

MAINE PROBATE AND TRUST LAW ADVISORY COMMISSION

Comments to L.D. 1763

“An Act Regarding Trustee Duties to Beneficiaries”

Joint Standing Committee on Judiciary

Introduction

The Probate and Trust Law Advisory Commission (“PATLAC”) hereby submits the following comments to L D 1763, “**An Act Regarding Trustee Duties to Beneficiaries,**” which would amend Sections 810, 818, 819, and 1004 of Title 18-B – the Maine Uniform Trust Code

General Comments

It appears that the proposed amendments to Title 18-B were precipitated by a specific matter involving a trust and a beneficiary with physical or mental disabilities. However, PATLAC is concerned that if enacted, the proposed amendments will have significant unintended consequences and therefore PATLAC opposes the enactment of L D 1763. PATLAC’s primary concerns are the following:

- (a) Some of the proposed changes are inconsistent or conflict with other provisions of the Maine Uniform Trust Code,
 - (b) The proposed changes represent a departure from the language of the Uniform Trust Code, and unless there is a compelling reason for deviating from a Uniform Act, PATLAC favors maintaining uniformity with Uniform Acts,
 - (c) The proposed changes could have the unintended consequences of discouraging settlors from establishing trusts in Maine and professional fiduciaries from serving as trustee, leaving beneficiaries vulnerable to decisions and actions of inexperienced trustees, and
 - (d) The Maine Uniform Trust Code already has many provisions aimed at protecting all beneficiaries, including beneficiaries with disabilities, which provisions are intertwined with other trust code provisions and that work together, in harmony, as a cohesive set of statutes
- 1. Section 1. 18-B MRSA §810, sub-§5.** The Maine Uniform Trust Code contains requirements and default provisions for trusts. Trusts are voluntary and private contracts made by individuals for the benefit of others. Individuals are able to establish trusts on their own terms, subject only to certain requirements in the Maine Uniform Trust Code that may not be altered by the terms of the trust. The trustee is subject to significant fiduciary duties in the management, reporting and distribution of the trust. The Maine Uniform Trust Code contains well established standards for trustee’s duties to report to the beneficiaries, and balances settlors’ autonomy to establish trusts consistent with their personal preferences and the relationship between the trust, the trustee and the beneficiaries. The proposed

amendment to Title 18-B, §810 would add additional reporting requirements to a Trustee's existing statutory duties. Section 813 ("Duty to inform and report") already requires Trustees to keep Qualified Beneficiaries "reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." This includes the duty to (a) promptly furnish a copy of the trust to any beneficiary who so requests, (b) notify all qualified beneficiaries – in advance – of any change in the method or rate of the trustee's compensation, and (c) report – at least annually – the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee's compensation, and a listing of the trust assets "to the distributees or permissible distributees of trust income or principal, and to the other qualified beneficiaries who request it."

The proposed amendment to Title 18-B, §810 is in conflict with §813 and the mandatory reporting requirements in Title 18-B, §105(H) and (I). The proposed amendment would expand the scope of §813 by expanding the pool of potential recipients beyond "distributees or permissible distributees of trust income or principal, and to the other qualified beneficiaries who request it" to any beneficiary who requests a report, regardless of whether the beneficiary is a permissible beneficiary, a qualified beneficiary, or a non-vested contingent (i.e., extremely remote) beneficiary.

Because the proposed change to §810 would expand the scope of §813 to include remote, contingent beneficiaries, may require trustees to make reports against the Settlor's written directions in the trust and because this change would represent a significant departure from the Uniform Trust Code, PATLAC recommends that §810 not be amended as provided in L D 1763.

2. **Section 2. 18-B MRSA §818.** The proposed amendment to Title 18-B, §818 would add additional duties on trustees of trusts owning real property, including the duty to have a current appraisal in hand before selling trust-owned real property and, if a beneficiary is residing in such real property, a duty to arrange for "alternative housing of the same or similar quality and accommodations as the real property or dwelling being sold or conveyed."

PATLAC believes existing provisions of the Maine Uniform Trust Code provide sufficient and appropriate protection for beneficiaries. The Maine (and Uniform) Trust Code already imposes fiduciary duties of loyalty – administration of the trust solely in beneficiaries' interests (§802), impartiality – (§803), and prudent administration – "reasonable care, skill and caution (§804) on trustees with regard to all actions of the trustee, including the sale of real estate. Further §801 mandates that a trustee "administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries and in accordance with this Code."

As noted above, any sale would be governed by various fiduciary duties of a trustee. The duty of prudent administration in the sale of real estate does not have a one size fits all solution.

