

# TITLE LVI PROBATE COURTS AND DECEDENTS' ESTATES

## CHAPTER 564-D QUALIFIED DISPOSITIONS IN TRUST ACT

### Section 564-D:1

#### **564-D:1 Definitions. –**

I. "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

II. "Creditor" means, with respect to a transferor, a person who has a claim.

III. "Debt" means liability on a claim.

IV. "Disposition," means a conveyance, assignment or any other transfer of property, including a change in the legal ownership of property occurring upon the substitution of one trustee for another or the addition of one or more new trustees, or the exercise of a power so as to cause a transfer of property to a trustee or trustees. The term "disposition" shall not include the release or relinquishment of an interest in property that theretofore was the subject of a qualified disposition.

V. "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended and as in effect from time to time.

VI. "Property" means real property, personal property, and interests in real or personal property.

VII. "Qualified disposition" means a disposition by or from a transferor to a qualified trustee or qualified trustees, with or without consideration, by means of a trust instrument.

VIII. "Spouse" and "former spouse" means only persons to whom the transferor was married at, or before, the time the qualified disposition is made.

IX. "Transferor" means any person as an owner of property; as a holder of a power of appointment which authorizes the holder to appoint in favor of the holder, the holder's creditors, the holder's estate, or the creditors of the holder's estate; or as a trustee, directly or indirectly, who makes a disposition or causes a disposition to be made.

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

### Section 564-D:2

#### **564-D:2 Trust Instrument Defined. –**

I. For the purposes of this chapter, a trust instrument is a trust instrument (within the meaning of RSA 564-B:1-103(20)) that appoints a qualified trustee for the property that

is the subject of a disposition and meets the following requirements:

(a) The trust instrument expressly incorporates the law of this state to govern the validity, construction, and administration of the trust;

(b) The trust instrument is irrevocable; and

(c) The trust instrument provides that the interest of the transferor or other beneficiary in the trust property or the income therefrom may not be transferred, assigned, pledged, or mortgaged, whether voluntarily or involuntarily, before the qualified trustee or qualified trustees actually distribute the property or income therefrom to the beneficiary, and such provision of the trust instrument shall be deemed to be a restriction on the transfer, assignment, pledge, or mortgage of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of section 541(c)(2) of the Bankruptcy Code (11 U.S.C. section 541(c)(2)) as it exists as of the time such restriction is established.

II. For purposes of subparagraph I(b), a trust instrument shall not be deemed revocable on account of the inclusion of any one or more of the following rights, powers, and interests:

(a) A transferor's power to veto a distribution from the trust;

(b) A power of appointment, other than a power to appoint to the transferor, the transferor's creditors, the transferor's estate, or the creditors of the transferor's estate, exercisable by will or other written instrument of the transferor effective only upon the transferor's death;

(c) The transferor's potential or actual receipt of income, including rights to such income retained in the trust instrument;

(d) The transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust (each within the meaning of section 664(d) of the Internal Revenue Code) and the transferor's right, at any time, and from time to time, to release, in writing delivered to the qualified trustee, all or any part of the transferor's retained interest in such trust, in favor of one or more charitable organizations that have a remainder interest in such trust at the time of such release;

(e) The transferor's receipt each year of a percentage, not to exceed 5 percent, specified in the trust instrument of the initial value of the trust assets or their value determined from time to time pursuant to the trust instrument;

(f) The transferor's potential or actual receipt or use of principal if such potential or actual receipt or use of principal would be the result of a qualified trustee or qualified trustees, including a qualified trustee or qualified trustees acting at the direction of a trust advisor described in RSA 564-D:4, acting either in such qualified trustee's or qualified trustees' sole discretion or pursuant to an ascertainable standard contained in the trust instrument;

(g) The transferor's right to remove a trustee or trust advisor and to appoint a new trustee or trust advisor, other than a person who is a related or subordinate party with respect to the transferor (within the meaning of section 672(c) of the Internal Revenue Code);

(h) The transferor's potential or actual use of real property held under a personal residence trust (within the meaning of such term as described in section 2702(c) of the Internal Revenue Code);

(i) The transferor's potential or actual receipt or use of a qualified annuity interest (within the meaning of such term described in section 2702 of the Internal Revenue Code); and

(j) The ability, whether pursuant to discretion or direction, of a qualified trustee to pay, after the transferor's death, all or any part of the transferor's debts outstanding at the time of the transferor's death, the expenses of administering the transferor's estate, or any estate inheritance tax imposed on or with respect to the transferor's estate.

