

## **MUNICIPAL TRUSTEES: SUMMARY OF LAWS AND FAQS**

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### I. Role of the Director of Charitable Trusts

#### A. Supervision and Enforcement of Charitable Trusts

1. Common Law Authority: The Attorney General has the common law duty and power to supervise and enforce charitable trusts. *See, e.g., Souhegan National Bank v. Kenison*, 92 N.H. 117, 122 (1942). This authority of the Attorney General originally is derived from the 1601 Statute of Charitable Uses (Elizabeth I).
2. Statutory Authority: In 1943, New Hampshire became the first state to codify the Attorney General's common law authority to regulate charitable trusts. *See* RSA 7:19, I (providing that the New Hampshire Attorney General, by and through its Director of Charitable Trusts, is the state regulator responsible for supervision and administration of charitable organizations, as well as enforcement of charitable trust laws). RSA 7:20 provides that the Director of Charitable Trusts "shall have and exercise all the common law and statutory rights, duties, and powers of the attorney general in connection with the supervision, administration, and enforcement of charitable trusts, charitable solicitations, and charitable sales promotions." RSA 7:20; *see also* RSA 564-B:4-405 (c). The Attorney General may intervene in and initiate cases to enforce and to terminate charitable trusts. RSA 7:28-f; *see also Attorney General v. Rochester Trust Co.*, 115 N.H. 70, 76 (1975); *Duke v. Fuller*, 9 N.H. 536, 540 (1838).
3. Municipal Trusts: Trusts created in municipalities by donors and testators are enforceable and governed by the laws pertaining to charitable trusts. *See State v. Federal Square Corp.*, 89 N.H. 538 (1938).

#### B. Reports to the Director of Charitable Trusts

1. Charitable Trusts and Organizations: All New Hampshire charitable trusts and organizations are required to register and then file with the Director of Charitable Trusts annual reports signed under oath by the president or treasurer of the organizations. *See* RSA 7:28. In addition, the Director of Charitable Trusts may at any time require that any person, entity, or

political agency with information pertaining to charitable trusts submit documentation or testimony to the Director of Charitable Trusts. *See* RSA 7:24.

2. Governmental Entities: The State of New Hampshire, counties, and municipalities are also required to submit information to the Director of Charitable Trusts donated funds held in trust:
  - a. The State: In accordance with RSA 11:5-6, II and Jus 404.06 (a), the state treasurer shall submit to the charitable trusts unit on an annual basis a list of any donated funds held in trust by the State of New Hampshire. The list shall include the name, purpose, and current dollar value of each fund.
  - b. Counties: In accordance with RSA 23:21 and Jus 404.06 (b), county treasurers shall submit to the charitable trusts unit on an annual basis a list of any donated funds held in trust by the county. The list shall include the name, purpose, and current dollar value of each fund.
  - c. Trustees of Trust Funds: In accordance with RSA 31:38, Jus 404.06 (c), Rev 1707.11, and Rev 1707.12, municipal trustees of trust funds shall submit online on an annual basis no later than 2 months after the end of the municipality's fiscal year department of revenue administration Forms MS-9, "Report of Trust and Capital Reserve Funds" and MS-10, "Report of Common Trust Fund Investments," available online at <https://www.doj.nh.gov/bureaus/charitable-trusts/municipalities.htm>.
  - d. Municipal Library Trustees: In accordance with RSA 202-A:12-a and Jus 404.06 (d), municipal library trustees shall submit to the charitable trusts unit on an annual basis no later than 2 months after the end of the municipality's fiscal year a list of any donated funds held in trust by the trustees. The list shall include the name, purpose, and current dollar value of each fund. In the alternative, municipal library trustees shall submit to the charitable trusts unit their annual financial reports.
  - e. All Government Entities: In accordance with Jus 404.06 (e), the Director of Charitable Trusts may require that any governmental entity holding donated funds submit to the charitable trusts unit additional information concerning the purpose, distribution, or investment of any trust funds held by the governmental entity.

