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H.P. 415

House of Representatives, February 15, 2011

An Act To Update the Maine Uniform Trust Code

Reported by Representative NASS of Acton for the Probate and Trust Law Advisory Commission pursuant to the Maine Revised Statutes, Title 18-A, section 1-803, subsection 2.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint Rule 218.

A handwritten signature in cursive script that reads "Heather J.R. Priest".

HEATHER J.R. PRIEST
Clerk

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 18-B MRSA §103, sub-§4-A** is enacted to read:

3 **4-A. Current beneficiary.** "Current beneficiary" means a beneficiary who, on the
4 date the beneficiary's qualification is determined, is a distributee or permissible
5 distributee of trust income or principal.

6 **2011 MAINE COMMENT (103)**
7

8 Subsection 4-A. "Current beneficiaries" are a subclass of "qualified beneficiaries," as
9 defined in section 103, subsection 12, paragraph A. The term "current beneficiary" has
10 been added to distinguish a qualified beneficiary who is a present distributee or
11 permissible distributee of trust income or principal from a qualified beneficiary who may
12 or will become a distributee or permissible distributee on some future date. Current
13 beneficiaries have rights to notice, information or reports under section 105, subsection 2,
14 paragraphs H and I that are not afforded to other qualified beneficiaries.

15 **Sec. 2. 18-B MRSA §105, sub-§2, ¶H,** as amended by PL 2005, c. 184, §5, is
16 further amended to read:

17 H. Subject to subsection 3, the duty under section 813, subsection 2, paragraphs B
18 and C to notify ~~qualified~~ current beneficiaries of an irrevocable trust who have
19 attained 25 years of age of the existence of the trust, of the identity of the trustee and
20 of their right to request trustee's reports;

21 **Sec. 3. 18-B MRSA §105, sub-§2, ¶I,** as amended by PL 2005, c. 184, §5, is
22 further amended to read:

23 I. Subject to subsection 3, the duty under section 813, subsection 1 to respond to the
24 request of a ~~qualified~~ current beneficiary of an irrevocable trust for trustee's reports
25 and other information reasonably related to the administration of a trust;

26 **Sec. 4. 18-B MRSA §105, sub-§3, ¶B,** as enacted by PL 2005, c. 184, §6, is
27 amended to read:

28 ~~B. Designating~~ With respect to one or more of the current beneficiaries as to whom
29 the settlor has waived or modified such duties, designating a person or persons, any
30 of whom may or may not be a beneficiary, to act in good faith to protect the interests
31 of the ~~qualified~~ current beneficiaries who are not receiving notice, information or
32 reports and to receive any notice, information or reports required under section 813,
33 subsection 1 or 2 in lieu of providing such notice, information or reports to the
34 ~~qualified~~ current beneficiaries. The person or persons designated under this
35 paragraph are deemed to be representatives of the ~~qualified~~ current beneficiaries not
36 receiving notice, information or reports for the purposes of the time limitation for a
37 beneficiary to commence an action against the trustee for breach of trust as provided
38 in section 1005, subsection 1.

39 **2011 MAINE COMMENT (105)**
40

1 As a result of the changes to subsection 2, paragraph H and subsection 3, paragraph B,
2 the original Maine Comment is revised to read:
3

4 Subsection 2, paragraph H has been changed by adding the word "current" before
5 "beneficiaries." "Current beneficiary" is a defined term under section 103, subsection 4-
6 A. The term identifies a subclass of "qualified beneficiaries," as defined in section 103,
7 subsection 12, paragraph A. Section 813, subsection 1, as adopted in Maine, requires that
8 a trustee respond to a "qualified beneficiary's" request for trustee's reports and other
9 information reasonably related to the administration of a trust. Notwithstanding the
10 trustee's default duty under section 813, subsection 2, paragraphs B and C to provide
11 qualified beneficiaries with notice of certain information about the trust, under section
12 105, subsection 2, paragraph H a settlor may, by the terms of the trust, prohibit the trustee
13 from notifying a current beneficiary who has not yet attained 25 years of age of the
14 existence of the trust, of the identity of the trustee and of the current beneficiary's right to
15 request trustee reports. However, once a current beneficiary attains 25 years of age, the
16 only way the current beneficiary may be "kept in the dark" as to the existence of the trust
17 is for the settlor to name a person or persons to receive trustee reports on behalf of the
18 current beneficiary as provided in subsection 3. The protector named in subsection 3 must
19 act in good faith to protect the interests of the current beneficiary on whose behalf the
20 protector is receiving trust information. Subsection 3 is not a uniform provision of the
21 Uniform Trust Code. Maine added subsection 3 as a means to provide settlors with an
22 option to prevent disclosure of the existence of the trust and details of the trust
23 administration to current beneficiaries. A settlor has the power to prohibit the disclosure
24 of the existence of the trust and details of the trust administration to all non-qualified
25 beneficiaries and to all qualified beneficiaries that are not current beneficiaries (*i.e.*,
26 remainder beneficiaries) without the need to name a third person to receive such
27 information on behalf of the nonqualified beneficiaries and remainder beneficiaries.
28

