

PROPOSED COMMITTEE AMENDMENT
For Judiciary Committee consideration March 18, 2021

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COMMITTEE AMENDMENT "." to LD 422, An act to Enact the Maine Uniform Trust Decanting Act

Amend the bill by striking out everything after the enacting clause and inserting in its place the following:

Sec. 1. 18-B MRSA Part 1, c. 12 is enacted to read:

CHAPTER 12
MAINE UNIFORM TRUST DECANTING ACT

§1201. Short title

This Act may be known and cited as "the Maine Uniform Trust Decanting Act." Any references in this chapter to "Act" mean "the Maine Uniform Trust Decanting Act."

§1202. Definitions

As used in this Act, unless the context otherwise indicates, the following terms have the following meanings.

1. Appointive property. "Appointive property" means the property or property interest subject to a power of appointment.

2. Authorized fiduciary. "Authorized fiduciary" means:

A. A trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more current beneficiaries;

B. A special fiduciary appointed under section 1208; or

C. A special-needs fiduciary under section 1212.

3. Charitable interest. "Charitable interest" means an interest in a trust that:

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A. Is held by an identified charitable organization and makes the organization a qualified beneficiary;

B. Benefits only charitable organizations and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary; or

C. Is held solely for charitable purposes and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary.

4. Charitable organization. “Charitable organization” means:

A. A person, other than an individual, organized and operated exclusively for charitable purposes; or

B. A government or governmental subdivision, agency or instrumentality, to the extent it holds funds exclusively for a charitable purpose.

5. Charitable purpose. “Charitable purpose” means the relief of poverty, the advancement of education or religion, the promotion of health, a municipal or other governmental purpose or another purpose the achievement of which is beneficial to the community.

6. Court. “Court” means the courts in this state having jurisdiction in matters relating to trusts.

7. Decanting power. “Decanting power” or “the decanting power” means the power of an authorized fiduciary under this Act to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust.

8. Expanded distributive discretion. “Expanded distributive discretion” means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard.

9. First trust. “First trust” means a trust over which an authorized fiduciary may exercise the decanting power.

10. First-trust instrument. “First-trust instrument” means the trust instrument for a first trust.

11. General power of appointment. “General power of appointment” means a power of appointment exercisable in favor of a powerholder, the powerholder’s estate, a creditor of the powerholder or a creditor of the powerholder’s estate.

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12. Power of appointment. “Power of appointment” means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. “Power of appointment” does not include a power of attorney.

13. Powerholder. “Powerholder” means a person in which a donor creates a power of appointment.

14. Presently exercisable power of appointment. “Presently exercisable power of appointment” means a power of appointment exercisable by the powerholder at the relevant time. “Presently exercisable power of appointment”:

A. Includes a power of appointment exercisable only after the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time only after:

- (1) The occurrence of the specified event;
- (2) The satisfaction of the ascertainable standard; or
- (3) The passage of the specified time; and

B. Does not include a power exercisable only at the powerholder’s death.

15. Reasonably definite standard. “Reasonably definite standard” means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of 26 U.S.C. Section 674(b)(5)(A) and any applicable regulations.

16. Record. “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

17. Second trust. “Second trust” means:

A. A first trust after modification under this Act; or

B. A trust to which a distribution of property from a first trust is or may be made under this Act.

18. Second-trust instrument. “Second-trust instrument” means the trust instrument for a second trust.

19. Settlor. “Settlor”, except as otherwise provided in section 1224, means a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to the person’s contribution except to the extent another

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person has power to revoke or withdraw that portion.

20. Sign. “Sign” means, with present intent to authenticate or adopt a record:

A. To execute or adopt a tangible symbol; or

B. To attach to or logically associate with the record an electronic symbol, sound, or process.

§1203. Scope

1. Express trust. Except as otherwise provided in subsections 2 and 3, this Act applies to an express trust that is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.