III. For purposes of subparagraph I(b), a trust instrument shall not be deemed revocable on account of the transferor's potential or actual receipt of income or principal to pay, in whole or in part, income taxes due on trust income if such receipt of income or principal is pursuant to a provision in the trust instrument that expressly provides for the payment of such taxes and such receipt of income or principal results from (i) the qualified trustee's acting in such qualified trustee's discretion or (ii) the qualified trustee acting at the direction of a trust advisor who is acting in such trust advisor's discretion. Any distribution to pay income taxes made under discretion included in a trust instrument pursuant to subparagraphs II(c), (f), and (i) may be made by direct payment to the taxing authorities.

IV. A disposition by a trustee that is not a qualified trustee to a trustee that is a qualified trustee may not be treated as other than a qualified disposition solely because the trust instrument fails to meet the requirements of subparagraph I(a).

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

### **Section 564-D:3**

**564-D:3 Qualified Trustee Defined.** – For the purposes of this chapter, a qualified trustee is any person, other than the transferor, who in the case of a natural person, is a resident of this state or who, in all other cases, is a state or federally chartered bank or trust company having a place of business in New Hampshire, is authorized to engage in a trust business in this state, and maintains or arranges for custody in this state of some or all of the property that is the subject of the qualified disposition, maintains records in this state for the trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation in this state of fiduciary income tax returns for the trust, or otherwise materially participates in this state in the administration of the trust.

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

### **Section 564-D:4**

**564-D:4 Persons Not Eligible to be Considered a Qualified Trustee; Appointment of Trust Advisors.** – Neither the transferor nor any other natural person who is a nonresident of this state nor an entity that is not authorized by the law of this state to act as a trustee or whose activities are not subject to supervision as provided in RSA 564-D:3 may be considered a qualified trustee. However, nothing in this chapter precludes a transferor from appointing one or more trust advisors (whether or not such trust advisors would meet the requirements imposed by RSA 564-D:3), including, but not limited to:

I. Trust advisors who have authority under the terms of the trust instrument to remove and appoint qualified trustees or trust advisors; and

II. Trust advisors who have authority under the terms of the trust instrument to direct, consent to, or disapprove distribution from the trust. For purposes of this section, the term trust advisor includes a trust advisor as described in RSA 564-B:1-103(27), a trust protector as described in RSA 564-B:1-103(28), or any other person who, in addition to a qualified trustee, holds one or more trust powers.

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

### **Section 564-D:5**

**564-D:5 Transferor May Serve as Trust Advisor.** – Any individual, including the transferor of the qualified disposition, may serve as a trust advisor as described in RSA 564-D:4. However, if such transferor serves as the trust advisor, his or her rights and powers as a trust advisor shall be limited to:

I. The right to direct, consent to, or veto a fiduciary's actual or proposed investment decisions; and

II. The rights and powers described in RSA 564-D:2, II excluding any power that would enable the transferor, acting as trust advisor, to direct, consent to, veto, or otherwise participate in a distribution by the trustee to or for the benefit of the transferor, the transferor's creditors, the transferor's estate, or the creditors of the transferor's estate.

