

MAINE STATE LEGISLATURE

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122nd MAINE LEGISLATURE

FIRST SPECIAL SESSION-2005

Legislative Document

No. 1551

S.P. 538

In Senate, April 6, 2005

**An Act To Make Technical Amendments to the Maine Uniform
Trust Code**

(EMERGENCY)

Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator MILLS of Somerset.

2 **Emergency preamble.** Whereas, acts of the Legislature do not
become effective until 90 days after adjournment unless enacted
as emergencies; and

4
6 **Whereas,** the Maine Uniform Trust Code, enacted by Public Law
2003, chapter 618, Part A, takes effect July 1, 2005; and

8 **Whereas,** the amendments in this legislation to the Maine
Uniform Trust Code must also become effective on July 1, 2005,
because allowing the amendments to become effective 90 days after
10 the end of the legislative session would cause confusion and
12 uncertainty for Maine citizens and taxpayers; and

14 **Whereas,** in the judgment of the Legislature, these facts
create an emergency within the meaning of the Constitution of
16 Maine and require the following legislation as immediately
necessary for the preservation of the public peace, health and
18 safety; now, therefore,

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

22 **Sec. 1. 18-A MRSA §5-508, sub-§(g),** as amended by PL 1999, c.
66, §1, is further amended to read:

24 (g) The requirements of subsections (b), (c) and (d) do not
26 render ineffective a durable financial power of attorney validly
executed prior to September 19, 1997 or a durable financial power
28 of attorney executed prior to December 31, 1998 in accordance
with this section as in effect on September 19, 1997. The
30 requirements of subsection (d) do not render ineffective a
durable power of attorney validly executed prior to July 1, 2005
32 in accordance with this section.

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

36 **1-A. Ascertainable standard.** "Ascertainable standard"
38 means an ascertainable standard relating to an individual's
health, education, support or maintenance within the meaning of
40 Section 2041(b)(1)(A) or Section 2514(c)(1) of the federal
Internal Revenue Code of 1986, as in effect on July 1, 2005.

42 **Sec. 3. 18-B MRSA §103, sub-§10,** as enacted by PL 2003, c.
618, Pt. A, §1 and affected by §2, is amended to read:

44 **10. Power of withdrawal.** "Power of withdrawal" means a
46 presently exercisable general power of appointment other than a
power exercisable by a trustee that is limited by an
48 ascertainable standard, or exercisable by another person only

2 upon consent of the trustee or a person holding an adverse
interest.

4 **Sec. 4. 18-B MRSA §103, sub-§12**, as enacted by PL 2003, c.
618, Pt. A, §1 and affected by §2, is amended to read:

6 **12. Qualified beneficiary.** "Qualified beneficiary" means a
8 living beneficiary who on the date the beneficiary's
qualification is determined:

10 A. Is a distributee or permissible distributee of trust
12 income or principal;

14 B. Would be a distributee or permissible distributee of
trust income or principal if the interests of the
16 distributees described in paragraph A terminated on that
date, but the termination of those interests would not cause
18 the trust to terminate; or

20 C. Would be a distributee or permissible distributee of
trust income or principal if the trust terminated on that
22 date.

24 "Qualified beneficiary" does not include a contingent distributee
or a contingent permissible distributee of trust income or
26 principal whose interest in the trust is not reasonably expected
to vest.

28 **Sec. 5. 18-B MRSA §105, sub-§2, ¶¶H and I**, as enacted by PL
30 2003, c. 618, Pt. A, §1 and affected by §2, are amended to read:

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

38 I. The Subject to subsection 3, the duty under section 813,
40 subsection 1 to respond to the request of a qualified
beneficiary of an irrevocable trust for trustee's reports
42 and other information reasonably related to the
administration of a trust;

44 **Sec. 6. 18-B MRSA §105, sub-§3** is enacted to read:

46 **3. Waiver or modification.** The settlor, in the trust
48 instrument or in another writing delivered to the trustee, may
wave or modify the duties of a trustee under section 813.