2. Trust solely for charitable purposes. This Act does not apply to a trust held solely for charitable purposes.

3. Restricted or prohibited decanting power. Subject to section 1214, a trust instrument may restrict or prohibit exercise of the decanting power.

4. Power not limited. This Act does not limit the power of a trustee, powerholder or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, law of this state other than this Act, common law, a court order or a nonjudicial settlement agreement.

5. Ability of settlor. This Act does not affect the ability of a settlor to provide in a trust instrument for the distribution of the trust property or appointment in further trust of the trust property or for modification of the trust instrument.

§1204. Fiduciary duty

1. Act in accordance with fiduciary duty. In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

2. No duty to exercise power; inform beneficiaries. This Act does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of this Act.

3. Deemed to include decanting power. Except as otherwise provided in a first-trust instrument, for purposes of this Act and section 801 and section 802, subsection 1, the terms of the first trust are deemed to include the decanting power.

§1205. Application; governing law

1. This state. This Act applies to a trust that:

A. Has its principal place of administration in this state, including a trust whose principal place of administration has been changed to this state; or

B. Provides by its trust instrument that it is governed by the law of this state or is governed by the law of this state for the purpose of:

(1) Administration, including administration of a trust whose governing law for purposes of administration has been changed to the law of this state;

(2) Construction of terms of the trust; or

(3) Determining the meaning or effect of terms of the trust.

2. Creation of trust; court proceedings. Except as otherwise provided in this Act:

A. The Act applies to a trust created before, on or after the effective date;

B. The Act applies to any proceedings in court commenced on or after the effective date;

C. The Act applies to proceedings in court pending on the effective date unless the court finds that application of a particular provision of the Act would interfere substantially with the effective conduct of the proceeding or prejudice a right of a party, in which case the particular provision of the Act does not apply; and

D. A rule of construction or presumption provided in the Act applies to a trust instrument executed prior to the effective date unless there is a clear indication of a contrary intent in the terms of the instrument.

3. Action before effective date of Act. Except as otherwise provided in subsection 2, an action done before the effective date is not affected by the Act.

§1206. Reasonable reliance

A trustee or other person that reasonably relies on the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust, under this Act, law of this state other than this Act or the law of another jurisdiction is not liable to any person for any action or failure to act as a result of the reliance.

§1207. Notice; exercise of decanting power

1. Notice period. In this section, a notice period begins on the day notice is given under subsection 3 and ends 59 days after the day notice is given.

2. Exercise without consent or approval. Except as otherwise provided in this Act, an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.

3. Notice. Except as otherwise provided in subsection 6, an authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than 60 days before the exercise to:

A. Each settlor of the first trust, if living or then in existence;

B. Each qualified beneficiary of the first trust;

C. Each holder of a presently exercisable power of appointment over any part or all of the first trust;

D. Each person that currently has the right to remove or replace the authorized fiduciary;

E. Each other fiduciary of the first trust;

F. Each fiduciary of the second trust; and

G. The Attorney General, if section 1213, subsection 2 applies.

4. Notice not required. An authorized fiduciary is not required to give notice under subsection 3 to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

5. Requirements of notice. A notice under subsection 3 must:

A. Specify the manner in which the authorized fiduciary intends to exercise the decanting power;

B. Specify the proposed effective date for exercise of the power;

C. Include a copy of the first-trust instrument; and

D. Include a copy of all second-trust instruments.

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6. Waiver of notice period. The decanting power may be exercised before expiration of the notice period under subsection 1 if all persons entitled to receive notice waive the period in a signed record.

7. Right to file application. The receipt of notice, waiver of the notice period or expiration of the notice period does not affect the right of a person to file an application under section 1208 asserting that:

A. An attempted exercise of the decanting power is ineffective because it did not comply with this Act or was an abuse of discretion or breach of fiduciary duty; or

B. Section 1221 applies to the exercise of the decanting power.

8. Reasonable care. An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under subsection 3 if the authorized fiduciary acted with reasonable care to comply with subsection 3.

