

MAINE STATE LEGISLATURE

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1
2 Date: 6-8-21

11
L.D. 422

(Filing No. H-445)

3 JUDICIARY

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5 STATE OF MAINE
6 HOUSE OF REPRESENTATIVES
7 130TH LEGISLATURE
8 FIRST SPECIAL SESSION

9 COMMITTEE AMENDMENT "A" to H.P. 306, L.D. 422, "An Act To Enact the
10 Maine Uniform Trust Decanting Act"

11 Amend the bill by striking out everything after the enacting clause and inserting the
12 following:

13 'Sec. 1. 18-B MRSA c. 12 is enacted to read:

14 CHAPTER 12

15 MAINE UNIFORM TRUST DECANTING ACT

16 §1201. Short title

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

19 §1202. Definitions

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

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

24 2. Ascertainable standard. "Ascertainable standard" means a standard relating to an
25 individual's health, education, support or maintenance within the meaning of 26 United
26 States Code, Section 2041(b)(1)(A), as amended, or 26 United States Code, Section
27 2514(c)(1), as amended, and any applicable regulations.

28 3. Authorized fiduciary. "Authorized fiduciary" means:

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

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1 B. A special fiduciary appointed under section 1208; or

2 C. A special-needs fiduciary under section 1212.

3 **4. Beneficiary.** "Beneficiary" means a person that:

4 A. Has a present or future, vested or contingent, beneficial interest in a trust;

5 B. Holds a power of appointment over trust property; or

6 C. Is an identified charitable organization that will or may receive distributions under
7 the terms of the trust.

8 **5. Charitable interest.** "Charitable interest" means an interest in a trust that:

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

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

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

17 **6. Charitable organization.** "Charitable organization" means:

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

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

22 **7. Charitable purpose.** "Charitable purpose" means the relief of poverty, the
23 advancement of education or religion, the promotion of health, a municipal or other
24 governmental purpose or another purpose the achievement of which is beneficial to the
25 community.

26 **8. Court.** "Court" means the applicable court in this State having jurisdiction in
27 matters relating to trusts.

28 **9. Current beneficiary.** "Current beneficiary" means a beneficiary that on the date
29 the beneficiary's qualification is determined is a distributee or permissible distributee of
30 trust income or principal. "Current beneficiary" includes the holder of a presently
31 exercisable general power of appointment but does not include a person that is a beneficiary
32 only because the person holds any other power of appointment.

33 **10. Decanting power.** "Decanting power" means the power of an authorized fiduciary
34 under this Act to distribute property of a first trust to one or more 2nd trusts or to modify
35 the terms of the first trust.

36 **11. Expanded distributive discretion.** "Expanded distributive discretion" means a
37 discretionary power of distribution that is not limited to an ascertainable standard or a
38 reasonably definite standard.

39 **12. First trust.** "First trust" means a trust over which an authorized fiduciary may
40 exercise the decanting power.

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1 **13. First-trust instrument.** "First-trust instrument" means the trust instrument for a
2 first trust.

3 **14. General power of appointment.** "General power of appointment" means a power
4 of appointment exercisable in favor of a powerholder, the powerholder's estate, a creditor
5 of the powerholder or a creditor of the powerholder's estate.

6 **15. Person.** "Person" means an individual, estate, business or nonprofit entity, public
7 corporation, government or governmental subdivision, agency or instrumentality or other
8 legal entity.

9 **16. Power of appointment.** "Power of appointment" means a power that enables a
10 powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership
11 interest in or another power of appointment over the appointive property. "Power of
12 appointment" does not include a power of attorney.

13 **17. Powerholder.** "Powerholder" means a person in which a donor creates a power
14 of appointment.

15 **18. Presently exercisable power of appointment.** "Presently exercisable power of
16 appointment" means a power of appointment exercisable by the powerholder at the relevant
17 time. "Presently exercisable power of appointment":

18 A. Includes a power of appointment not exercisable until the occurrence of a specified
19 event, the satisfaction of an ascertainable standard or the passage of a specified time
20 period only after:

21 (1) The occurrence of the specified event;

22 (2) The satisfaction of the ascertainable standard; or

23 (3) The passage of the specified time period; and

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

25 **19. Qualified beneficiary.** "Qualified beneficiary" means a beneficiary that on the
26 date the beneficiary's qualification is determined:

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

28 B. Would be a distributee or permissible distributee of trust income or principal if the
29 interests of the distributees described in paragraph A terminated on that date without
30 causing the trust to terminate; or

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

33 **20. Reasonably definite standard.** "Reasonably definite standard" means a clearly
34 measurable standard under which a holder of a power of distribution is legally accountable
35 within the meaning of 26 United States Code, Section 674(b)(5)(A) and any applicable
36 regulations.

