



May 12, 2023

Testimony of John Brautigam, Esq., Legal Services for the Elderly, in support of L.D. 1763 An Act Regarding Trustee Duties to Beneficiaries before the Joint Standing Committee on Veterans and Legal Affairs

Senator Carney, Representative Moonen and members of the Joint Standing Committees on Judiciary

On behalf of Legal Services for the Elderly I would like to offer some comments in support of LD 1763. Legal Services for the Elderly (LSE) is a nonprofit legal services organization, and our mission is to provide free legal assistance to Maine's older adults when their basic human needs are threatened. Some of the most difficult matters that we encounter involve the financial exploitation of older adults. In many cases the exploitation involves a family member or someone who is known to the victim. We welcome these proposed changes to the Maine Uniform Trust Code.

LSE comments regarding LD1763:

Section 1. We believe that the current Uniform Trust Code language is sufficient and support deleting Section 1.

Section 2. "Selling real property and dwellings belonging to trust".

The current Uniform Trust Code does not specifically require the trustee to get an appraisal before selling real property from the estate. Given the recent changes in the housing market and the unusual increases in values for Maine homes, it seems prudent to introduce this requirement to the Code. We agree that a licensed appraiser would be best, but we also think that adding a independent licensed

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real estate broker as another option would be helpful. A sale using a broker would result in a determination of fair market value since the sale process itself is designed to result in the highest current price. However, if a private sale or sale without a real estate broker is contemplated, a licensed appraiser must be engaged. We suggest that the appraisal may be relied upon for 270 days -- a period longer than that set forth in LD 1763. That will be more than enough time to complete a sale but not enough time for a professional estimate to become stale. We also suggest adding an option that if neither of those options seem useful, the trustee may ask the court for permission to sell the property. Our final suggestion is the addition of an option allowing the trustee to rely on the language of the trust document if it contains the authority to sell real estate in any other way or grants sole discretion of the method and price to the trustee.

This section additionally provides specific guidance regarding the trustee's duty when selling a home occupied by the beneficiary. This is also missing from the Uniform Trust Code. Because the beneficiary or beneficiaries are often the ones who have placed their home in trust and still live there, it seems fair that they must agree with a trustee's decision to sell their home. Relocating may not be an option that is either desirable or economically feasible. More to the point, the use of a trust to hold the property may have been an attempt to secure its use so they could age in place for the rest of their lives. There is no guarantee that the trustee will use the trust assets to maintain them in their home if they are willing to assume more risk in their living arrangement than the trustee is willing to support. More often than we care to realize, children who are worried about aging parents will "encourage" them into facility care rather than keep them living in their own homes. Especially if the home has been placed in an irrevocable trust 60 months before the parent needs long term care, a child who is also trustee of the trust may be tempted to do exactly that since the parent will qualify for MaineCare payment for nursing facility care.

Our amended language recognizes that if a trust provides for the sale of a home without the consent of the qualified beneficiary who occupies the dwelling, the appraisal or independent broker requirement does not apply. It also recognizes that if the beneficiary does not have the capacity to give consent, their agent,

guardian or conservator may make that decision. If none of those fiduciaries exist, the court may give the trustee authority to sell the home.

Finally, an added sub-section makes the Section effective July 1, 2024 to give practitioners and existing trustees the time to accommodate to these changes.

We present the pertinent Uniform Trust Code language in green and our proposals amending the language of the bill as written in red.

Uniform Trust Code

Title 18-B, Chapter 8: DUTIES AND POWERS OF TRUSTEE

§815. General powers of trustee

1. General powers. A trustee, without authorization by the court, may exercise:
 - A. Powers conferred by the terms of the trust; and
 - B. Except as limited by the terms of the trust:
 - (1) All powers over the trust property that an unmarried competent owner has over individually owned property;
 - (2) Any other powers appropriate to achieve the proper investment, management and distribution of the trust property; and
 - (3) Any other powers conferred by this Code.
2. Subject to fiduciary duties. The exercise of a power is subject to the fiduciary duties prescribed by this chapter.