§1208. Court involvement

1. Application to court. On application of an authorized fiduciary, a person entitled to notice under section 1207, subsection 3, a beneficiary, or with respect to a charitable interest the Attorney General, the court may:

A. Provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under this Act and consistent with the fiduciary duties of the authorized fiduciary;

B. Appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under this Act and to exercise the decanting power;

C. Approve an exercise of the decanting power;

D. Determine that a proposed or attempted exercise of the decanting power is ineffective because:

(1) After applying section 1221, the proposed or attempted exercise does not or did not comply with this Act; or

(2) The proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty;

E. Determine the extent to which section 1221 applies to a prior exercise of the decanting power;

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F. Provide instructions to the trustee regarding the application of section 1221 to a prior exercise of the decanting power; or

G. Order other relief to carry out the purposes of this Act.

2. Court approval. On application of an authorized fiduciary, the court may approve:

A. An increase in the fiduciary's compensation under section 1215; or

B. A modification under section 1217 of a provision granting a person the right to remove or replace the fiduciary.

§1209. Formalities

An exercise of the decanting power must be made in a record signed by an authorized fiduciary. The signed record must, directly or by reference to the notice required by section 1207, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.

§1210. Decanting power under expanded distributive discretion

1. Definitions. As used in this section, the following terms have the following meanings.

A. "Noncontingent right" means a right that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. "Noncontingent right" does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right to any person other than the beneficiary or the beneficiary's estate.

B. "Presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary.

C. "Successor beneficiary" means a beneficiary that is not a qualified beneficiary on the date the beneficiary's qualification is determined. The term does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment.

D. "Vested interest" means:

(1) A right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power;

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(2) A current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount or a percentage of value of some or all of the trust property;

(3) A current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount or a percentage of value of some or all of the trust property;

(4) A presently exercisable general power of appointment; or

(5) A right to receive an ascertainable part of the trust property on the trust's termination which is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.

2. Expanded distributive discretion over principal. Subject to subsection 3 and section 1213, an authorized fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

3. Restrictions on second trust. Subject to section 1212, in an exercise of the decanting power under this section, a second trust may not:

A. Include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in subsection 4;

B. Include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as otherwise provided in subsection 4; or

C. Reduce or eliminate a vested interest.

4. Permitted second trust. Subject to subsection 3, paragraph C and section 1213, in an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction and may:

A. Retain a power of appointment granted in the first trust;

B. Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

C. Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary; and

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D. Create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.

5. Power of appointment; permissible appointees. A power of appointment described in subsection 4, paragraphs A through D may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust.

6. Discretion over part of principal. If an authorized fiduciary has expanded distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has expanded distributive discretion.

§1211. Decanting power under limited distributive discretion

1. Limited distributive discretion. In this section, “limited distributive discretion” means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

2. Authorized fiduciary. An authorized fiduciary that has limited distributive discretion over the principal of the first trust for benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

3. Creation of second trust; similar beneficial interests. Under this section and subject to section 1213, a second trust may be created or administered under the law of any jurisdiction. Under this section, the second trusts, in the aggregate, must grant each beneficiary of the first trust beneficial interests which are substantially similar to the beneficial interests of the beneficiary in the first trust.

4. Distribution for the benefit of beneficiary. A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:

A. The distribution is applied for the benefit of the beneficiary;

B. The beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under this Part; or

C. The distribution is made as permitted under the terms of the first-trust instrument and the second-trust instrument for the benefit of the beneficiary.

5. Discretion over part of principal. If an authorized fiduciary has limited distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has limited distributive discretion.

§1212. Trust for beneficiary with disability

1. Definitions. As used in this section, the following terms have the following meanings.

A. “Beneficiary with a disability” means a beneficiary of a first trust who the special-needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated as being subject to a guardianship, conservatorship or a protective arrangement.