37 **21. Record.** "Record" means information that is inscribed on a tangible medium or
38 that is stored in an electronic or other medium and is retrievable in perceivable form.

39 **22. Second trust.** "Second trust" means:

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

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

23. Second-trust instrument. "Second-trust instrument" means the trust instrument for a 2nd trust.

24. 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 person has power to revoke or withdraw that portion.

25. 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, a 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:

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

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

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

7 (2) Construction of terms of the trust; or

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

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

10 A. The Act applies to a trust created before, on or after the October 1, 2021;

11 B. The Act applies to any proceedings in court commenced on or after October 1,
12 2021;

13 C. The Act applies to proceedings in court pending on October 1, 2021 unless the court
14 finds that application of a particular provision of the Act would interfere substantially
15 with the effective conduct of the proceeding or prejudice a right of a party, in which
16 case the particular provision of the Act does not apply; and

17 D. A rule of construction or presumption provided in the Act applies to a trust
18 instrument executed prior to October 1, 2021 unless there is a clear indication of a
19 contrary intent in the terms of the instrument.

20 **3. Action before effective date of Act.** Except as otherwise provided in subsection
21 2, an action done before October 1, 2021 is not affected by the Act.

22 **§1206. Reasonable reliance**

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

27 **§1207. Notice; exercise of decanting power**

28 **1. Notice period.** For purposes of this section, a notice period begins on the day notice
29 is given under subsection 3 and ends 59 days after the day notice is given.

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

33 **3. Notice.** Except as otherwise provided in subsection 4 or 6, an authorized fiduciary
34 shall give notice in a record of the intended exercise of the decanting power not later than
35 60 days before the exercise to:

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

37 B. Each qualified beneficiary of the first trust;

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

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

3 E. Each other fiduciary of the first trust;

4 F. Each fiduciary of the 2nd trust; and

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

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

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

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

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

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

14 D. Include a copy of all 2nd-trust instruments.

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

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

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

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

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

28 **§1208. Court involvement**

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

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

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

38 C. Approve an exercise of the decanting power;

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

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(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;

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 2nd trust or trusts and state the property of the first trust being distributed to each 2nd 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, unless the context otherwise indicates, 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. "Successor beneficiary" 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;

(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;

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

4 (4) A general power of appointment that is a presently exercisable general power
5 of appointment; or

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

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

13 **3. Restrictions on 2nd trust.** Subject to section 1212, in an exercise of the decanting
14 power under this section, a 2nd trust may not:

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

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

20 C. Reduce or eliminate a vested interest.

21 **4. Permitted 2nd trust.** Subject to subsection 3, paragraph C and section 1213, in an
22 exercise of the decanting power under this section, a 2nd trust may be a trust created or
23 administered under the law of any jurisdiction and may:

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

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

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

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

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

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

42 **§1211. Decanting power under limited distributive discretion**

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1 **1. Limited distributive discretion defined.** For purposes of this section, "limited
2 distributive discretion" means a discretionary power of distribution that is limited to an
3 ascertainable standard or a reasonably definite standard.

4 **2. Limited distributive discretion over principal.** An authorized fiduciary that has
5 limited distributive discretion over the principal of the first trust for the benefit of one or
6 more current beneficiaries may exercise the decanting power over the principal of the first
7 trust.

8 **3. Creation of 2nd trust; similar beneficial interests.** Under this section and subject
9 to section 1213, a 2nd trust may be created or administered under the law of any
10 jurisdiction. Under this section, the 2nd trusts, in the aggregate, must grant each beneficiary
11 of the first trust beneficial interests that are substantially similar to the beneficial interests
12 of the beneficiary in the first trust.

13 **4. Distribution for benefit of beneficiary.** A power to make a distribution under a
14 2nd trust created pursuant to this section for the benefit of a beneficiary who is an individual
15 is substantially similar to a power under the first trust to make a distribution directly to the
16 beneficiary. A distribution is deemed to be for the benefit of a beneficiary if:

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

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

21 C. The distribution is made as permitted under the terms of the first-trust instrument
22 and the 2nd-trust instrument for the benefit of the beneficiary.

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

27 **§1212. Trust for beneficiary with disability**

28 **1. Definitions.** As used in this section, unless the context otherwise indicates, the
29 following terms have the following meanings.