## II. Roles of the Municipal Trustees with Respect to Charitable Trusts

### A. Authority to Accept Trusts:

1. Acceptance of Gifts:
  - a. General: Municipalities have the authority to take and hold in trust gifts, legacies, and devises made to them for *public* (not private) purposes (including, but not limited to, the establishment of scholarships and the maintenance, and care of public parks, libraries, schools, and cemeteries). RSA 31:19, I. Towns may also vote at an annual meeting to create trust funds for a public purpose. RSA 31:19-a.
  - b. Perpetual Care Funds: Towns shall accept perpetual care funds donated for cemeteries. *See* RSA 31:20. Note that some towns and cemetery bylaws do not require a dedicated payment for perpetual care at the time of the purchase of a cemetery lot. Some towns that do require payment for perpetual care stipulate in the cemetery deed or right to inter that the payment will support maintenance of that lot as well as other lots in the cemetery.
  - c. Gifts to the Library: Gifts for the public library may be accepted by the town or directly by the library trustee, as specified by the donor. RSA 202-A:22, 23.
  - d. School Districts and Village Districts: Gifts for a school district, village district, or any other subdivision of a town may be accepted by said subdivision, but the funds are to be held by the trustees of trust funds. RSA 31:31.
  - e. Conservation Commissions: Conservation commissions may receive gifts of money, personal property, real property, and water rights, subject to the approval of the local governing body. RSA 36-A:4. Note that the town treasurer shall have custody of the funds of the conservation commission. RSA 36-A:5, II.
  - f. Heritage Commissions: Heritage commissions may receive gifts of money and property, both real and personal, in the name of the city or town, subject to the approval of the governing body. RSA 674:44-b, I (h). Note that the town treasurer has custody of all heritage commission funds. RSA 674:44-d, II.
2. Acceptance at Town Meeting: Towns accept (or reject) gifts, grants, bequests, and devises by vote at the annual town meeting. RSA 31:19.
3. Acceptance of Trusts Without Town Meeting: Towns *may* authorize the local governing body (selectmen or town council) to accept trust funds without further action by the town at a town meeting. RSA 31:19, II. However, that authority shall continue in effect for one year from the date

of the town or council meeting, unless the warrant article or vote granting such authority uses the words “indefinitely” or “until rescinded” or similar language. RSA 31:19, III.

4. Acceptance of Gifts of Real Estate: Towns may also authorize the selectmen to accept gifts of real estate, provided that they comply with the procedure set forth in the statute. *See* RSA 41:14-a; RSA 41:14-c. Trustees of trust funds do not have oversight of gifts of real estate.
5. Unanticipated funds:
  - a. “Unanticipated funds” are funds from a non-tax source that are not anticipated or known at the time of budget preparation. For example, a bequest under a will, donations for a special fundraising event, a grant.
  - b. Towns and Village Districts:
    1. A town or village district at an annual meeting can adopt an article authorizing the board of selectmen or commissioners to apply for, accept, and expend without further action by the town unanticipated funds from governmental entities and private sources that become available during the fiscal year. RSA 31:95-b.
    2. The warrant article approving the authorization can state that it is indefinite unless specifically rescinded. RSA 31:95-b, I (a).
    3. For unanticipated moneys in the amount of \$10,000 or more, the selectmen or commissioners shall hold a public hearing. RSA 31:95-b, III (a). For unanticipated moneys less than \$10,000, the selectmen determine the amount of unanticipated funds that trigger notice. RSA 31:95-b, III (b).
  - c. Libraries:
    1. A Town can adopt an article authorizing (indefinitely until specific rescission of such authority) the public library trustees to apply for, accept, and expend unanticipated money available during the fiscal year. RSA 202-A:4-c; *see also* RSA 202-A:4-d (allowing the town to adopt an article authorizing public library trustees to accept gifts of personal property).
    2. For unanticipated money of \$5,000 or more, the library shall hold a public hearing. RSA 202-A:4-c, III. For unanticipated funds of less than \$5,000, the library trustees shall establish the amount of unanticipated funds that require a hearing. *Id.*

#### B. Trustees of Trust Funds

1. Composition: The trustees of trust funds shall be composed of 3 elected trustees, unless a town at an annual or special town meeting votes that the trustees shall consist of a board of 5 trustees. (In towns where the total book value of all trust funds is less than \$15,000, the town may vote that the board consist of only one trustee, and the single trustee’s compensation

shall be determined at town meeting. *See* RSA 31:23.) Any vacancies shall be filled by the selectmen for the remainder of the term. In cities, the trustees shall be chosen and hold their offices for such terms as shall be provided by city ordinance. RSA 31:22.