B. “Governmental benefits” means financial aid or services from a state, federal or other public agency.

C. “Special-needs fiduciary” means, with respect to a trust that has a beneficiary with a disability:

(1) A trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries;

(2) If no trustee or fiduciary has discretion under subparagraph (1), a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries; or

(3) If no trustee or fiduciary has discretion under subparagraphs (1) and (2), a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries.

D. “Special-needs trust” means a trust the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

2. Special needs decanting. A special-needs fiduciary may exercise the decanting power under section 1210 over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:

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A. A second trust is a special-needs trust that benefits the beneficiary with a disability; and

B. The special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

3. Beneficiary with a disability. In an exercise of the decanting power under this section, the following apply:

A. Notwithstanding section 1210, subsection 3, paragraph B, the interest in the second trust of a beneficiary with a disability may:

(1) Be a pooled trust as defined by Medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. Section 1396p(d)(4)(C); or

(2) Contain payback provisions complying with reimbursement requirements of Medicaid law under 42 U.S.C. Section 1396p(d)(4)(A).

B. Section 1210, subsection 3, paragraph C does not apply to the interests of the beneficiary with a disability.

C. Except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are 2 or more second trusts, the second trusts in the aggregate, must grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficiary's beneficial interests in the first trust.

§1213. Protection of charitable interest

1. Definitions. As used in this section, the following terms have the following meanings.

A. "Determinable charitable interest" means a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event or after the passage of a specified time and which is unconditional or will be held solely for charitable purposes.

B. "Unconditional" means not subject to the occurrence of a specified event that is not certain to occur, other than a requirement in a trust instrument that a charitable organization be in existence or qualify under a particular provision of the United States Internal Revenue Code of 1986 on the date of the distribution, if the charitable organization meets the requirement on the date of determination.

2. Rights of Attorney General. If a first trust contains a determinable charitable interest, for purposes of this Section, the Attorney General has the rights of a qualified

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beneficiary and may represent and bind the charitable interest.

3. Limitation on second trusts. If a first trust contains a charitable interest, the second trust or trusts may not:

- A. Diminish the charitable interest;
- B. Diminish the interest of an identified charitable organization that holds the charitable interest;
- C. Alter any charitable purpose stated in the first-trust instrument; or
- D. Alter any condition or restriction related to the charitable interest.

4. Treatment of 2 or more second trusts. If there are two or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of subsection 3.

5. State law applicable; exceptions. If a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to subsection 3 must be administered under the law of this state unless:

- A. The Attorney General, after receiving notice under section 1207, fails to object in signed record delivered to the authorized fiduciary within the notice period;
- B. The Attorney General consents in a signed record to the second trust or trusts being administered under the law of another jurisdiction; or
- C. The court approves the exercise of the decanting power.

6. Attorney General's powers and duties not limited. This Act does not limit the powers and duties of the Attorney General under law of this state other than this Act.

§1214. Trust limitation on decanting

1. Limitation on decanting power. An authorized fiduciary may not exercise the decanting power to the extent the first-trust instrument expressly prohibits exercise of:

- A. The decanting power; or
- B. A power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

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2. Express restrictions on decanting power. Exercise of the decanting power is subject to any restriction in the first-trust instrument that expressly applies to exercise of:

A. The decanting power; or

B. A power granted by state law to a fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

3. Decanting power not precluded. A general prohibition of the amendment or revocation of a first trust, a spendthrift clause or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.

4. First trust permits modification or distribution. Subject to subsections 1 and 2, an authorized fiduciary may exercise the decanting power under this Act even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.

5. Express prohibition or restriction. If a first-trust instrument contains an express prohibition described in subsection 1 or an express restriction described in subsection 2, the provision must be included in the second-trust instrument.

§1215. Change in compensation

1. Compensation specified. If a first-trust instrument specifies an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless:

A. All qualified beneficiaries of the second trust consent to the increase in a signed record; or

B. The increase is approved by the court.

2. Compensation not specified. If a first-trust instrument does not specify an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by this Part unless:

A. All qualified beneficiaries of the second trust consent to the increase in a signed record; or

B. The increase is approved by the court.

3. Change in compensation incidental. A change in an authorized fiduciary's

compensation which is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of subsections 1 and 2.