30 A. "Beneficiary with a disability" means a beneficiary of a first trust who the special-
31 needs fiduciary believes may qualify for governmental benefits based on disability,
32 whether or not the beneficiary currently receives those benefits or is an individual who
33 is subject to a guardianship, a conservatorship or a protective arrangement.

34 B. "Governmental benefits" means financial aid or services from a state, federal or
35 other public agency.

36 C. "Special-needs fiduciary" means, with respect to a trust that has a beneficiary with
37 a disability:

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

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

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(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:

A. A 2nd 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 2nd trust of a beneficiary with a disability may:

(1) Be a pooled trust as defined under the federal Medicaid program for the benefit of the beneficiary with a disability under 42 United States Code, Section 1396p(d)(4)(C); or

(2) Contain payback provisions complying with reimbursement requirements under the federal Medicaid program under 42 United States Code, Section 1396p(d)(4)(A);

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

C. Except as affected by any change to the interests of a beneficiary with a disability, the 2nd trust or, if there are 2 or more 2nd trusts, the 2nd trusts in the aggregate must grant each other beneficiary of the first trust beneficial interests in the 2nd trusts that 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, unless the context otherwise indicates, 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 period and that 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.

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1 **2. Determinable charitable interest; Attorney General may represent and bind.**
2 If a first trust contains a determinable charitable interest, for purposes of this section, the
3 Attorney General has the rights of a qualified beneficiary and may represent and bind the
4 determinable charitable interest.

5 **3. Limitation on 2nd trusts.** If a first trust contains a determinable charitable interest,
6 the 2nd trust or trusts may not:

7 A. Diminish the determinable charitable interest;

8 B. Diminish the interest of an identified charitable organization that holds the
9 determinable charitable interest;

10 C. Alter any charitable purpose stated in the first-trust instrument; or

11 D. Alter any condition or restriction related to the determinable charitable interest.

12 **4. Treatment of 2 or more 2nd trusts.** If there are 2 or more 2nd trusts, the 2nd trusts
13 must be treated as one trust for purposes of determining whether the exercise of the
14 decanting power diminishes the determinable charitable interest or diminishes the interest
15 of an identified charitable organization for purposes of subsection 3.

16 **5. State law applicable; exceptions.** If a first trust contains a determinable charitable
17 interest, a 2nd trust or trusts that include a determinable charitable interest pursuant to
18 subsection 3 must be administered under the law of this State unless:

19 A. The Attorney General, after receiving notice under section 1207, does not object in
20 a signed record delivered to the authorized fiduciary within the notice period;

21 B. The Attorney General consents in a signed record to the 2nd trust or trusts being
22 administered under the law of another jurisdiction; or

23 C. The court approves the exercise of the decanting power.

24 **6. Attorney General's powers and duties not limited.** This Act does not limit the
25 powers and duties of the Attorney General under a law of this State other than this Act.

26 **§1214. Trust limitation on decanting**

27 **1. Decanting power prohibited.** An authorized fiduciary may not exercise the
28 decanting power to the extent the first-trust instrument expressly prohibits exercise of:

29 A. The decanting power; or

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

32 **2. Decanting power restricted.** Exercise of the decanting power is subject to any
33 restriction in the first-trust instrument that expressly applies to exercise of:

34 A. The decanting power; or

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

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

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

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

9 **§1215. Change in compensation**

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

14 **A. All qualified beneficiaries of the 2nd trust consent to the increase in a signed record;**
15 **or**

16 **B. The increase is approved by the court.**

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

21 **A. All qualified beneficiaries of the 2nd trust consent to the increase in a signed record;**
22 **or**

23 **B. The increase is approved by the court.**

24 **3. Change in compensation incidental.** A change in an authorized fiduciary's
25 compensation that is incidental to other changes made by the exercise of the decanting
26 power is not an increase in the authorized fiduciary's compensation for purposes of
27 subsections 1 and 2.

28 **§1216. Relief from liability and indemnification**

29 **1. Liability for breach of trust.** Except as otherwise provided in this section, a 2nd-
30 trust instrument may not relieve an authorized fiduciary from liability for breach of trust to
31 a greater extent than the first-trust instrument does.

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

36 **3. No reduction in liability in aggregate.** A 2nd-trust instrument may not reduce
37 fiduciary liability in the aggregate.

38 **4. Division and reallocation of fiduciary powers; relief from fiduciary liability.**
39 Subject to subsection 3, a 2nd-trust instrument may divide and reallocate fiduciary powers
40 among fiduciaries, including one or more trustees, distribution advisors, investment
41 advisors, trust protectors or other persons, and relieve a fiduciary from liability for an act
42 or failure to act of another fiduciary as permitted by a law of this State other than this Act.