2. Administration of Trusts: The trustees of trust funds are charged with “administering” trust funds. RSA 31:22. The term “administer” under RSA 31:22 means “manage, direct, and superintend” the affairs of the trust. N.H. A.G. Op. 1965-16. Thus, the trustees of trust funds cannot distribute trust funds to the selectmen for purposes contrary to the judgment of the trustees. *Id.*
3. Bookkeeper: The trustees shall elect one of the trustees to serve as “bookkeeper,” who is required to maintain the records and “shall require a voucher before making any disbursements of funds from said trusts.” RSA 31:22. The bookkeeper may be compensated in the amount determined at town meeting. RSA 31:35.
4. Trustee Expenses: Trustee expenses are incidental town charges and should be included in the municipal budget. RSA 31:24. Trustee expenses cannot be taken from trust funds.
5. Trustee Records: The trustees shall keep a record of all trusts, open to the inspection of all persons in the town. RSA 31:34. The trustees should permanently maintain all trust instruments, permanently maintain minutes and quarterly reports, and maintain bank statements for a period of 6 years after audit. *See* RSA 33-A:3-a, CXXXVIII. Vouchers should be maintained until audited plus one year. RSA 33-A:3-a, CXLII.
6. Audit: The accounts of the trustees of trust funds shall be audited annually by the auditor of the town. RSA 31:33, I. In a year in which a town accepts gifts, legacies, and devises for any trust created, the trustees and auditor shall print in the annual town report the names of the donors and the value of the gifts at the time of donation. RSA 31:33, III.
7. Custody and Investment.
  - a. All Trust Funds: The trustees of trust funds shall have the custody of all trust funds held by the town. RSA 31:37 (towns shall pay over to the trustees of trust funds the full amount of its trust funds). They are responsible for the administration of private donations and trusts given to a town or city, but do not have the authority to accept or reject private donations (as discussed above, that authority rests with the voter, unless the voters delegate the authority to specific public officials). They are also the custodian of capital reserve and expendable trust funds. RSA 35:10.

- b. Library Funds: Trust funds given to towns and cities for the use of a public library shall be held in the custody and under the management of the trustees of trust funds, and the entire income from such funds shall be paid over to the library trustees. Payment of such income shall be made by the trustees of trust funds to the library trustees as the same is received. RSA 202-A:22.
- c. School District Funds: Trustees of trust funds hold all gifts, bequests, and devises given to a school or school district. RSA 31:31; *Drury v. Sleeper*, 84 N.H. 98 (1929) (presumption that the testator intended that the officers of the town having legal authority would hold and administer the trust). The one exception involves “student activity funds.” Schools may retain control of funds used to support co-curricular and extracurricular student activities (e.g., drama club, chess club, marching band, etc.). Student activities do not include the PTA.
- d. Trust Fund Investments:
  - i. Investment Policy: The trustees shall formally adopt an investment policy for all investments that shall be reviewed and confirmed at least annually. RSA 31:25; see also RSA 34:5; RSA 35:9. A copy of the investment policy must be filed with the Director of Charitable Trusts. *Id.*
  - ii. Collective Investments: Common investment of trust funds is permitted under RSA 31:27; *but see* RSA 31:19-a (preventing the commingling of privately-donated funds with taxpayer-funded trusts); RSA 31:28 (providing that RSA 31:27 is not applicable where the instrument creating the particular trust specifically prohibits collective investments or where such investment violates any specific court order made in any particular trust).
  - iii. Bank and Investment Accounts Must Be in the Name of the Municipality: The investments must be in the name of the town or city and must use the municipality’s taxpayer identification number (and not a particular trustee’s social security number).
  - iv. Prudent Man Standard of Investment: Under the prudent man standard (the default standard), the preservation of principal and the amount and regularity of the income would be considered in determining whether *each* investment is “prudent.” RSA 31:25-b.
  - v. Prudent Investor Standard of Investment: Under the prudent investor rule, the investment portfolio is judged in its entirety, considers diversification, and the purposes and terms of the trusts.

RSA 31:25-d; RSA 564-B:9-901-9-905. In order for trustees to manage and invest funds in accordance with the prudent investor rule, the trustees must notify the Director of Charitable Trusts in writing and hire or employ the trust department of a bank or a brokerage firm to provide investment advice and assistance. RSA 31:25-d. The specifics of hiring a professional bank or brokerage firm are set forth in RSA 31:38-a. Expenses of the bank or brokerage firm can be charged against the trust funds involved and shall be reported in the annual report as expenditures out of the trust funds. RSA 31:38-a, IV.