§1216. Relief from liability and indemnification

1. Liability for breach of trust. Except as otherwise provided in this section, a second-trust instrument may not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first-trust instrument.

2. Indemnification for claim payable if decanting power not exercised. A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

3. No reduction in liability in aggregate. A second-trust instrument may not reduce fiduciary liability in the aggregate.

4. Division and reallocation of fiduciary powers, liability. Subject to subsection 3, a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by law of this state other than this Act.

§1217. Removal or replacement of authorized fiduciary

1. Power to remove or replace fiduciary. An authorized fiduciary may not exercise the decanting power to modify a provision in a first-trust instrument granting another person power to remove or replace the fiduciary unless:

A. The person holding the power consents to the modification in a signed record and the modification applies only to the person;

B. The person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or

C. The court approves the modification and the modification grants a substantially similar power to another person.

§1218. Tax-related limitations

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1. Definitions. As used in this section the following terms have the following meanings.

A. “Grantor trust” means a trust as to which a settlor of a first trust is considered the owner under 26 U.S.C. Sections 671 through 677 or 26 U.S.C. Section 679.

B. “Internal Revenue Code” means the United States Internal Revenue Code of 1986.

C. “Nongrantor trust” means a trust that is not a grantor trust.

D. “Qualified benefits property” means property subject to the minimum distribution requirements of 26 U.S.C. Section 401(a)(9), and any applicable regulations, or to any similar requirements that refer to 26 U.S.C. Section 401(a)(9) or the regulations.

2. Limitations on decanting power. An exercise of the decanting power is subject to the following limitations:

A. If a first trust contains property that qualified, or would have qualified but for provisions of this Act other than this section, for a marital deduction for purposes of the gift or estate tax under the Internal Revenue Code or a state gift, estate or inheritance tax, the second-trust instrument must not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified.

B. If the first trust contains property that qualified, or would have qualified but for provisions of this Act other than this section, for a charitable deduction for purposes of the income, gift or estate tax under the Internal Revenue Code or a state income, gift, estate or inheritance tax, the second-trust instrument must not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified.

C. If the first trust contains property that qualified, or would have qualified but for provisions of this Act other than this section, for the exclusion from the gift tax described in 26 U.S.C. Section 2503(b), the second-trust instrument must not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. Section 2503(b). If the first trust contains property that qualified, or would have qualified but for provisions of this Act

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other than this section, for the exclusion from the gift tax described in 26 U.S.C. Section 2503(b) by application of 26 U.S.C. Section 2503(c), the second-trust instrument must not include or omit a term that, if included or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. Section 2503(c).

D. If the property of the first trust includes shares of stock in an S corporation, as defined in 26 U.S.C. Section 1361 and the first trust is, or but for provisions of this Act other than this section would be, a permitted shareholder under any provision of 26 U.S.C. Section 1361, an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under 26 U.S.C. Section 1361(c)(2). If the property of the first trust includes shares of stock in an S corporation and the first trust is, or but for provisions of this Act other than this section would be, a qualified subchapter-S trust within the meaning of 26 U.S.C. Section 1361(d), the second-trust instrument must not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust.

E. If the first trust contains property that qualified, or would have qualified but for provisions of this Act other than this section, for a zero-inclusion ratio for purposes of the generation-skipping transfer tax under 26 U.S.C. Section 2642(c) the second-trust instrument must not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer to the first trust from qualifying for a zero-inclusion ratio under 26 U.S.C. Section 2642(c).

F. If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument may not include or omit any term that, if included in or omitted from the first-trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under 26 U.S.C. Section 401(a)(9) and any applicable regulations, or any similar requirements that refer to 26 U.S.C. Section 401(a)(9) or the regulations. If an attempted exercise of the decanting power violates the preceding sentence, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power and section 1221 applies to the separate share.