**Source.** 2008, 374:27, eff. Sept. 9, 2008. 2011, 243:19, eff. Sept. 11, 2011.

### **Section 564-D:6**

**564-D:6 Successor Qualified Trustee.** – If a qualified trustee of a trust ceases to meet the requirements of RSA 564-D:3, and there remains no trustee that meets such requirements, such formerly qualified trustee shall be deemed to have resigned as of the time of such cessation, and thereupon the successor qualified trustee provided for in the trust instrument shall become a qualified trustee of the trust, effective upon such successor qualified trustee's acceptance of the office of trustee, or, if such named successor qualified trustee is unable or unwilling to accept such office, or if the trust instrument does not provide for any successor qualified trustee, the probate court shall, upon application of any interested party, appoint a successor qualified trustee.

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

### **Section 564-D:7**

**564-D:7 Disposition to More Than One Trustee.** – In the case of a disposition to more than one trustee, a disposition that is otherwise a qualified disposition may not be treated as other than a qualified disposition solely because not all of the trustees are qualified trustees.

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

### **Section 564-D:8**

**564-D:8 Transferor's Powers and Rights.** – A qualified disposition is subject to RSA 564-D:9 to RSA 564-D:14, inclusive, notwithstanding a transferor's retention of any or all of the powers and rights described in RSA 564-D:2, II or the transferor's service as trust advisor pursuant to RSA 564-D:5. The transferor has only such powers and rights as are conferred by the trust instrument. Except as permitted by RSA 564-D:2 and RSA 564-D:5, a transferor has no rights or authority with respect to the property that is the subject of a qualified disposition or the income therefrom, and any agreement or understanding purporting to grant or permit the retention of any greater rights or authority is void.

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

### **Section 564-D:9**

**564-D:9 Restrictions on Attachment or Other Provisional Remedy Against Property.** – Notwithstanding any other provision of law, no action of any kind, including an action to enforce a judgment entered by a court or other body having adjudicative authority, may be brought at law or in equity for an attachment or other provisional remedy against property that is the subject of a qualified disposition or for avoidance of a qualified disposition unless such action is brought pursuant to the provisions of RSA 545-A, the Uniform Fraudulent Transfer Act, or RSA 564-D:15.

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

### **Section 564-D:10**

**564-D:10 Extinguishment of Creditor's Claim.** – A creditor's claim under RSA 564-D:9 is extinguished unless:

I. The creditor's claim arose before the qualified disposition was made and the action is brought within the limitations period of RSA 545-A, the Uniform Fraudulent Transfer Act, in effect on the date of the qualified disposition; or

II. Notwithstanding the provisions of RSA 545-A, the Uniform Fraudulent Transfer Act, the creditor's claim arose on or after the date of the qualified disposition, and the action is brought within 4 years after such date.

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

### **Section 564-D:11**

**564-D:11 Qualified Disposition Made by Transferor Who is Trustee.** – A qualified disposition that is made by means of a disposition by a transferor who is a trustee is deemed to have been made as of the time, whether before, on, or after the effective date

of this chapter, the property that is the subject of the qualified disposition was originally transferred to the transferor (or any predecessor trustee), in a form that meets the requirements of RSA 564-D:2, I(b), I(c), and II.

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

### **Section 564-D:12**

#### **564-D:12 Creditor's Rights With Respect to a Qualified Disposition. –**

Notwithstanding any law to the contrary, a creditor, including a creditor whose claim arose before, at the time of or after a qualified disposition, or any other person has only such rights with respect to a qualified disposition as are provided in RSA 564-D:9 to RSA 564-D:16, inclusive, and no such creditor nor any other person has any claim or cause of action against the trustee, or an advisor described in RSA 564-D:4, of a trust that is the subject of a qualified disposition, or against any person involved in the counseling, drafting, preparation, execution, or funding of a trust that is the subject of a qualified disposition.

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

### **Section 564-D:13**

**564-D:13 Actions Against Trustee of Trust That Is the Subject of a Qualified Disposition Barred. –** Notwithstanding any other provision of law, no action of any kind, including an action to enforce a judgment entered by a court or other body having adjudicative authority, may be brought at law or in equity by a creditor against the trustee, or advisor described in RSA 564-D:4, of a trust that is the subject of a qualified disposition, or against any person involved in the counseling, drafting, preparation, execution, or funding of a trust that is the subject of a qualified disposition, if, as of the date such action is brought, an action by a creditor with respect to such qualified disposition would be barred under RSA 564-D:9 to RSA 564-D:12, inclusive.