- vi. Investments for Total Return: Investing for total return (i.e., ignoring the distinction between principal and income) is not permitted unless authorized by the court for funds with value greater than \$1 million. RSA 292-B:2, V (d).
- e. Taxpayer Funds Investments:
  - i. Funds Derived from Public Money: Trustees of trust funds also hold and invest capital reserve funds, expendable trust funds, and reserves derived from taxpayer money for the town, school district, and village district. RSA 35:10.
  - ii. Investment Policy: The trustees must adopt an investment policy for all investments and trust funds in their custody, shall review the policy at least annually, and file the policy with the Director of Charitable Trusts. RSA 35:9.
  - iii. Investment Options Limited: The investments must “maximize growth and mitigate risk.” RSA 35:9. For example, the investments could include bank deposits, government bonds, certain securities, and mutual funds. *Id.*
  - iv. Bank or Brokerage Assistance: The trustees may contract with a bank or investment advisor. RSA 34:16. The town at town meeting or the school district at school district meeting may adopt an article authorizing the trustees of trust funds, without further action of the town meeting or school district, to charge any expenses related to the bank or investment advisor against the taxpayer funds. RSA 35:9-a.
- f. Commingling Funds: A town may at an annual or special meeting vote to create a trust fund for a public purpose (e.g., for a park). While the local legislative body may accept privately donated gifts, legacies, and devises to be utilized for the same purpose as a trust fund created by the town at town meeting, such privately donated gifts shall be

invested and accounted for separately from, and not commingled with the trust funded by public money. RSA 31:19-a. That is, private donations cannot be deposited into a general fund trust or expendable trust created pursuant to RSA 31:19-a because the town could vote to rescind or abolish the general fund trust, and private donations never lapse. In other words, public (taxpayer) money cannot be commingled with privately donated money. Note that a town meeting vote may explicitly make a trust fund permanent (i.e., not subject to a subsequent vote to terminate the fund). RSA 31:19-a.

8. Distributions: The trustees shall require a voucher before making any disbursement of funds from trusts. RSA 31:22; RSA 289:7, I (d). With respect to donated funds, the trustees of the trust funds make any distributions to the trustees or agents of the town or of the charitable organization designated by the trust to carry out the purposes. RSA 31:32. If the trust does not designate a particular agent (e.g., library or cemetery trustees or friends of the library), the trustees of trust funds expend the funds. RSA 31:32. For taxpayer funds, the selectmen are the default agent for expenditure, unless the warrant article designates another body. RSA 35:3; RA 35:15.

### C. Library Trustees

1. Composition: Library trustees in a city are generally appointed in accordance with the charter or city ordinance provisions. RSA 202-A:8. Library trustees in a town are elected at town meeting and must consist of a number of persons divisible by 3. RSA 202-A:6.
2. Custody and Management of the Library: The library trustees have the custody and management of the library. They are responsible for appointing a librarian, adopting bylaws, and making rules and regulations for the library. The trustees are responsible for preparing an annual budget for the operation of the library and for expending the money raised and appropriated by the municipality for the library. RSA 202-A:11, II.
3. Trust Funds:
  - a. Funds Held by the Trustees of Trust Funds: The trustees of trust funds normally hold and manage trust funds given to towns and cities for the use of a public library and pay over the income from the funds to the library trustees. RSA 202-A:22. Library trustees and selectmen or city council must establish a (written or unwritten) payment schedule for all moneys raised and appropriated by the town or city for library purposes. RSA 202-A:11, III.
  - b. Trust Funds Held by Library Trustees: Library trustees have the authority to hold and administer private donations when the donor so



specifies. RSA 202-A:23. If the library trustees administer the investments of such special funds, they are governed by the provisions of RSA 31:25 and RSA 31-25-d concerning investments and RSA 41:6 concerning bonding requirements. RSA 202-A:23.