Title 18-B §816. Specific powers of trustee

2. Acquire or sell property. Acquire or sell property, for cash or on credit, at public or private sale;

LD1763 Changes with suggested amendments in red

Sec. 2. 18-B MRSA §818 is enacted to read:

§818. Selling real property and dwellings belonging to trustor

1. Current appraisal. Unless otherwise provided in the terms of the trust, permitted by a court order or unless the trustee engages an impartial, Maine licensed real estate broker to publicly list and sell real property or a dwelling held in the trust, a trustee may not sell or otherwise convey real property or a dwelling belonging to a trust such property in for an amount not supported by an appraisal conducted by an impartial appraiser certified under Title 32, chapter 124 within 90 270 days of the sale or conveyance. by an impartial appraiser certified under Title 32, chapter 124.

2. Alternative housing for beneficiary. Selling a beneficiary's home. Unless otherwise provided in the terms of the trust, A trustee may not sell or otherwise convey real property that is the primary residence or a dwelling that is the primary residence of a **qualified beneficiary without their consent or the consent of their agent pursuant to a power of attorney, their guardian or conservator,** ~~of the beneficiary unless the trustee arranges for alternative housing of the same or similar quality and accommodations as the real property or dwelling being sold or conveyed.~~ **or unless the trustee obtains a court order permitting the sale.**

3. Effective Date: This section is effective June 30, 2024

Section 3. “Beneficiaries with physical or mental disabilities”.

The Uniform Trust Code contains specific directions regarding to whom payments or distributions from the trust may be made on behalf of a beneficiary with special needs. However, it does not provide guidance to the trustee about making reasonable accommodations for the beneficiary with respect to the operation of the trust. The proposed amended language requires a trustee who knows that a qualified beneficiary has physical or mental impairments or who receives a request from that beneficiary, must take action to meet those special needs. For example, the trustee should provide payment for hearing aids so the beneficiary may hear telephone calls from the trustee or make home visits to the beneficiary for trust related business if the beneficiary has mobility issues.

The Uniform Trust Code does not ensure that the trustee will have due regard for the special needs of a qualified beneficiary not specifically related to trust business. Unless the trust provides otherwise, we suggest adding language that requires the trustee to be aware of the qualified beneficiary’s special needs related to their physical and mental disabilities and respond to those needs by paying for necessary goods or services to the extent trust funds are available.

The bill language also gives the beneficiary the right to bring a suit against the trustee for failing to meet those obligations. The court is required to make decisions in those cases in the “best interest” of the beneficiary. We suggest particularly describing the definition of best interest to ensure that if the

beneficiary has the capacity to express their choice, they will have the opportunity to do so and if the beneficiary does not do so, the court will examine their prior decisions, preferences, opinions, values and actions to the extent known or brought to the court's attention. This simply carries forward the same concern and respect for preserving an individual's dignity and autonomy as previously evidenced in the Uniform Health Care Decisions Act and the Guardianship and Conservator sections of the Maine Probate Code as well as decisions of the Maine Supreme Court.

Finally, we propose a sub-section making the Section effective July 1, 2024 to give practitioners and existing trustees the time to accommodate to these changes.

Uniform Trust Code

Title 18-B, Chapter 8: DUTIES AND POWERS OF TRUSTEE

§816. Specific powers of trustee

21. Beneficiary under legal disability or incapacitated. Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

- A. Paying it to the beneficiary's conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian;
- B. Paying it to the beneficiary's custodian under Title 33, chapter 32, which is the Maine Uniform Transfers to Minors Act, or to a custodial trustee under the laws of another state, and, for that purpose, creating a custodianship or custodial trust;
- C. If the trustee does not know of a conservator, guardian, custodian or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or
- D. Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;

LD1763 suggested amendments.