2 subsection 1 or 2 to give notice, information and reports to
3 qualified beneficiaries by:

4 A. Waiving or modifying such duties as to all qualified
5 beneficiaries except the settlor's surviving spouse during
6 the lifetime of the settlor or the lifetime of the settlor's
7 surviving spouse; and

8
9 B. Designating a person or persons, any of whom may or may
10 not be a beneficiary, to act in good faith to protect the
11 interests of the qualified beneficiaries who are not
12 receiving notice, information or reports and to receive any
13 notice, information or reports required under section 813,
14 subsection 1 or 2 in lieu of providing such notice,
15 information or reports to the qualified beneficiaries. The
16 person or persons designated under this paragraph are deemed
17 to be representatives of the qualified beneficiaries not
18 receiving notice, information or reports for the purposes of
19 the time limitation for a beneficiary to commence an action
20 against the trustee for breach of trust as provided in
21 section 1005, subsection 1.

22 **REVISED MAINE COMMENT §105**

23
24 Subsection 2, paragraph H has been changed by adding the
25 word "qualified" before "beneficiary". The change is consistent
26 with section 813, subsection 1, which, as adopted in Maine,
27 requires that a trustee respond to a "qualified beneficiary's"
28 request for trustee's reports and other information reasonably
29 related to the administration of a trust. Notwithstanding the
30 trustee's duty under section 813, subsection 2, paragraphs B and
31 C to provide qualified beneficiaries with notice of certain
32 information about the trust, under subsection 105, subsection 2,
33 paragraph H a settlor may, by the terms of the trust, prohibit
34 the trustee from notifying a qualified beneficiary who has not
35 yet attained 25 years of age, of the existence of the trust, of
36 the identity of the trustee and of the qualified beneficiary's
37 right to request trustee reports. However, once a qualified
38 beneficiary attains 25 years of age, the only way the qualified
39 beneficiary may be "kept in the dark" as to the existence of the
40 trust is for the settlor to name a person or persons to receive
41 trustee reports on behalf of the qualified beneficiary as
42 provided in subsection 3. The "protector" named in subsection 3
43 must act in good faith to protect the interests of the qualified
44 beneficiary on whose behalf the protector is receiving trust
45 information. Subsection 3 is not a uniform provision of the
46 Uniform Trust Code. Maine added subsection 3 as a means to
47 provide settlors with an option to prevent disclosure of the
48 existence of the trust and details of the trust administration to

2 qualified beneficiaries. A settlor has the power to prohibit the
disclosure of the existence of the trust and details of the trust
4 administration to all non-qualified beneficiaries without the
need to name a third person to receive such information on behalf
6 of the beneficiaries. Note that a settlor may not name a
protector to receive notice, information or reports in lieu of
8 providing the notice, information or reports directly to the
settlor's surviving spouse.

10 The UTC has built into its default provisions a hierarchy of
rights relating to providing various beneficiaries with
12 information about a trust. The default provisions will govern
unless the settlor chooses to modify them by the terms of the
14 trust document:

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

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

28 iii. Nonqualified beneficiaries have a right to obtain a
copy of the trust instrument only if they request a copy,
30 but a trustee is under no affirmative obligation to inform
them of the existence of the trust or of their right to
32 request a copy; the non-qualified beneficiaries are on their
own to learn of the existence of the trust (see section 813,
34 subsection 2, paragraph A).