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§1217. Removal or replacement of authorized 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 authorized fiduciary unless:

1. Person holding power consents. The person holding the power to remove or replace the authorized fiduciary consents to the modification in a signed record and the modification applies only to the person;

2. Person holding power and qualified beneficiaries consent. The person holding the power to remove or replace the authorized fiduciary and the qualified beneficiaries of the 2nd trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or

3. Court approves. The court approves the modification and the modification grants a substantially similar power to remove or replace the authorized fiduciary to another person.

§1218. Tax-related limitations

1. Definitions. As used in this section, unless the context otherwise indicates, 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 United States Code, Sections 671 to 677 or 26 United States Code, 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 United States Code, Section 401(a)(9), and any applicable regulations, or to any similar requirements that refer to 26 United States Code, Section 401(a)(9) or an applicable regulation.

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 2nd-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 2nd-trust instrument may 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

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1 deduction, or would have reduced the amount of the deduction, under the same
2 provisions of the Internal Revenue Code or state law under which the transfer qualified.

3 C. If the first trust contains property that qualified, or would have qualified but for
4 provisions of this Act other than this section, for the exclusion from the gift tax
5 described in 26 United States Code, Section 2503(b), the 2nd-trust instrument may not
6 include or omit a term that, if included in or omitted from the trust instrument for the
7 trust to which the property was transferred, would have prevented the transfer from
8 qualifying under 26 United States Code, Section 2503(b). If the first trust contains
9 property that qualified, or would have qualified but for provisions of this Act other than
10 this section, for the exclusion from the gift tax described in 26 United States Code,
11 Section 2503(b) by application of 26 United States Code, Section 2503(c), the 2nd-
12 trust instrument may not include or omit a term that, if included or omitted from the
13 trust instrument for the trust to which the property was transferred, would have
14 prevented the transfer from qualifying under 26 United States Code, Section 2503(c).

15 D. If the property of the first trust includes shares of stock in an S corporation, as
16 defined in 26 United States Code, Section 1361 and the first trust is, or but for
17 provisions of this Act other than this section would be, a permitted shareholder under
18 any provision of 26 United States Code, Section 1361, an authorized fiduciary may
19 exercise the power with respect to part or all of the S corporation stock only if any 2nd
20 trust receiving the stock is a permitted shareholder under 26 United States Code,
21 Section 1361(c)(2). If the property of the first trust includes shares of stock in an S
22 corporation and the first trust is, or but for provisions of this Act other than this section
23 would be, a qualified subchapter S trust within the meaning of 26 United States Code,
24 Section 1361(d), the 2nd-trust instrument may not include or omit a term that, if
25 included or omitted, would have the effect of preventing the 2nd trust from qualifying
26 as a qualified subchapter S trust.

27 E. If the first trust contains property that qualified, or would have qualified but for
28 provisions of this Act other than this section, for an inclusion ratio of zero for purposes
29 of the generation-skipping transfer tax under 26 United States Code, Section 2642(c),
30 the 2nd-trust instrument may not include or omit a term that, if included in or omitted
31 from the first-trust instrument, would have prevented the transfer to the first trust from
32 qualifying for an inclusion ratio of zero under 26 United States Code, Section 2642(c).

33 F. If the first trust is directly or indirectly the beneficiary of qualified benefits property,
34 the 2nd-trust instrument may not include or omit any term that, if included in or omitted
35 from the first-trust instrument, would have increased the minimum distributions
36 required with respect to the qualified benefits property under 26 United States Code,
37 Section 401(a)(9) and any applicable regulations, or any similar requirements that refer
38 to 26 United States Code, Section 401(a)(9) or an applicable regulation. If an attempted
39 exercise of the decanting power violates the preceding sentence, the trustee is deemed
40 to have held the qualified benefits property and any reinvested distributions of the
41 property as a separate share from the date of the exercise of the power, and section
42 1221 applies to the separate share.

43 G. If the first trust qualifies as a grantor trust because of the application of 26 United
44 States Code, Section 672(f)(2)(A), the 2nd trust may not include or omit a term that, if
45 included in or omitted from the first-trust instrument, would have prevented the first
46 trust from qualifying under 26 United States Code, Section 672(f)(2)(A).

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H. Subject to paragraph I, a 2nd-trust instrument may not include or omit a term that, if included in or omitted 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 tax benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the tax 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.