Prudent administration may include a certified appraisal before a private sale, or include a comparative market analysis by realtors before listing property on the market, however, mandating a certified appraisal requirement introduces a mechanical step which may or may not be relevant or justified under the terms of the trust and the circumstances of the sale, and may be counter to the trustee's duty to consider the sole interests of the beneficiaries. In addition to the expense and potential inconvenience this would cause, in a rapidly changing real estate market with a short "selling season," the length of time occasionally required to obtain a qualified appraisal could significantly impact the sale price that a trustee can obtain for the trust beneficiaries. A sale to a related party is already subject to several special requirements and is voidable under §802(2) for failure by the trustee to meet the statute's requirements. In addition, the proposed amendment is silent about the differences between certified appraisals and market analyses, and implications of an appraisal, such as what would happen if the trustee is unable to find a buyer at the appraised value or if the property is on the market for more than 90 days after a listing at the appraisal value. Finally, PATLAC is concerned about the requirement that a trustee find "alternative housing of the same or similar quality and accommodations as the real property or dwelling being sold or conveyed." Who decides whether the alternative housing is "the same or similar?" What factors are considered in making this determination? What if the trust doesn't have sufficient funds to maintain ownership of the real property or alternative real property? The underlying foundation of trust law is that a settlor establishes a trust and sets forth the terms, albeit consistent with well-established laws on trusts. A trustee should only be required to provide alternative housing if the settlor provides such an instruction in the provisions of the trust. To mandate alternative housing for a beneficiary, when the settlor has not provided such an instruction, runs the risk of undermining the settlor's purposes of the trust. For example, suppose an adult child was living with a parent when the parent died leaving a trust to benefit her three children equally. This section would subvert the settlor's intention to treat her children equally and instead essentially require the other two children to subsidize housing (indefinitely?) for the third.

Because the proposed change to §818 would place additional requirements (and expense) on trustees of trusts that own real property, would interfere with a trustee's ability to exercise its discretion, is overly broad, may lead to professional trustees being reluctant to accept trusteeship for trusts that own real property, and would represent a significant departure from the Uniform Trust Code, PATLAC recommends that §818 not be amended as provided in L D 1763.

3. **Section 3. 18-B MRSA §819.** The proposed amendment to Title 18-B, §819 would require trustees of trusts for the benefit of someone with physical or mental disabilities to make "appropriate accommodations" to ensure that the trustee and the administration of the trust meet the special needs of the beneficiary. The proposed amendment seems to be mandating an ambiguous trust distribution standard and thereby usurping settlors' rights to establish their own standards for their intended beneficiaries, and the vague standard may adversely impact necessary public benefits.

on which a beneficiary relies. It is unclear to PATLAC what specific concerns this provision is designed to address. In addition, PATLAC is unsure of what an “appropriate accommodation” would look like. Finally, the expense of “appropriate accommodations,” whatever those are, may very well be cost prohibitive for many trusts.

Because this change would be a significant departure from the Uniform Trust Code, it is not clear what would be required of trustees for trusts benefiting someone with physical or mental disabilities, and the change may discourage settlors from establishing trusts for persons with disabilities and at the same time may make professional trustees reluctant to accept trusteeship for trusts that benefit (now or in the future) a beneficiary with physical or mental disabilities. PATLAC recommends that §819 not be amended as provided in L D 1763.

- 4. Section 4. 18-B MRSA §1004.** The proposed amendment to Title 18-B, §1004 would require that a trustee make a showing to the court of a reasonable likelihood of prevailing in a matter against a beneficiary prior to expending trust funds in the matter and would allow a beneficiary to use trust funds in a controversy against the trustee on showing the court a colorable claim. PATLAC believes that §1004, as currently constituted, provides sufficient and appropriate guidance for when, and under what circumstances it is appropriate for trust resources to be expended on behalf of a trustee and/or a beneficiary. Section 1001 provides that a violation of a trustee’s duty to a beneficiary is a breach of trust and provides more than 10 remedies for beneficiaries. We believe the proposed amendment would result in additional (and potentially confusing) layers for trustees, beneficiaries, and the courts to consider when determining the appropriateness of using trust funds for costs and fees. The existing §1004 properly leaves this determination to the court. If a trustee improperly uses trust assets in a controversy against a beneficiary, the court has the authority under §1001(2)(C) to order the trustee to make repayment of those assets to the trust.

Because this change would be a significant departure from the Uniform Trust Code, and a significant change to Maine law, which again may lead to professional trustees being reluctant to serve in that role, PATLAC recommends that §1004 not be amended as provided in L D 1763.

Conclusion

PATLAC is concerned that these changes (i) add uncertainty and ambiguity to the Maine Uniform Trust Code, which in turn could lead to unnecessary and expensive litigation, (ii) would lead to a lack of uniformity among states that have enacted the Uniform Trust Code, (iii) would add additional expense to the administration of trusts in Maine, (iv) may not lead to the desired result, but may instead discourage settlors from creating trusts in the first place, and (v) dissuade professional trustees from accepting trusteeships in Maine. The proposed amendments undermine the Maine Uniform Trust Code’s underlying purpose of replacing a patchwork of laws with a consistent legal framework for settlors, trustees and beneficiaries.

who often reside in different states. In a time when many states are courting the business of trusts and trust companies by enacting modern trust laws, this proposed amendment would move Maine decidedly in the opposite direction. For these reasons, the Probate and Trust Law Advisory Commission recommends that L D 1763 not be enacted.

Dated May 12, 2023

Respectfully submitted,

Probate and Trust Law Advisory Commission

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