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

40 **Sec. 7. 18-B MRSA §110**, as enacted by PL 2003, c. 618, Pt. A,
42 §1 and affected by §2, is amended to read:

44 **§110. Others treated as qualified beneficiaries**

46 **1. Charitable organization or person to enforce trust.** A
charitable organization expressly designated to receive
48 distributions under the terms of a charitable trust ~~or a person
appointed to enforce a trust created for the care of an animal or~~

~~another noncharitable purpose as provided in section 408 or 409~~
2 has the rights of a qualified beneficiary under this Code. if the
3 charitable organization, on the date the charitable
4 organization's qualification is being determined:

6 A. Is a distributee or permissible distributee of trust
7 income or principal;

8 B. Would be a distributee or a permissible distributee of
9 trust income or principal upon the termination of the
10 interests of other distributees or permissible distributees
11 then receiving or eligible to receive distributions; or
12

13 C. Would be a distributee or permissible distributee of
14 trust income or principal on that date.

15 A charitable organization whose interest in the trust as a
16 contingent distributee of the trust income or principal is not
17 reasonably expected to vest does not have the rights of a
18 qualified beneficiary.
19

20 1-A. Person appointed to enforce trust. A person appointed
21 to enforce a trust created for the care of an animal or another
22 noncharitable purpose as provided in section 408 or 409 has the
23 rights of a qualified beneficiary under this Code.
24

25 2. Attorney General. The Attorney General has the rights
26 of a qualified beneficiary provided in Title 5, section 194 with
27 respect to a charitable trust having its principal place of
28 administration in this State, but may not be treated as and does
29 not have the rights of a qualified beneficiary.
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31 **REVISED MAINE COMMENT §110**

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Maine has deleted the Uniform Code's subsection (a), which
stated:

(a) Whenever notice to qualified beneficiaries of a trust
is required under the UTC, the trustee must also give notice
to any other beneficiary who has sent the trustee a request
for notice.

Uniform Code subsections (b) and (c) have been renumbered 1 and 2
respectively in the Maine version. The National UTC Conference
Comments, referring to subsections (a), (b) and (c), refer to the
Uniform Code subsections before they have been re-lettered in the
Maine version and should therefore be read accordingly.

Maine has also deleted the Uniform Code's subsection (d)

2 that gave the Attorney General the rights of a qualified
3 beneficiary with respect to a charitable trust having its
4 principal place of administration in Maine. In its place, Maine
5 has added a new subsection 3 which acknowledges the Attorney
6 General's existing enforcement role under the Maine Revised
7 Statutes, Title 5, section 194. The purpose of this section is
8 to expand the class of persons who are treated as a "qualified
9 beneficiary" as defined in UTC section 103, subsection 13. The
10 qualified beneficiary concept of the UTC is used to narrowly
11 define the class of beneficiaries who are entitled to notice of
12 certain matters related to the trust. See the National UTC
13 Conference Comments under this section for further explanation.
14 The notice required to be given to "qualified" beneficiaries
15 under the UTC should not be confused with the notice requirements
16 of section 1-401 of Maine's Probate Code, which section requires
17 that notice of a proceeding or hearing be given to any
18 "interested person". The term "interested person" is a defined
19 term under section 1-201, subsection (20) of the Maine Probate
20 Code, and defines a more expansive group of persons than does the
21 term "qualified beneficiary". The provisions of section 1-401 of
22 Maine's Probate Code are limited to notice of a "proceeding or
23 hearing"; i.e., a matter involving the court. Note that the term
24 "proceeding" is defined in section 1-201, subsection (32) of
25 Maine's Probate Code as "including any civil action in any court
26 of competent jurisdiction."

27 **Sec. 8. 18-B MRSA §301, sub-§4** is enacted to read:

28 **4. Limitation on representation by settlor.** A settlor may
29 not represent and bind a beneficiary under this chapter with
30 respect to termination or modification of a trust under section
31 411, subsection 1.
32

33 **Sec. 9. 18-B MRSA §411, sub-§1**, as enacted by PL 2003, c. 618,
34 Pt. A, §1 and affected by §2, is amended to read:

35 **1. Consent of settlor and all beneficiaries.** ---A
36 ~~noncharitable-irrevocable-trust-may-be-modified-or-terminated~~
37 ~~upon-consent-of-the-settlor-and-all-beneficiaries,-even-if-the~~
38 ~~modification-or-termination-is--inconsistent--with--a--material~~
39 ~~purpose-of-the-trust.~~ If the settlor and all beneficiaries
40 consent to the modification or termination of an irrevocable
41 trust, the court shall enter an order approving the modification
42 or termination even if the modification or termination is
43 inconsistent with a material purpose of the trust, if the court
44 finds that the modification or termination is in the best
45 interests of the beneficiaries. A settlor's power to consent to
46 a trust's modification or termination may be exercised by an
47 agent under a power of attorney only to the extent expressly
48 authorized
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2 by the power of attorney or the terms of the trust; by the
4 settlor's conservator with the approval of the court supervising
6 the conservatorship if an agent is not so authorized; or by the
settlor's guardian with the approval of the court supervising the
guardianship if an agent is not so authorized and a conservator
has not been appointed.

8 **Sec. 10. 18-B MRSA §501**, as enacted by PL 2003, c. 618, Pt.
A, §1 and affected by §2, is amended to read:

10 **§501. Rights of beneficiary's creditor or assignee**

12 To the extent a beneficiary's interest is not protected by a
14 spendthrift provision, the court may authorize a creditor or
assignee of the beneficiary to reach the beneficiary's interest
16 by attachment of present or future distributions to ~~or for the~~
~~benefit of~~ the beneficiary ~~or other means~~. The court may limit
18 the award to such relief as is appropriate under the
circumstances.

20 **Sec. 11. 18-B MRSA §504, sub-§2**, as enacted by PL 2003, c.
22 618, Pt. A, §1 and affected by §2, is amended to read:

24 **2. Right of beneficiary not limited.** This section does not
limit the right of a beneficiary to maintain a judicial
26 proceeding against a trustee for ~~an abuse of discretion failure~~
~~to exercise a discretionary power in accordance with the terms~~
28 ~~and purposes of the trust~~ or ~~for~~ failure to comply with a
standard for distribution.

30 **Sec. 12. 18-B MRSA §504, sub-§3** is enacted to read:

32 **3. Creditor limited.** A creditor may not reach the interest
34 of a beneficiary who is also a trustee, or otherwise compel a
distribution, if the trustee's discretion is limited by an
36 ascertainable standard.

38 **MAINE COMMENT**

40 Maine did not adopt the proposed subsections (a) and (c) of
42 section 504 because, among other things, of a desire to preserve
common law distinction between discretionary and support trusts.

44 **Sec. 13. 18-B MRSA §603, sub-§1**, as enacted by PL 2003, c.
46 618, Pt. A, §1 and affected by §2, is amended to read:

48 **1. Revocable trust.** While a trust is revocable ~~and the~~
~~settlor has capacity to revoke the trust~~, rights of the

2 beneficiaries are subject to the control of, and the duties of
the trustee are owed exclusively to, the settlor.

4 **Sec. 14. 18-B MRSA §704, sub-§4, ¶B**, as enacted by PL 2003, c.
618, Pt. A, §1 and affected by §2, is amended to read:

6
8 B. By a person appointed by unanimous agreement of the
charitable organizations expressly designated to receive
10 distributions under the terms of the trust ~~if the Attorney
General concurs in the appointment~~; or

12 **Sec. 15. 18-B MRSA §802, sub-§§4 and 6**, as enacted by PL 2003,
c. 618, Pt. A, §1 and affected by §2, are amended to read:

14
16 **4. Transaction between trustee and beneficiary.** A
transaction between a trustee and a beneficiary that does not
18 concern trust property but that occurs during the existence of
the trust or while the trustee retains significant influence over
20 the beneficiary and from which the trustee obtains an advantage
beyond the normal commercial advantage for such a transaction is
voidable by the beneficiary unless the trustee establishes that
22 the transaction was fair to the beneficiary. A transfer or
obligation is not voidable under this section against a person
24 who took property from the trustee in good faith for a reasonably
equivalent value or against any subsequent transferee or obligee.