G. If the first trust qualifies as a grantor trust because of the application of 26 U.S.C. Section 672(f)(2)(A) the second trust may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the first trust from qualifying under 26 U.S.C. Section 672(f)(2)(A).

H. In this paragraph, “tax benefit” means a federal or state tax deduction, exemption, exclusion or other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust. Subject to paragraph I, a second-trust instrument may not include or omit a term that, if included in or omitted

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from the first-trust instrument, would have prevented qualification for a tax benefit if:

(1) The first-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the benefit; and

(2) The transfer of property held by the first trust or the first trust qualified, or but for provisions of this Act other than this section, would have qualified for the tax benefit.

I. Subject to paragraph D:

(1) Except as otherwise provided in paragraph H, the second trust may be a nongrantor trust, even if the first trust is a grantor trust; and

(2) Except as otherwise provided in paragraph J, the second trust may be a grantor trust, even if the first trust is a nongrantor trust.

J. An authorized fiduciary may not exercise the decanting power if a settlor objects in a signed record delivered to the fiduciary within the notice period and:

(1) The first trust and a second trust are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the first trust to cease to be a grantor trust, and the second trust does not grant an equivalent power to the settlor or other person; or

(2) The first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in part, with respect to the settlor, unless:

(a) The settlor has the power at all times to cause the second trust to cease to be a grantor trust; or

(b) The first-trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second-trust instrument contains the same provision.

§1219. Duration of second trust

1. Duration. Subject to subsection 2, a second trust may have a duration that is the same as or different from the duration of the first trust.

2. Rules applicable to property. To the extent that property of a second trust is attributable to property of the first trust, the property of the second trust is subject to any

rules governing maximum perpetuity, accumulation or suspension of the power of alienation which apply to property of the first trust.

§1220. Need to distribute not required

An authorized fiduciary may exercise the decanting power whether or not under the first trust's discretionary distribution standard the fiduciary would have made or could have been compelled to make a discretionary distribution of principal at the time of the exercise.

§1221. Savings provision

1. Second-trust instrument in part not in compliance. If exercise of the decanting power would be effective under this Act except that the second-trust instrument in part does not comply with this Act, the exercise of the power is effective and the following rules apply with respect to the principal of the second trust attributable to the exercise of the power:

A. A provision in the second-trust instrument which is not permitted under this Act is void to the extent necessary to comply with this Act.

B. A provision required by this Act to be in the second-trust instrument which is not contained in the instrument is deemed to be included in the instrument to the extent necessary to comply with this Act.

2. Fiduciary action. If a trustee or other fiduciary of a second trust determines that subsection 1 applies to a prior exercise of the decanting power, the fiduciary shall take corrective action consistent with the fiduciary's duties.

§1222. Trust for care of animal

1. Definitions. As used in this section the following terms have the following meanings.

A. "Animal trust" means a trust or an interest in a trust created to provide for the care of one or more animals.

B. "Protector" means a person appointed in an animal trust to enforce the trust on behalf of the animal or, if no such person is appointed in the trust, a person appointed by the court for that purpose.

2. Consent of protector. The decanting power may be exercised over an animal trust that has a protector to the extent the trust could be decanted under this Act if each

animal that benefits from the trust were an individual, if the protector consents in a signed record to the exercise of the power.

3. Rights of qualified beneficiary. A protector for an animal has the rights under this Act of a qualified beneficiary.

4. Period first trust benefitted animal. Notwithstanding any other provision of this Act, if a first trust is an animal trust, in an exercise of the decanting power, the second trust must provide that trust property may be applied only to its intended purpose for the period the first trust benefitted the animal.

§1223. Terms of second trust

A reference in this Title to a trust instrument or terms of the trust includes a second-trust instrument and the terms of the second trust.