29 For example, in a trust for the lifetime benefit of a settlor's child, with distribution to the
30 child's descendants upon the death of the child, the child is the only current beneficiary of
31 the trust. The settlor may direct that until the child attains 25 years of age, no notices,
32 information or reports need be given to the child or to anyone on the child's behalf. After
33 the child attains 25 years of age, the settlor may direct that the child still be "kept in the
34 dark" about the trust, but in order to do so, the settlor must identify another person to
35 receive trust notices, information and reports on behalf of the child. The child's
36 descendants are not current beneficiaries and therefore the settlor may direct that the
37 trustee withhold all notices, information and reports from the child's descendants,
38 regardless of their age. By permitting a settlor to direct the trustee to withhold notice,
39 information and reports from remainder beneficiaries, the settlor avoids the need to
40 provide notice, information and reports to a class of beneficiaries who may never benefit
41 from the trust, particularly when the current beneficiary has a testamentary power of
42 appointment that may be exercised to eliminate the interest of one or more of the
43 remainder beneficiaries.
44

45 Note that a settlor may not name a protector to receive notice, information or reports in
46 lieu of providing the notice, information or reports directly to the settlor's surviving
47 spouse.
48

1 The Uniform Trust Code has built into its default provisions a hierarchy of rights relating
2 to providing various beneficiaries with information about a trust. The default provisions
3 will govern unless the settlor chooses to modify them by the terms of the trust document:
4

5 i. Some classes of beneficiaries have a right to information whether they request it or not
6 (e.g., under section 813, subsection 3, distributees or permissible distributees of trust
7 income or principal have a right to receive annual reports without request);
8

9 ii. Other beneficiaries have a right to be affirmatively told of their right to request
10 information (e.g., under section 813, subsection 2, paragraph C, qualified beneficiaries
11 have to be informed of their right to request a copy of the trust instrument and of trustee's
12 reports); and
13

14 iii. Nonqualified beneficiaries have a right to obtain a copy of the trust instrument only if
15 they request a copy, but a trustee is under no affirmative obligation to inform them of the
16 existence of the trust or of their right to request a copy; the nonqualified beneficiaries are
17 on their own to learn of the existence of the trust (see section 813, subsection 2,
18 paragraph A).
19

20 Section 105 permits the settlor, by the terms of the trust, to alter the beneficiaries' rights
21 and trustee's duties under section 813, except as specified in section 105, subsection 2,
22 paragraphs H and I.

23 **Sec. 5. 18-B MRSA §504, sub-§3**, as enacted by PL 2005, c. 184, §12, is
24 repealed and the following enacted in its place:

25 **3. Creditor limited.** If a trustee's or cotrustee's discretion to make distributions for
26 the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor
27 may not reach or compel distribution of the beneficial interest except to the extent the
28 interest would be subject to the creditor's claim were the beneficiary not acting as trustee
29 or cotrustee.

30 2011 MAINE COMMENT (504)

31
32 The change to section 504, subsection 3 does not represent a change in Maine law. Since
33 the effective date of the Maine Uniform Trust Code, Maine law has prohibited a creditor
34 from reaching or compelling distribution of the interest of a beneficiary who also serves
35 as trustee as long as the trustee's discretion to make distributions for the trustee's own
36 benefit is limited by an ascertainable standard.
37