#### D. Cemetery Trustees

1. Composition: Every municipality is required to elect a board of cemetery trustees, although towns with a town manager form of government may vote to eliminate the trustees and delegate their duties to the town manager RSA 289:6. A town may adopt by vote of the town meeting to have the board of selectmen serve for the term of elected office as the cemetery trustees. RSA 289:6, II-a.
2. Management of the Cemeteries: Cemetery trustees are required to adopt bylaws, prepare an annual budget, expend monies raised and appropriated by the municipality and expend such trust funds as are transferred to them by the trustees of trust funds. RSA 289:7, I. Since towns are required to budget in gross (RSA 32:5), the annual cemetery income budget should reflect projected income to be received from trust funds and the expenditure budget should reflect use of that income from trust funds.
3. Trust Funds: While cemetery trustees are not authorized to hold or administer private trust funds or perpetual care funds, they have the authority to expend income from trust funds for perpetual care and cemetery are. The trustees of trust funds hold the funds and release them to the cemetery trustees upon the receipt of a voucher.
4. Cemetery Perpetual Care Funds: Perpetual care funds are considered to be privately donated charitable trusts. They are permanent funds, and only the income from the funds may be spent. (Income in this context is defined as dividends and interest; principal appreciation or capital gains may not be expended.) The income from the perpetual care funds may be used only for the care and maintenance of the grave to which the perpetual care fund is attached. *See Town of Boscawen v. Acting Attorney General*, 93 N.H. 444 (1945) (the income from perpetual care funds cannot be expended by the town for general cemetery maintenance without permission from the court). To address this, cemetery trustees may conduct an informal labor study to determine the annual maintenance cost for each lot in a cemetery, and that allocated amount may be spent from the income of a perpetual care fund pertaining to a lot in that cemetery. Note that towns are required to appropriate “sufficient funds” for the maintenance of their cemeteries, which would include burial lots, to the extent they are not otherwise supported by perpetual care funds. RSA 289:4.

### III. Fiduciary Duties of Municipal Trustees

A. Overview: Municipal trustees are fiduciaries and owe certain legal duties with respect to the charitable funds over which they have oversight. *See* RSA 7:28-e (“every person soliciting, collecting, or expending contributions for charitable purposes, and every officer, director, trustee, and employee of any such person...shall be deemed to be a fiduciary....”). Those legal duties include the duties of loyalty, care, and obedience.

#### B. Duty of Loyalty:

1. Meaning: The duty of loyalty means that the trustees must act in good faith and in the best interests of the entity to which they are entrusted and not seek to derive personal gain from its assets or programs. That is, a trustee’s priority is to the trust and not to the trustee’s private interests.
2. Conflicts of Interest: Trustees must disclose any conflicts of interest and remove themselves from discussions or votes when conflicts arise. They must also comply with any applicable conflict of interest ordinances or ethics resolutions. New Hampshire municipalities have authority to enact local conflict of interest ordinances, RSA 31:39-a; RSA 49-C:33, I (c), and many local governing bodies have adopted ethics resolutions that include conflicts of interest provisions. RSA 669:7 prohibits persons holding certain officers from holding certain other municipal offices (e.g., a selectman cannot also hold the position of trustee of trust funds).
3. Examples: Violations of the duty of loyalty may include fraud, self-dealing, or improper diversion of assets or corporate opportunities.

#### C. Duty of Care

1. Meaning: The duty of care means that the director, officer, or trustee must act in good faith with the care a person of ordinary prudence in a like position would exercise under similar circumstances. Breaches of the duty of care can fall into three categories: lack of attention in overseeing the affairs of the trust, poor business decision-making, and waste of assets.
2. Obligation to Pay Attention: Trustees have an obligation to actively participate in meetings and act carefully with respect to the mechanics of accepting gifts, the investment of funds, the distribution of funds, the use of funds, and the completion of annual financial reports. They have an obligation to become educated about their roles and responsibilities and consult with experts when they are not clear about their roles and responsibilities.