26
28 **6. Investment.** An investment by a trustee in securities of
an investment company or investment trust to which the trustee,
30 or its affiliate, provides services in a capacity other than as
trustee is not presumed to be affected by a conflict between
32 personal and fiduciary interests if the investment otherwise
complies with the prudent investor rule of chapter 9. In
34 addition to its compensation for acting as trustee, the trustee
may be compensated by the investment company or investment trust
for providing those services out of fees charged to the trust.
36 If the trustee receives compensation from the investment company
or investment trust for providing investment advisory or
38 investment management services, the trustee at least annually
shall notify the persons entitled under section 813 to receive a
40 copy of the trustee's annual report of the rate and method by
which that compensation was determined.

42 **Sec. 16. 18-B MRSA §813, sub-§5** is enacted to read:

44
46 **5. Applicable date.** Subsection 2, paragraphs B and C apply
only to a trustee who accepts a trusteeship on or after July 1,
2005, to an irrevocable trust created on or after July 1, 2005
48 and to a revocable trust that becomes irrevocable on or after
July 1, 2005.

2 **Sec. 17. 18-B MRSA §814, sub-§1**, as enacted by PL 2003, c.
618, Pt. A, §1 and affected by §2, is amended to read:

4 **1. Discretionary power; interests of beneficiaries.**
6 Notwithstanding the breadth of discretion granted to a trustee in
the terms of the trust, including the use of such terms as
8 "absolute," "sole" or "uncontrolled," the trustee shall exercise
a discretionary power in good faith and in accordance with the
10 terms and purposes of the trust ~~and--the--interests--of--the~~
~~beneficiaries.~~ A trustee's power to make distributions is
12 discretionary notwithstanding terms of the trust providing that
the trustee "shall" make distributions exercising a discretionary
14 power, with or without standards.

16 **Sec. 18. 18-B MRSA §814, sub-§2, ¶A**, as enacted by PL 2003, c.
618, Pt. A, §1 and affected by §2, is amended to read:

18 A. A person other than a settlor who is a beneficiary and
20 trustee of a trust that confers on the trustee a power to
make discretionary distributions to or for the trustee's
22 personal benefit may exercise the power only in accordance
with an ascertainable standard ~~relating--to--the--trustee's~~
24 ~~individual health, education, support or maintenance within~~
~~the meaning of the Federal Internal Revenue Code of 1986,~~
26 ~~Section 2041(b)(1)(A) or 2514(c)(1), as in effect on July 1,~~
~~2005, or as later amended; and~~

28 **MAINE COMMENT**

30 Adoption of section 814, subsection 1 is not intended to
32 impose any new or additional requirements of "good faith" upon a
trustee's exercise of a discretionary power, or to change
34 existing Maine law regarding the standards applicable to the
exercise or non-exercise of a trustee's discretion. As noted in
36 the Maine Comment to section 504, the distinction at common law
between discretionary and support trusts is not abolished by
38 enactment of this Code.

40 **Emergency clause.** In view of the emergency cited in the
preamble, this Act takes effect July 1, 2005.

44 **SUMMARY**

46 The amendment of the Maine Revised Statutes, Title 18-A,
section 5-508, subsection (g) preserves the effectiveness of
48 powers of durable powers of attorney executed prior to July 1,
2005.

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2 The new Title 18-B, section 103, subsection 1-A and the
4 changes to section 103, subsection 10 provide a definition of
6 "ascertainable standard," relating to limits on a trustee's
8 exercise of discretion, that is identical to the definition found
10 in the federal Internal Revenue Code of 1986. These amendments,
12 and others related to the federal Internal Revenue Code of 1986,
14 will protect Maine taxpayers using trusts from "accidental"
16 taxation of the trustee because the trustee's discretion appeared
18 too broad.

20 The amendment to Title 18-B, section 103, subsection 12,
22 paragraph B is added to clarify the definition of a "qualified
24 beneficiary." A qualified beneficiary is entitled to receive
26 certain notices and trustee reports.

