term of a Trust relieving a Trustee of liability for breach of trust is unenforceable to the extent that it:

- (1) relieves the Trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the Trust or the interests of the beneficiaries; or
- (2) was inserted as the result of an abuse by the Trustee of a fiduciary or confidential relationship to the settlor.

RSA 564-B:10-1008


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Ascertainable Standards

- Generous support
- Happiness
- Benefit
- Best interests
- Welfare
- Emergency and severe hardship

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Statute of Limitations

Under RSA 564-B:10-1005 Trustee can shorten limitations period to one year if he provides a report adequately disclosing the existence of a potential claim and advises the beneficiary that he/she has one year to make a claim. Otherwise, the period is three years commencing from the first to occur:

- (1) the removal, resignation, or death of the trustee;
- (2) the termination of the beneficiary's interest in the trust;
- (3) the termination of the trust; or
- (4) provision of a report adequately disclosing the breach.

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Fiduciary Duty Claims

Liability of Third Party

Third party who participates in breach of Trust by Trustee is jointly and severally liable.



Thank You