#### D. Duty of Obedience

1. Meaning: The duty of obedience, often considered to be a subset of either the duty of care or the duty of loyalty, generally means that trustees must obey all applicable local, state, and federal laws and honor any restrictions placed on funds received from donors or from government grants.
2. Obligation to Honor Donor Intent: Trustees must honor the donor's intent as expressed in the gift instrument (e.g., last will and testament, trust, deed of gift, letter, response to fundraising campaign). Funds may be unrestricted or restricted by the donor as to purpose (e.g., for a scholarship), time (e.g., permanent), or both.
  - a. Unrestricted Funds: Some gifts to municipalities are not restricted in any way. For example, a will that provides, "I leave the rest and residue of my estate to the town." The town may expend some or all of the gift for any lawful municipal purpose.
  - b. Restricted Fund as to Purpose: A gift may be restricted for a particular purpose. For example, "I give, devise, and bequeath to the Town of Merrimack the sum of \$50,000 to be used for the benefit of the Fire Department." This fund is purpose restricted, but it may be expended fully for that purpose.
  - c. Restricted as to Time: A gift may be permanently restricted or restricted for up to a particular period of time. For example, "I give the to the Town of Antrim \$100,000, the income only to be used for whatever purpose the Selectmen deem appropriate." This is permanently restricted, but not purpose restricted.
  - d. Restricted as to Time and Purpose: For example, "I give \$50,000 to the City of Manchester, the income to be expended for the maintenance of Victory Park." This is both a permanently restricted fund as well as a purpose restricted fund. (Income in this context is defined as dividends and interest; principal appreciation or capital gains may not be expended.)
3. Changes to Purpose or Administration of a Restricted Fund.
  - a. Overview: Selectmen, city councilors, and trustees do not have the authority to change restrictions on donor-restricted funds. (RSA 41:14-a, II (c) specifically provides that the selectmen do not have the authority to sell any real estate "that has been given, devised, or bequeathed to the town for charitable or community purposes except [with court permission under the doctrine of *cy pres*].")
  - b. Doctrine of *Cy Pres*:
    - i. Definition and Jurisdiction: *Cy pres* is an equitable doctrine applied by the courts to modify the charitable purpose of a charitable trust in appropriate circumstances so that the charitable

trust does not fail. The term “cy pres” comes from the French phrase “cy pres comme possible” or “as near as possible.” Bogert, *Trusts* § 147 (5<sup>th</sup> ed. 1973). Under the doctrine of *cy pres*, when the purpose of a charitable trust has become impossible, illegal, or impracticable to carry out or when applying assets for the trust’s original purpose has become wasteful, the court will direct application of the assets or an appropriate portion of the assets to charitable purposes that reasonably approximate the original purposes. *Restatement (Third) of Trusts* § 67. Both the Probate Court and the Superior Court have the authority to apply the *cy pres* doctrine. See RSA 498:4-a (Superior Court); RSA 547:3-d (Probate Court). The Uniform Trust Code, which applies to express trusts, contains a *cy pres* provision. RSA 564-B:4-413 (a). RSA 31:22 provides for *cy pres* related to perpetual care funds.

ii. Examples:

- *Trustees of Adams Female Academy v. Adams*, 65 N.H. 225 (1889) (applying *cy pres* to allow the trust, which was established for a “female academy for the education of females” to be used in support of a local school district to benefit female students when the fund was insufficient to maintain an independent school).
- *In re Certain Scholarship Funds*, 133 N.H. 227 (1990) (finding that it was unconstitutional for the City of Keene to hold scholarship funds held by the city to benefit boys and Protestant boys and applying *cy pres* to strike the restrictions)
- *Adams v. Page*, 76 N.H. 96 (1911) (involving a testamentary trust requiring that the funds be used to establish and maintain a hospital in Franklin, but a hospital was already operating, making the operation of a new hospital impracticable. The court applied the doctrine of *cy pres* to permit the trust funds to be used to create a ward within the existing hospital in Franklin).

c. Doctrine of Deviation:

- i. Definition and Jurisdiction: The doctrine of deviation is an equitable doctrine that allows a court to modify an administrative term of a charitable trust in the event that compliance with the term has become unlawful, impossible, impracticable or wasteful, the term impairs the prudent management or investment of an asset, or circumstances exist that had not been anticipated by the donor. The doctrine of deviation essentially allows a trustee (with court approval) to deviate from the express terms of the trust in order to carry out the primary objectives of the trust in light of changed

circumstances. *Restatement (Third) of Trusts* § 66 (2003). Both the Superior Court and the Probate Court have the authority to apply the doctrine of deviation. *See* RSA 498:4 (Superior Court); RSA 547:3-c (Probate Court).

ii. Examples:

- *Souther v. Schofield*, 95 N.H. 379 (1949) (holding that if the court on remand determines that the settlor of the trust had not anticipated that the town's purchase of land for a park exceeded what was needed to fulfill those purposes, and retention of that excess land would substantially impair the purpose of the trust, the court could order deviation from the trust terms to allow the town to sell the excess property to the school district for a school building).
  - *Town of Exeter v. Robinson Heirs*, 94 N.H. 463 (1947) (deviation was appropriate in a case involving a residuary trust established for the education of females. When the trust assets became insufficient to maintain an all-female academy in the town, the court authorized deviation from the trust to allow the funds to be used in a co-educational school system solely for the instruction of females).
- d. Petition for Instructions or Modification or Termination: The New Hampshire Trust Code, RSA 564-B, sets forth the circumstances under which express trusts may be modified and terminated. In any proceeding involving the modification or termination of a charitable trust, the Director of Charitable Trusts is a necessary party. RSA 564-B:4-405.
- e. Nonjudicial Settlement Agreement: RSA 564-B:1-111 (b) provides that all of the interested persons to an express trust may enter into a binding nonjudicial settlement agreement ("NJSA") with respect to any matter involving a trust, so long as the agreement does not violate a material purpose of the trust. With respect to charitable trusts, interested persons include trustees, any person with the power to enforce the trust, and the director of charitable trusts. RSA 564-B:1-111 (a). Matters that may be resolved by NJSA include, among other things, the interpretation of the terms of a trust, the resignation or appointment of a trustee, the transfer of a trust's principal place of administration, and the termination or modification of a trust. RSA 564-B:1-111 (d).

#### IV. Frequently Asked Questions

##### Trustees of Trust Funds

**The trustees of trust funds are holding scholarship funds to benefit girls seeking higher education. Can the trustees or selectmen modify the terms of the funds to award scholarships to all students?**

No, neither the trustees of trust funds nor the selectmen can alter the purpose of a trust fund on their own. Consult with town legal counsel and the Charitable Trusts Unit regarding discriminatory funds. Modification may be possible either through a petition to the probate or superior court or through a nonjudicial settlement agreement.

**Are vouchers required before trustees of trust funds release funds?**

Yes. RSA 31:22. However, the trustees of trust funds must pay over any income from trust funds they hold for libraries regardless of whether they receive a voucher. RSA 202-A:22.

**With respect to permanent funds, can we invest for total return (i.e., ignore the distinction between principal and income)?**

Not without court approval. Investing for total return is not permitted unless authorized by the court for *funds with value greater than \$1 million*. RSA 292-B:2, V (d).

**Can we spend capital appreciation on principal as “income?”**

No, not without court approval in limited circumstances. In almost all cases, “income” means traditional investment income; that is, interest and dividends. It does not include capital gains or appreciation of the investment. The principal of a trust consists of the original amount given by the donor increased or decreased by realized capital gains or losses over time. The principal and any realized gains are permanently restricted. Capital gains on restricted trust fund principal may not be expended by the trustees.

**What is the difference between the Form MS-9 and the Form MS-10? Do we report the same funds on each form?**

Trustees of trust funds must report (individually) all funds held by the trustees on the Form MS-9. Trustees of trust funds use the Form MS-10 to report the particular investments (stocks, bonds, CDs, etc.) for the funds held in common. Investments held in common are funds that are collectively invested for the

purpose of facilitating investments, providing diversification, and obtaining reasonable income. The trustees of trust funds are not required to include on the Form MS-10 funds held in the NH PDIP (“Public Deposit Investment Pool”).

**Can trust funds be invested in common with capital reserve funds?**

No. Taxpayer funds cannot be commingled with privately-donated trust funds.

**Can the trustees of trust funds take the investment fees from principal withdrawals?**

Trustees of trust funds may hire or employ the trust department or departments of a bank or a brokerage firm to assist in the management and investment of trust fund resources and/or provide bookkeeping services in connection with the investment of trust funds. RSA 31:38-a, III. Any expenses relating to the bank or brokerage firm for managing the town’s investments may be withdrawn from principal. RSA 31:38-a, IV. Trustees of trust funds who have not engaged a bank or brokerage firm to manage the investments may not withdraw from the principal any fees related to investments. Any such fees should be withdrawn from income.

**Are the signatures of all trustees of trust funds required on the MS-9 and MS-10 forms?**

The MS-9 and MS-10 online forms require the submitter to attest to the content of the forms and to the submitter’s authority to submit the form. This attestation is made under pains and penalties of perjury. This requirement on the form has the force of law. RSA 541-A:22, II.

Cemeteries

**Can the income from perpetual care funds be used for general cemetery maintenance?**

No. Unless the municipality has received an order from a court permitting that use, cemetery perpetual care income may not be used for general cemetery maintenance or cemetery improvement. Cemetery perpetual care funds are valid charitable trusts, and the income is restricted for use on the lot or lots upon which the fund has been placed. *See Opinion of the Justices*, 101 N.H. 531 (1957).