28 The addition to Title 18-B, section 105, subsection 3 and
30 the modification of Title 18-B, section 105, subsection 2,
32 paragraphs H and I will allow the settlor of a Maine trust to
34 keep the trust private by limiting the persons to whom notice and
36 reports must be given. To keep the trustee accountable to
38 someone, a trust that takes advantage of the option to restrict
40 notice must designate a representative, sometimes called a "trust
42 protector," to receive the same information that would otherwise
44 be provided to qualified beneficiaries.

46 The changes to Title 18-B, section 110 clarify when a
48 charitable organization, a person other than a beneficiary
50 appointed to enforce a trust and the Attorney General are
entitled to the notice and reports that are required to be
provided to a qualified beneficiary. The change to Title 18-B,
section 110, subsection 2 recognizes that the State already has a
specific statutory provision allowing the Attorney General to
receive and act on information regarding charitable trusts, and
eliminates the potentially conflicting provisions of the uniform
law in favor of a reference to the Maine-specific provisions of
Title 5.

38 The addition of Title 18-B, section 301, subsection 4 is
40 designed to prevent an adverse federal estate and gift tax result
42 that some commentators have identified as a possibility when the
44 settlor of an irrevocable trust can give consent on behalf of a
46 beneficiary to a modification or termination of the trust.
48 Similarly, the new sentence added to Title 18-B, section 411,
50 subsection 1 is designed to require court approval if the settlor
and all the beneficiaries agree to modify or terminate an
irrevocable trust. Without required approval by the court, some
commentators believe that the property in an irrevocable trust
that can be modified in such a way could be included in the
settlor's taxable estate.

Title 18-B, section 501 is amended to make it clear that, if

2 a beneficiary's interest is not protected by a spendthrift
3 provision, a creditor can attach only distributions to the
4 beneficiary and not payments made by the trustee to 3rd parties
5 that in some way help the beneficiary.

6 Title 18-B, section 504, subsection 2 is amended to clarify
7 the beneficiary's right to take legal action against a trustee
8 for failure to act in accordance with the terms and purposes of
9 the trust. A new Title 18-B, section 504, subsection 3 is added
10 to provide that beneficiaries who are also trustees are protected
11 from creditors to the extent that distributions are subject to an
12 ascertainable standard.

13 Title 18-B, section 603, subsection 1 protects the settlors
14 of Maine trusts by making it clear that the remainder
15 beneficiaries have no rights as long as the settlor of a
16 revocable trust is alive, even if incapacitated.

17 Title 18-B, section 704, subsection 4 is amended to delete
18 the requirement that the Attorney General must approve the
19 charity's appointment of the successor trustee of a charitable
20 trust. Title 5, section 194 imposes no such requirement and is a
21 comprehensive and recent enactment.

22 Title 18-B, section 802, subsection 4 is amended to protect
23 innocent 3rd parties who purchase from a trustee from a
24 forfeiture of the property if the trustee acted wrongfully. This
25 protects the integrity of real estate titles and is identical to
26 the provisions of Maine law with respect to fraudulent transfers.

27 Title 18-B, section 813 is amended for clarification. Title
28 18-A, section 813, subsection 5 is added to provide that the
29 requirement of giving notice to beneficiaries does not require
30 trustees to send additional notices to beneficiaries of trusts
31 already in existence on July 1, 2005.

32 Title 18-B, section 814, subsection 1 is amended to clarify
33 that existing Maine law applicable to a trustee's exercise of
34 discretionary power is not changed; no new or additional
35 standards are imposed upon trustees exercising discretion. The
36 Official Maine Comment is also amended to make the same point.

37 Title 18-B, section 814, subsection 2, paragraph A is
38 amended to reflect the fact that an "ascertainable standard" is
39 now defined in Title 18-B, section 103 by deleting the now
40 redundant words after "ascertainable standard."
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