38 The restrictions on a creditor's ability to reach or compel distribution of the beneficial
39 interest as provided in subsection 3 are not limited to a bypass trust. Although a bypass
40 trust is a common example of a trust in which a cotrustee or the sole trustee is also a
41 beneficiary, with the settlor's spouse frequently named as both trustee and beneficiary, the
42 provisions of subsection 3 are not limited to a bypass trust. The provisions of subsection
43 3 apply to any trust in which a beneficiary serves as a cotrustee or the sole trustee of the
44 trust as long as the trustee's or cotrustee's discretion to make distributions for the trustee-
45 beneficiary's own benefit is limited by an ascertainable standard, regardless of whether
46 the beneficiary has a testamentary power of appointment that will result in the trust

1 property being included in the beneficiary's taxable estate upon the beneficiary's death.
2 Therefore, although the main purpose of subsection 3 may be to protect the trustee-
3 beneficiary of a bypass trust from creditor claims, the same protection from creditor
4 claims is available to the trustee-beneficiary of any trust that limits the trustee's discretion
5 to make distributions for the trustee-beneficiary's own benefit by an ascertainable
6 standard.

7 **Sec. 6. 18-B MRSA §506**, as enacted by PL 2003, c. 618, Pt. A, §1 and affected
8 by §2, is repealed and the following enacted in its place:

9 **§506. Overdue distribution**

10 **1. Definitions.** As used in this section, unless the context otherwise indicates,
11 "mandatory distribution" means a distribution of income or principal that a trustee is
12 required to make to a beneficiary under the terms of a trust, including a distribution upon
13 termination of the trust. "Mandatory distribution" does not include a distribution subject
14 to the exercise of the trustee's discretion even if:

15 A. The discretion is expressed in the form of a standard of distribution; or

16 B. The terms of the trust authorizing a distribution couple language of discretion
17 with language of direction.

18 **2. Unreasonable delay in distribution.** Whether or not a trust contains a spendthrift
19 provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of
20 income or principal, including a distribution upon termination of the trust, if the trustee
21 has not made the distribution to the beneficiary within a reasonable time after the
22 designated distribution date.

23 **2011 MAINE COMMENT (506)**

24
25 Subsection 1 has been added to the existing section 506 (which has been retained as
26 subsection 2 to clarify, not change, the existing section). It is identical to a new
27 subsection that was added to the approved draft of the Uniform Trust Code by the
28 National Conference of Commissioners on Uniform State Laws after the Maine Uniform
29 Trust Code was drafted. The new subsection 1 is intended to make clear that the term
30 "mandatory distribution" is to be understood in its traditional sense. Mandatory
31 distributions can be distributions of income or principal, or both. Trust language making
32 reference to a standard for distribution (such as "support," "education," "health" or similar
33 terms) does not create a mandatory distribution that can be compelled by either a creditor
34 or a beneficiary (see section 504). Even imperative language coupled with discretionary
35 language (such as "my trustee shall, in its discretion, distribute such amounts as are
36 necessary for the beneficiary's support") does not create a mandatory distribution. The
37 language of the new subsection 1 is consistent with section 814, subsection 1 as adopted
38 in Maine ("A trustee's power to make distributions is discretionary notwithstanding terms
39 of the trust providing that the trustee 'shall' make distributions exercising a discretionary
40 power, with or without standards.").

41 **Sec. 7. 18-B MRSA §813, sub-§6** is enacted to read:

1 The bill amends the Maine Uniform Trust Code with language added to the approved
2 draft of the Uniform Trust Code by the National Conference of Commissioners on
3 Uniform State Laws after the Maine Uniform Trust Code was adopted to clarify that a
4 creditor may reach or compel distribution of the interest of a beneficiary who also serves
5 as trustee when the trustee's discretion to make distributions for the trustee's own benefit
6 is limited by an ascertainable standard, but only to the extent the interest would be subject
7 to the creditor's claim were the beneficiary not acting as trustee or cotrustee.

8 The bill repeals and replaces Title 18-B, section 506 to insert a new subsection 1,
9 retaining the current language as a new subsection 2. The new subsection 1 is based on a
10 new subsection added to the approved draft of the Uniform Trust Code by the National
11 Conference of Commissioners on Uniform State Laws after the Maine Uniform Trust
12 Code was adopted. The new language is intended to make clear that the term "mandatory
13 distribution" is to be understood in its traditional sense.

14 The bill adds a new subsection to Title 18-B, section 813 to clarify that whether or
15 not a settlor has capacity to revoke a trust, the trustee's duties to inform and report under
16 section 813 are owed exclusively to the settlor.