**Do we need to report on the MS-9 form each of our perpetual care funds separately? We have hundreds!**

Yes. The NH Supreme Court has ruled that perpetual care funds are charitable trusts and are lot specific. As a result, a list of perpetual funds must be submitted on or with the MS-9 form.

Effective in October 2023, it no longer is necessary to enter each perpetual care fund on the MS-9 form in the portal, **provided** that you upload a document that itemizes each of the perpetual care funds and includes the information that the MS-9 form requires (e.g., principal, income, market value, etc.). If you choose to upload a document listing each of the perpetual care funds, you simply must enter on the MS-9 form the total amount for all perpetual care funds in each cemetery location. You do not need to enter each perpetual care fund as a separate item in the online portal if you are attaching a file listing those funds. While it is not required, an Excel spreadsheet is the preferred format for the itemized list of perpetual care funds.

For example:

On the MS-9 report ledger, you can enter “Grove Hill Cemetery Perpetual Care” as a fund and enter the total amount for all perpetual care funds in that cemetery. Then you upload an Excel spreadsheet (or other document) itemizing each perpetual care fund in the Grove Hill Cemetery using the “instruments” button associated with the Grove Hill Cemetery Perpetual Care line item on the portal. Each cemetery location should be listed separately on the MS-9.

**The value of some of our perpetual care funds is under \$100.00. Can't we just terminate those funds and use them for cemetery improvements?**

No. Neither the cemetery trustees nor trustees of trust funds have the authority to terminate a permanent fund, including a cemetery perpetual care fund, without court approval.

**We have excess income from some of our perpetual care funds. Can we use that excess income for general cemetery maintenance?**

Not without court approval. RSA 31:22-a provides the process for filing petitions for *cy pres* for cemetery trust funds. In summary, the municipality must convince the court that it is impossible or impracticable to expend the excess accumulated perpetual care income for the care and maintenance of the lot in question, and the excess income therefore should be freed for general cemetery maintenance or capital expansion. However, if the petition is approved, the court likely will require that the municipality must care for the particular cemetery lots in perpetuity if the perpetual care income is exhausted. *See Town of Boscawen v. Attorney General*, 93 N.H. 444 (1945).

**Do the cemetery trustees hold the funds received from sales of cemetery lots?**

No. RSA 289:2-a provides that upon the sale of cemetery lots, the legislative body may, at any annual or special meeting, determine whether the funds are deposited in the town's general fund or with the trustees of trust funds for the purpose of maintaining the cemetery.



## Libraries

### **Who holds the library's trust funds?**

The trustees of trust funds hold any funds left to the town for the benefit of the library. For example, "I leave to the Town the sum of \$2,000 for the benefit of Memorial Library." However, the library trustees hold any funds left directly to the library. For example, "I leave \$2,000 to the Memorial Library in the Town."

### **If the library holds only the income of trust funds, are the library trustees required to submit a report with the Charitable Trusts Unit?**

No. However, if the library trustees hold the principal of trust funds, they must file a report and a copy of their investment policy. In accordance with RSA 202-A:12-a and Jus 404.06 (d), municipal library trustees shall submit to the charitable trusts unit on an annual basis no later than 2 months after the end of the municipality's fiscal year a list of any donated funds held in trust by the trustees. The list shall include the name, purpose, and current dollar value of each fund. In the alternative, municipal library trustees shall submit to the charitable trusts unit their annual financial reports that are part of the town's annual report.

## Resources

### **What resources are available to municipal trustees?**

The following is a non-exhaustive list of resources available to municipal trustees.

- The Charitable Trusts Unit of the NH Attorney General's office:  
<https://www.doj.nh.gov/bureaus/charitable-trusts/municipalities.htm>

Please note that the Charitable Trusts Unit of the Attorney General's office can offer guidance with respect to matters involving charitable trust funds and *cy pres* petitions, but the unit is not able to offer legal advice to municipal trustees and does not offer advice or guidance regarding municipal procedures or library, cemetery, or other town rules and regulations. Legal issues should be addressed by town counsel.

- The New Hampshire Municipal Association: [www.nhmunicipal.org](http://www.nhmunicipal.org)
- The Department of Revenue Administration: [www.revenue.nh.gov/mun-prop/municipal](http://www.revenue.nh.gov/mun-prop/municipal)
- New Hampshire Cemetery Association: [www.nhcemetery.org](http://www.nhcemetery.org)
- New Hampshire Library Trustees Association: [www.nhlta.com](http://www.nhlta.com)