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MAINE PROBATE AND TRUST LAW ADVISORY COMMISSION
Report on LD 1763
“An Act Regarding Trustee Duties to Beneficiaries”
Joint Standing Committee on Judiciary

Introduction

The Probate and Trust Law Advisory Commission (“PATLAC”) hereby submits the following report regarding LD 1763, “**An Act Regarding Trustee Duties to Beneficiaries**,” which would amend Title 18-B – the Maine Uniform Trust Code.

Background

LD 1763 was originally submitted during the First Special Session of the 131st Maine Legislature. PATLAC, through its written comments dated May 12, 2023, recommended that LD 1763 not be enacted. The Joint Standing Committee on Judiciary (“the Committee”) then held a public hearing and work session on LD 1763. On October 24, 2023, at Senator Carney’s request, PATLAC convened a stakeholder group comprised of representatives of Legal Services for the Elderly (now Legal Services for Maine Elders), the Elder Law Section of the Maine State Bar Association, and the Trust and Estate Section of the Maine State Bar Association, via a Zoom call, to further discuss LD 1763. By email on the afternoon of October 24, 2023, as a follow up to the Zoom call of the stakeholder group, PATLAC provided Senator Carney with several documents from the docket of the York Probate Court under Docket Number 2018-1114 in response to questions that were raised during the Zoom call. The Committee then voted to table further consideration of LD 1763 until the next legislative session.

During the Second Session of the 131st Maine Legislature, the Committee unanimously voted Ought Not to Pass on LD 1763. After the Committee’s vote of Ought Not to Pass, the sponsor of LD 1763 submitted a proposed amended version of LD 1763 for the Committee’s consideration.

The proposed amendment to LD 1763 (“the proposed amendment”) is as follows:

Section _____. **Trust considerations of persons with physical or mental disabilities.**

1. Trustee accommodation of person with physical or mental disability - So long as not inconsistent with the trustee's legal obligations through the legal document or court order creating the trust relationship, a trustee shall make appropriate accommodations to ensure that any basic needs of any person with a physical or mental disability, which are housing, food and medical needs, are being met by the trust for any disabled person who is a beneficiary to the trust. For the purposes of this section "physical or mental disability" has the same meaning as in Title 5, section 4553-A.

2. Court review - The trustee, a beneficiary to the trust, a person with physical or mental disability whose rights are protected by this statute, or the individual who the trustee represents, may file a motion with the court in which any current action is pending involving the parties, or in Probate Court, to determine whether the trustee is making a decision in the best interest of the person who has a mental or physical disability, taking into consideration the trustee's legal obligations to other interested persons, including other beneficiaries, and taking into consideration any trustee's obligations set forth in the legal documents and court orders creating the trust relationship.

By letter dated May 10, 2024, the Committee requested that PATLAC reconvene a group of stakeholders, including representatives of the Legal Services for Maine Elders, the Elder Law Section of the Maine State Bar Association, the Trust and Estate Section of the Maine State Bar Association, and others whose expertise may be beneficial, to review the proposed amendment. In its May 10 letter, the Committee requested that PATLAC examine the issues raised by the proposed amendment and provide the Committee with the outcome of the stakeholder group's deliberations along with any recommended legislation.

This report from PATLAC contains the results of the stakeholder group's deliberations on the proposed amendment, with PATLAC's recommendation for the Committee's further action on the proposed amendment.

PATLAC's Protocol for Soliciting Input

In response to the Committee's May 10, 2024 letter, PATLAC did the following in furtherance of its consideration of the proposed amendment:

- a) On July 13, 2024, PATLAC sent an email to representatives of the Elder Law Section of the Maine State Bar Association, the Trust and Estate Section of the Maine State Bar Association, Legal Services for Maine Elders, and the Maine Bankers Association ("the stakeholder group"), and provided each recipient with all relevant background documents relating to LD 1763, including the Committee's May 10, 2024 letter.
- b) On September 10, 2024, PATLAC sent an email to the stakeholder group representatives scheduling a stakeholder group Zoom call for October 4.
- c) On September 24, 2024, in preparation for the October 4 stakeholder group call, PATLAC convened for the purpose of internally discussing the proposed amendment.
- d) October 4, 2024 PATLAC convened a meeting of the representatives of the stakeholder group for a detailed review and discussion of the proposed amendment.