Sec. 3. 18-B MRSA §819 is enacted to read:

§819. Beneficiaries with physical or mental disabilities

- 1. Accommodations for a beneficiary with physical or mental disability .**

A trustee ~~for a qualified beneficiary who~~ has a physical or mental ~~condition~~ disability shall make ~~appropriate reasonable~~ accommodations with respect to the operation of the trust as requested by or for ~~a that~~ beneficiary ~~with a physical or mental disability~~. Unless otherwise provided by the terms of the trust, if the trustee becomes aware of other special needs relating to that beneficiary's physical or mental disabilities the trustee must respond to those needs by paying for necessary goods or services within the resources of the trust. The trustee shall provide that beneficiary with ~~supported by documentation to ensure that~~ describing how the trustee and the administration of the trust will meet the special needs of that beneficiary. A qualified beneficiary may bring an action against a trustee who violates this subsection. For purposes of this section, "physical or mental ~~disability~~ impairment" has the same meaning as in the Maine Human Rights Act, Title 5, section 4553 A.

2. Court review. In reviewing any matter involving a trust with a qualified beneficiary who has ~~with~~ a physical or mental disability, the court shall make any decision in the best interests of the special needs of the that beneficiary.

In determining the qualified beneficiary's best interests, the court shall consider their special needs and their wishes if that beneficiary has the capacity to make them known. Otherwise, the court shall consider the qualified beneficiary's prior directions, preferences, opinions, values and actions to the extent known or brought to the court's attention.

3. Effective Date: this section becomes effective on July 1, 2024

Section 4 Attorney's Fees and Costs.

We agree with this amendment.

The existing Trust Code applies to any lawsuit involving the administration of the trust against any party. It allows the court to "award" costs and expenses including attorney fees to any party and allows the court to determine whether another party or the trust must pay the award. These are decisions that the Court makes after it determines who wins the case.

The proposed language applies only to lawsuits between the trustee and the beneficiary of the trust and it applies before the court action is filed. It adds specific language explaining that if a trustee or a beneficiary decides to bring a lawsuit against the other, they must get the court's approval before they can use funds or assets from the trust to pay the costs and expenses of the lawsuit. The trustee must show the court that they have a "reasonable likelihood of prevailing" in a court action against a beneficiary. The beneficiary must show that they have a "colorable claim" against the trustee. In plain English, the reasonable likelihood

standard means no more than a 50/50 chance. The colorable claim standard means a chance that could be much less than 50/50 but a chance nonetheless.

This difference allows a beneficiary to more easily convince the court to let them use trust money to defend themselves against the trustee or to sue the trustee if they believe that the trustee is not doing what they are required to do according to their fiduciary duties. However, if a court tells a beneficiary that they do not have a chance of winning, they may decide not to risk the loss of funds that they would otherwise be paid.

The trustee, on the other hand, is asking for permission to not risk their own money but to use trust funds that would otherwise be paid to the beneficiary. If the court tells the trustee that they don't have an "even chance of winning", they may not risk suing the beneficiary or defending a weak argument with their own money.

In either case, the court will have the opportunity to inform the parties about the strength of their arguments before a lawsuit begins. The court may also refer the parties to mediation or suggest how their dispute might be settled. If the trustee is violating their duties to the beneficiary, the court could take immediate remedial action. Because the lawsuit may be brought in the Probate Court instead of the Superior Court, the current civil case backlog in the Judicial Branch will not be a concern. This amendment to the Trust Code will stop lawsuits between the trustee and the beneficiary at the front end and thus eliminate the need for an award at the end of a case.

Finally, an added sub-section makes the Section effective July 1, 2024 to give practitioners and existing trustees the time to accommodate to these changes.

Title 18-B: TRUSTS

Part 1: MAINE UNIFORM TRUST CODE

Chapter 10: LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE

§1004. Attorney's fees and costs

Sec. 4. 18-B MRSA §1004, as enacted by PL 2003, c. 618, Pt. A, §1 and affected by §2, is amended to read:

§1004. Attorney's fees and costs

In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's

fees, to any party, to be paid by another party or from the trust that is the subject of the controversy. A trustee may not expend funds or assets of the trust in any controversy against a beneficiary without the prior approval of the court upon a showing of a reasonable likelihood of prevailing in the controversy. The court may allow a beneficiary to expend funds or assets of the trust in a controversy against the trustee upon a showing of a colorable claim against the trustee.

Thank you for giving us the opportunity to make these comments and we hope that you vote ought to pass as amended with the addition of our suggestions.