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

### **Section 564-D:14**

**564-D:14 More Than One Qualified Disposition Is Made by Means of Same Trust Instrument. –** If more than one qualified disposition is made by means of the same trust instrument:

I. The making of a subsequent qualified disposition shall be disregarded in determining whether a creditor's claim with respect to a prior qualified disposition is extinguished as provided in RSA 564-D:10;

II. With respect to each subsequent qualified disposition, the limitations period with respect to actions brought under RSA 545-A, the Uniform Fraudulent Transfer Act, shall commence on the date such qualified disposition is made; and

III. Any distribution to a beneficiary is deemed to have been made from the latest such qualified disposition.

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

## **Section 564-D:15**

### **564-D:15 Persons Exempt From Application of Qualified Disposition Provisions.**

I. Notwithstanding the provisions of RSA 564-D:9 to RSA 564-D:14, inclusive, this chapter does not apply in any respect:

(a) To any person to whom the transferor is indebted on account of an antenuptial agreement or an agreement or order of court for the payment of support or alimony in favor of such transferor's spouse, former spouse, or children, or for a division or distribution of property in favor of such transferor's spouse or former spouse, but only to the extent of such debt; or

(b) To any person who suffers death, personal injury, or property damage on or before the date of a qualified disposition by a transferor, which death, personal injury, or property damage is at any time determined to have been caused in whole or in part by the act or omission of either such transferor or by another person for whom such transferor is or was vicariously liable.

II. Paragraph I shall not apply to any claim for forced heirship or legitime or the elective share of the transferor's surviving spouse, unless the transferor made the qualified disposition for the purpose of defeating the surviving spouse's elective share rights.

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

## **Section 564-D:16**

**564-D:16 Avoidance of Qualified Disposition.** – A qualified disposition is avoided only to the extent necessary to satisfy the transferor's debt to the creditor at whose instance the disposition had been avoided, together with such costs, including attorney's fees, as the court may allow. If any qualified disposition is avoided as provided in this section, then:

I. If the court is satisfied that a qualified trustee has not acted in bad faith in accepting or administering the property that is the subject of the qualified disposition:

(a) Such qualified trustee has a first and paramount lien against the property that is the subject of the qualified disposition in an amount equal to the entire cost, including attorney's fees, properly incurred by such qualified trustee in the defense of the action or proceedings to avoid the qualified disposition. It is presumed that such qualified trustee did not act in bad faith merely by accepting such property; and

(b) The qualified disposition is avoided subject to the proper fees, costs, preexisting rights, claims, and interests of such qualified trustee, and of any predecessor qualified trustee that has not acted in bad faith; and

II. If the court is satisfied that a beneficiary of a trust has not acted in bad faith, the

avoidance of the qualified disposition is subject to the right of such beneficiary to retain any distribution made upon the exercise of a trust power or discretion vested in the qualified trustee or qualified trustees of such trust, which power or discretion was properly exercised prior to the creditor's commencement of an action to avoid the qualified disposition. It is presumed that the beneficiary, including a beneficiary who is also a transferor of the trust, did not act in bad faith merely by creating the trust or by accepting a distribution made in accordance with the terms of the trust.

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

### **Section 564-D:17**

**564-D:17 Applicability.** – This chapter shall apply to qualified dispositions and dispositions by transferors who are trustees made after January 1, 2009.

**Source.** 2008, 374:27, eff. Sept. 9, 2008.

### **Section 564-D:18**

**564-D:18 Short Title.** – This chapter shall be known and may be referred to as the "Qualified Dispositions in Trust Act."

**Source.** 2008, 374:27, eff. Sept. 9, 2008.