- e) At the suggestion of the representative of one of the stakeholder group members, PATLAC sent an email to Kim Moody, the Executive Director of Disability Rights Maine, providing her with all relevant background information regarding LD 1763, and soliciting comments from Disability Rights Maine.
- f) On October 10, 2024, David Backer, PATLAC's Chair, spoke with Lauren Willey, the Legal Director of Disability Rights Maine, who said that Disability Rights Maine does not typically work with trusts, has no particular familiarity with the Maine Uniform Trust Code, and had no comments to offer on LD 1763.
- g) On November 15, 2024, PATLAC received comment from Caitlin DiMillo, Esq., a Senior Vice-President and Principal of Spinnaker Trust Company of Portland, and the current President of the Maine Estate Planning Council, reporting that the board of directors of the Maine Estate Planning Council is opposed to the proposed amendment. The Maine Estate Planning Council is a group of more than 200 estate planning professionals whose members include attorneys, CPAs, financial planning and insurance professionals, and trust officers.
- h) On November 15, 2024, PATLAC also received comment from Anya Endsley, Esq., Vice-Chair of the Private Clients and Fiduciary Services Group of Verrill, a Portland based law firm. Although Verrill is not a bank or non-depository trust company, Verrill's attorneys serve as professional trustee of many trusts for its clients. Verrill is opposed to the proposed amendment.

Comments

None of the individuals or groups that provided comments offered support for the proposed amendment. The Elder Law Section of the Maine State Bar Association, the Trust and Estate Section of the Maine State Bar Association, the Maine Bankers Association, the Maine Estate Planning Council, and the Private Clients and Fiduciary Services Group of Verrill oppose support for the proposed amendment. PATLAC also opposes support for the proposed amendment.

The consensus among all who provided comment is that the proposed amendment is problematic for many reasons and weakens special needs planning for trust beneficiaries who receive government assistance benefits, most notably MaineCare and Social Security Income (SSI) benefits.

PATLAC believes existing provisions of the Maine Uniform Trust Code ("the Maine UTC") provide sufficient and appropriate protection for trust beneficiaries, and provides comprehensive protection and remedies to address the concerns that prompted the introduction of LD 1763 and the proposed amendment. At its core, §801 of the Maine UTC mandates that a trustee "administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries and in accordance with this Code." The Maine UTC imposes fiduciary duties of loyalty – administration of the trust solely in beneficiaries'

interests (§802); impartiality (§803); and prudent administration - “reasonable care, skill and caution (§804), with regard to all actions of the trustee.

Section 813 of the Maine UTC requires Trustees to keep “qualified beneficiaries” (a defined term under §103(12)) “reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.” Section 813 also includes the duty to (a) promptly furnish a copy of the trust to any beneficiary who requests it; (b) notify all qualified beneficiaries – in advance – of any change in the method or rate of the trustee’s compensation; and (c) report – at least annually - the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee’s compensation, and a listing of the trust assets “to the distributees or permissible distributees of trust income or principal, and to the other qualified beneficiaries who request it.”

Section 201 of the Maine UTC permits any person with an interest in a trust to request that the court intervene in “any matter” involving the trust administration. Section 201(3) states, “A judicial proceeding involving a trust may relate to any matter involving the trust’s administration, including a request for instructions and an action to declare rights.”

Section 1001 of the Maine UTC provides, “In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney’s fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.”

In short, PATLAC, along with all individuals and groups that have provided comment, is confident that existing provisions of the Maine UTC contain comprehensive guidance as to a trustee’s fiduciary obligations, and provides procedural remedies for a violation of a trustee’s fiduciary obligations, making the proposed amendment unnecessary.

The specific wording of the proposed amendment is problematic in several respects:

- i. Paragraph 1 of the proposed amendment states, “*So long as not inconsistent with the trustee’s legal obligations through the legal document or court order creating the trust relationship, a trustee shall make appropriate accommodations to ensure that any basic needs of any person with a physical or mental disability, which are housing, food and medical needs, are being met by the trust for any disabled person who is a beneficiary to the trust.*” (emphasis added). Unless the terms of the trust, as written, happen to mirror the mandatory language of paragraph 1 (“a trustee shall make appropriate accommodations to ensure that any basic needs of any person with a physical or mental disability, which are housing, food and medical needs, are being met by the trust for any disabled person who is a beneficiary to the trust”), the trust language will *always* be inconsistent with the mandate of paragraph 1, rendering paragraph 1 meaningless.
- ii. The mandated language of paragraph 1 (“a trustee *shall* make appropriate accommodations to ensure that any basic needs of any person with a physical or

mental disability, which are housing, food and medical needs, are being met by the trust for any disabled person who is a beneficiary to the trust”), will disqualify a trust beneficiary who is receiving government assistance benefits. The core requirement of a supplemental (or special) needs trust, designed to enable a trust to benefit a beneficiary without interfering with the disabled beneficiary’s entitlement to government assistance benefits, is the trustee’s unfettered discretion to make, or not make, distributions from the trust for the benefit of the disabled beneficiary. The mandatory language (“shall”) of the proposed amendment violates the core unfettered trustee discretion requirement of a supplemental (or special) needs trust and will result in the trust beneficiary’s disqualification from government assistance benefits.

- iii. Paragraph 1 incorporates the meaning of “physical or mental disability” as used in Title 5, section 4553-A, which is part of the Maine Human Rights Act. Title 5, section 4553-A contains a comprehensive definition of “physical or mental disability. Section 4553-A(1)(B) defines the term as, “Without regard to severity unless otherwise indicated: absent, artificial or replacement limbs, hands, feet or vital organs; alcoholism; amyotrophic lateral sclerosis; bipolar disorder; blindness or abnormal vision loss; cancer; cerebral palsy; chronic obstructive pulmonary disease; Crohn's disease; cystic fibrosis; deafness or abnormal hearing loss; diabetes; substantial disfigurement; epilepsy; heart disease; HIV or AIDS; kidney or renal diseases; lupus; major depressive disorder; mastectomy; intellectual disability; multiple sclerosis; muscular dystrophy; paralysis; Parkinson's disease; pervasive developmental disorders; rheumatoid arthritis; schizophrenia; and acquired brain injury.” Section 4553-A(1)(C) and (D) expand upon the definition by saying that it applies to an individual who has “a record of” or who is “regarded as having or likely to develop any of the conditions” of §4553-A(1)(B). Section 4553-A(2)(A) states, “The existence of a physical or mental disability is determined without regard to the ameliorative effects of mitigating measures such as medication” Section 4553-A(2)(B) states, “Significantly impairs physical or mental health” means having an actual or expected duration of more than 6 months and impairing health to a significant extent as compared to what is ordinarily experienced in the general population. The statute is not clear as to whether the standard of §4553-A(2)(B) is to be measured “without regard to the ameliorative effects of mitigating measures such as medication,” as required by §4553-A(2)(A). The net effect of incorporating the definition of “physical or mental disability” as used in Title 5, section 4553-A, into the proposed amendment, is the invitation for court controversies, with petitions filed by both trustees and beneficiaries seeking the court’s guidance on the scope of the trustee’s fiduciary obligation to use trust assets for a beneficiary’s housing, food, and medical needs.
- iv. Paragraph 2 modifies the procedural standard of Maine UTC §201, which permits a person with an interest in a trust to request that the court intervene in any matter involving the trust administration. Paragraph 2 permits the filing of a motion with the court by “the individual who the trustee represents.” A trustee does not represent anyone in a trust relationship. To the contrary, a trustee has a duty of impartiality and

is prohibited from being an advocate for one beneficiary over another (see Maine UTC §803).

- v. Paragraph 2 creates a new standard that asks the court to “determine whether the trustee is making a decision *in the best interest of the person who has a mental or physical disability*, taking into consideration the trustee's legal obligations to other interested persons, including other beneficiaries, and taking into consideration any trustee's obligations set forth in the legal documents and court orders creating the trust relationship.” (emphasis added). As stated in Maine UTC §801 and §802, a trustee has a fiduciary obligation to administer the trust in “the interests of the beneficiaries” and as stated in §803, the trustee must consider those interests impartially unless the trust instructs the trustee otherwise. Paragraph 2 of the proposed amendment creates a class of beneficiary with priority over all others by requiring that a disabled beneficiary’s “best interests” be the focus of the trustee’s administration of the trust.