§1224. Settlor

1. Settlor of first trust is settlor of second trust. For purposes of law of this state other than this Act and subject to subsection 2, a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power.

2. Consideration of intent. In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, a settlor of the second trust and the authorized fiduciary may be considered.

§1225. Later-discovered property

1. Distribution of all principal of first trust. Except as otherwise provided in subsection 3, if exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust or trusts.

2. Distribution of less than all principal of first trust. Except as otherwise provided in subsection 3, if exercise of the decanting power was intended to distribute less than all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power remains part of the trust estate of the first trust.

3. Disposition by fiduciary. An authorized fiduciary may provide in an exercise of the decanting power or by the terms of a second trust for disposition of later-

discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power.

§1226. Obligations

A debt, liability or other obligation enforceable against property of a first trust is enforceable to the same extent against the property when held by the second trust after exercise of the decanting power.

§1227. Uniformity of application and construction

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§1228. Relation to Electronic Signatures in Global and National Commerce Act

This Act modifies, limits or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

§1229. Effective date

This Act takes effect October 1, 2022.

SUMMARY

This bill enacts the Maine Uniform Trust Decanting Act as recommended by the Probate and Trust Law Advisory Commission. It is based on the Uniform Trust Decanting Act approved by the National Conference of Commissioners on Uniform State Laws in 2015. The Prefatory Note and Comments included in the Uniform Act are useful for interpreting this Act.

“Decanting” is the term used to describe the distribution of assets from one trust into a second trust. Decanting can be a useful strategy for changing the outdated terms of an otherwise irrevocable trust, but can also be abused to defeat the settlor’s intent. The Maine Uniform Trust Decanting Act (MUTDA) permits decanting for appropriate purposes while preventing abuse and preserving the intent of the settlor.

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Because decanting is an exercise of the trustee's discretion and does not require beneficiaries to consent, certain tax consequences that would otherwise apply can be avoided.

Under the MUTDA, a trustee may "decant" by restating the existing trust document completely or by a discrete amendment, avoiding the need to draft an entirely new trust when only a small administrative change is intended. The MUTDA also contains a savings provision that gives effect to valid provisions of a decanting despite any technical violations that are later deemed invalid.

The MUTDA includes one stricter set of rules that apply when the settlor gave the trustee limited discretion over distributions, and another more liberal set of rules that apply when the trustee has expanded discretion. In both cases, the person exercising the decanting power is subject to all applicable fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

Under the MUTDA, all qualified beneficiaries must receive notice 60 days before a proposed decanting. Anyone who objects to the decanting may ask a court to intervene. Vested interests may not be reduced or eliminated.

When the trustee has limited discretion over distributions, decanting is permitted for administrative or tax purposes, but the beneficial interests under the second trust instrument must be substantially similar to the beneficial interests under the first trust; the trustee may not exercise the decanting power to reduce or eliminate the interest of any beneficiary.

If the trustee already has expanded discretion to reduce or eliminate the interest of beneficiaries under the terms of the first trust, the MUTDA provides more flexibility.

One common reason for decanting is to provide for a beneficiary with disabilities. If the settlor did not anticipate the possibility of disability, the beneficiary may be ineligible for governmental benefits that would otherwise be available. The MUTDA gives additional flexibility to trustees with respect to disabled beneficiaries.

Under the MUTDA, a trust held solely for charitable purposes may not be decanted. If the trust contains any determinable charitable interest, that interest may not be reduced or eliminated by a decanting. The Attorney General must be notified of any proposed decanting of a trust with a determinable charitable interest and may object on behalf of the charity or charities that stand to benefit.

The MUTDA limits decanting when it would defeat a tax-related purpose of the settlor. It prohibits decanting for the purpose of adjusting trustee compensation without the unanimous consent of the beneficiaries or court approval.

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The MUTDA allows a trustee that assumes management of a previously decanted trust to rely on the validity of the previous decanting without risk of incurring liability for the previous trustee's actions.

This Act takes effect October 1, 2022.