For the purposes of 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.

I. Subject to paragraph D:

(1) Except as otherwise provided in paragraph H, the 2nd 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 2nd 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 authorized fiduciary within the notice period under section 1207 and:

(1) The first trust and a 2nd 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 2nd trust does not grant an equivalent power to the settlor or other person; or

(2) The first trust is a nongrantor trust and a 2nd 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 2nd 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 2nd-trust instrument contains the same provision.

§1219. Duration of 2nd trust

1. Duration. Subject to subsection 2, a 2nd 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 2nd trust is attributable to property of the first trust, the property of the 2nd trust is subject to any rules governing maximum perpetuity, accumulation or suspension of the power of alienation that 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 authorized 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 for the 2nd-trust instrument's partial noncompliance with this Act, the exercise of the decanting power is effective and the following applies with respect to the principal of the 2nd trust attributable to the exercise of the decanting power:

A. A provision in the 2nd-trust instrument that is not permitted under this Act is void to the extent necessary to comply with this Act; and

B. A provision required by this Act to be in the 2nd-trust instrument that 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 2nd 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, unless the context otherwise indicates, 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. Time period first trust benefited animal. Notwithstanding any provision of this Act to the contrary, if a first trust is an animal trust, in an exercise of the decanting power, the 2nd trust must provide that trust property may be applied only for its intended purpose for the time period the first trust benefited the animal.

§1223. Terms of 2nd trust

A reference in this Title to a trust instrument or terms of the trust includes a 2nd-trust instrument and the terms of the 2nd trust.

§1224. Settlor

1. Settlor of first trust is settlor of 2nd trust. For purposes of the law of this State other than this Act and subject to subsection 2, a settlor of a first trust is deemed to be the

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settlor of the 2nd 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 2nd trust, the intent of a settlor of the first trust, a settlor of the 2nd 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 2nd trusts, later-discovered property belonging to the first trust and property paid to or acquired by the first trust after the exercise of the decanting power is part of the trust estate of the 2nd 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 2nd trusts, later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the decanting 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 2nd trust for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after the exercise of the decanting 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 2nd trust after exercise of the decanting power.

§1227. Uniformity of application and construction

In applying and construing this 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 United States Code, Section 7001 et seq., but does not modify, limit or supersede 15 United States Code, Section 7001(c), or authorize electronic delivery of any of the notices described in 15 United States Code, Section 7003(b).

§1229. Effective date

This Act takes effect October 1, 2021.

Amend the bill by relettering or renumbering any nonconsecutive Part letter or section number to read consecutively.

SUMMARY

This bill enacts the Maine Uniform Trust Decanting Act, or MUTDA, 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

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COMMITTEE AMENDMENT "A" to H.P. 306, L.D. 422

1 Laws in 2015. The prefatory note and comments included in the Uniform Trust Decanting
2 Act are useful for interpreting this Act.

3 "Decanting" is the term used to describe the distribution of assets from one trust into a
4 2nd trust. Decanting can be a useful strategy for changing the outdated terms of an
5 otherwise irrevocable trust, but can also be abused to defeat the settlor's intent. The
6 MUTDA permits decanting for appropriate purposes while preventing abuse and
7 preserving the intent of the settlor.

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

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

16 The MUTDA includes a more strict set of rules that apply when the settlor gives the
17 trustee limited discretion over distributions and another less strict set of rules that apply
18 when the trustee has expanded discretion. In both cases, the person exercising the
19 decanting power is subject to all applicable fiduciary duties, including the duty to act in
20 accordance with the purposes of the first trust.

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

24 When the trustee has limited discretion over distributions, decanting is permitted for
25 administrative or tax purposes but the beneficial interests under the 2nd trust must be
26 substantially similar to the beneficial interests under the first trust; the trustee may not
27 exercise the decanting power to reduce or eliminate the interest of any beneficiary.

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

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

34 A trust held solely for charitable purposes is not subject to MUTDA and may not be
35 decanted under this Act. If a trust contains any determinable charitable interest, that interest
36 may not be reduced or eliminated by a decanting. The Attorney General must be notified
37 of any proposed decanting of a trust with a determinable charitable interest and may object
38 on behalf of the charity or charities that stand to benefit.

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

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COMMITTEE AMENDMENT "A" to H.P. 306, L.D. 422

- 1 The MUTDA allows a trustee that assumes management of a previously decanted trust
- 2 to rely on the validity of the previous decanting without risk of incurring liability for the
- 3 previous trustee's actions.
- 4 This Act takes effect October 1, 2021.