The proposed amendment undermines the most fundamental rule of trust administration - a trustee is to administer a trust in accordance with its terms. This fundamental rule is codified in §801 of the Maine UTC, which states, “Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, *in accordance with its terms and purposes* and the interests of the beneficiaries and in accordance with this Code.” (emphasis added). The proposed amendment supplants a grantor’s stated intent by mandating that a trustee make distributions that are inconsistent with a grantor’s instructions. For example, a common instruction in a trust that has been created for a grantor’s three children might say, “The trustee may distribute to or for the benefit of one or more of my children as much of the trust income and principal as the trustee, in its sole discretion, deems advisable.” If one of the trustee’s children has a physical or mental disability, the proposed amendment appears to usurp the trustee’s discretion by mandating that the trustee provide distributions as necessary to fully cover the housing, food and medical needs of the child with a disability. The distributions would be required despite the value of the trust assets and despite completing needs of the two non-disabled children.

Conclusion

After considering comments from individuals and stakeholder groups who have expertise in matters of trust administration, PATLAC is of the opinion that the proposed amendment will (i) add uncertainty, ambiguity, and inconsistency to the Maine Uniform Trust Code, which in turn will promote litigation between trustees and beneficiaries; (ii) lead to a lack of uniformity among states that have enacted the Uniform Trust Code; and (iii) add additional expense to the administration of trusts in Maine. For the reasons stated above, the Probate and Trust Law Advisory Commission recommends that the proposed amendment to LD 1763 not be enacted.

Dated: January 17, 2025

Respectfully submitted,

Probate and Trust Law Advisory Commission

- Justice Jennifer Archer,
Maine Superior Court
- Judge William Avantaggio,
Lincoln County Probate Court
- David J. Backer, Esq., Chair
- Barbara Carlin, Esq.
- Cody Hopkins, AAG
- Jeffrey W. Jones, Esq.
- Justin LeBlanc, Esq., Vice-Chair
- Marianna Putnam Liddell, Esq.
- Patricia A. Nelson-Reade, Esq.
- Judge Robert Washburn,
Somerset County Probate Court

SENATE

ANNE M. CARNEY, DISTRICT 29, CHAIR
 DONNA BAILEY, DISTRICT 31
 ERIC BRAKEY, DISTRICT 20

JANET STOCCO, LEGISLATIVE ANALYST
 ELIAS MUPHY, LEGISLATIVE ANALYST
 SUSAN PINETTE, COMMITTEE CLERK

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STATE OF MAINE
ONE HUNDRED AND THIRTY-FIRST LEGISLATURE
COMMITTEE ON JUDICIARY

May 10, 2024

David J. Backer, Esq., Chair
 Probate and Trust Law Advisory Commission
 Drummond & Woodsum
 Portland, Maine 04101-2480

Re: Request for PATLAC Review of Issues Raised by Sponsor of LD 1763

Dear Chair Backer and members of the Probate and Trust Law Advisory Commission (PATLAC),

Over the past two years, the Judiciary Committee has carefully considered the issues raised in LD 1763, *An Act Regarding Trustee Duties to Beneficiaries*, sponsored by Senator Mark Lawrence. The bill proposed several amendments to the Maine Uniform Trust Code designed to ensure a trustee responsibly manages the assets of a trust in a manner that does not harm beneficiaries, especially beneficiaries with physical or mental disabilities whose primary residence is an asset of the trust, and further, as a bulwark against a trustee who fails to act appropriately, authorizing beneficiaries to expend trust assets to prosecute a colorable claim against a trustee. We greatly appreciate your assistance last interim in gathering a group of stakeholders—including representatives of the Legal Services for the Elderly, the Elder Law Section of the Maine Bar Association and the Trust and Estates Section of the Maine Bar Association—to review the proposals in the bill.

We were reassured to learn from PATLAC that the Maine Uniform Trust Code has several provisions addressing several of the bill's concerns, including by: imposing a duty of good faith administration on a trustee, 18-B M.R.S. §801; imposing a duty of loyalty on a trustee and rendering voidable any transaction involving trust assets tainted by a conflict of interest, §802; requiring a trustee to manage a trust impartially giving due regard to the respective interests of each beneficiary, §803; imposing on trustees the duty to administer trust assets prudently, considering the trust's distributional requirements as well as the purposes and other circumstances of the trust, §804; requiring a trustee to provide an annual accounting of trust assets to distributees as well as to any qualified beneficiaries who request such an accounting, §813(2); and authorizing a court to award costs and expenses, including reasonable attorney's fees, in favor of a prevailing party in judicial proceedings involving the administration of a trust, §1004. We also understand from PATLAC's work with stakeholders that, especially in the context of special needs trusts, creating statutory rights to distribution of certain trust assets in favor of beneficiaries with disabilities may negatively impact the beneficiary's eligibility for Medicaid coverage.

Senator Lawrence nevertheless remains concerned that there are situations where these general statutory trustee duties are insufficient to protect a beneficiary with a disability, who may not have a legal guardian and who may not be in a position to affirmatively protect their own interests from a trustee whose decisions are neither in the beneficiary's best interests nor in accordance with the

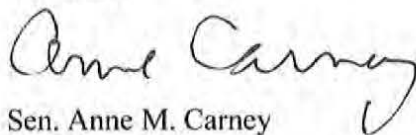
wishes of the settler. Additional procedural protections may be necessary to prevent a trustee from administering the trust in a manner that harms the beneficiary in these circumstances. For this reason, at our final work session on LD 1763, Senator Lawrence asked the committee to consider striking and replacing the bill with a provision establishing a new section of the Uniform Trust Code that would:

1. **Duty of accommodation.** Require a trustee to make appropriate accommodations for any trust beneficiary with a physical or mental disability to ensure that the beneficiary's basic needs—including housing, food and health care—are met, unless doing so would be inconsistent with the terms of the document or a court order establishing the trust.
2. **Opportunity for court review.** Authorize a trustee, a beneficiary with a physical or mental disability or a settler to file a motion in the appropriate court requesting a judicial determination whether a trustee's action or proposed action in administering the trust—including, for example, a decision to sell trust property that serves as the residence of a beneficiary with a physical or mental disability—meet the best interest of the beneficiary with a physical or mental disability. In making this determination, the court must consider the trustee's legal obligations to other interested persons, including other beneficiaries, as well as the trustee's obligations under the terms of the document or court order establishing the trust.

In light of the complex, unresolved issues involved in Senator Lawrence's proposal, the committee unanimously chose to vote Ought Not to Pass on LD 1763 and to request that PATLAC once again examine the important issues raised by Senator Lawrence. Through this letter, we are requesting that you reconvene a group of stakeholders—including representatives of the Legal Services for the Elderly, the Elder Law Section of the Maine Bar Association and the Trust and Estates Section of the Maine Bar Association and others whose expertise may be beneficial—to review the proposals in the sponsor's proposed amendment to LD 1763. We are particularly interested in your insights regarding the best way to ensure that trustees protect the interests of beneficiaries with disabilities who may reside on trust property without jeopardizing either the interests of any other beneficiaries of the trust or the eligibility of the beneficiary with a disability for federal benefits.

Thank you in advance for examining these important issues. If possible, please let us know the outcome of the stakeholder group's deliberations and any recommended legislation by February 1, 2025. This will provide the Judiciary Committee of the 132nd Legislature sufficient time to report out a committee bill related to the group's recommendations in early 2025 for purposes of holding a public hearing and work sessions on the proposal. Please do not hesitate to reach out to us if you have any questions regarding this request.

Sincerely,



Sen. Anne M. Carney
Senate Chair



Rep. Matthew W. Moonen
House Chair

cc: Members, Joint Standing Committee on Judiciary
Senator Mark Lawrence, sponsor of LD 1763

Strick everything in the bill and replace with the following:

Section _____. **Trust considerations of persons with physical or mental disabilities.**

1. Trustee accommodation of person with physical or mental disability- So long as not inconsistent with the trustee's legal obligations through the legal document or court order creating the trust relationship, a trustee shall make appropriate accommodations to ensure that any basic needs of any person with a physical or mental disability, which are housing, food and medical needs, are being met by the trust for any disabled person who is a beneficiary to the trust,. For the purposes of this section "physical or mental disability" has the same meaning as in Title 5, section 4553-A.
2. Court review- The trustee, a beneficiary to the trust, a person with physical or mental disability whose rights are protected by this statute, or the individual who the trustee represents, may file a motion with the court in which any current action is pending involving the parties, or in Probate Court, to determine whether the trustee is making a decision in the best interest of the person who has a mental or physical disability, taking into consideration the trustee's legal obligations to other interested persons, including other beneficiaries, and taking into consideration any trustee's obligations set forth in the legal documents and court orders creating the trust relationship.