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# Judiciary Committee

## Hearing Report

**To:** Members of the Senate

**From:** Susan Duncan  
*Senior Legislative Aide*

**Re:** **HB 1224 – AN ACT** *establishing the Uniform Trust Code in  
New Hampshire*

**Hearing date:** April 13, 2004

**Members present:** Senators Peterson, Foster, Clegg, Roberge  
and Sapareto

**Members absent:** No one

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**Sponsor(s):** Representative Hunt

**What the bill does:** This bill establishes the Uniform Trust Code in NH.

**Who supports the bill:** Representative Hunt  
Judge John Maher, Supervising Judge  
of the NH Probate Courts  
Attorney John Ransmeier  
Attorney Michael DeLucia, Director of  
Charitable Trusts, AG's Office  
Terry Knowles, Registrar of Charitable  
Trusts, AG's Office  
Robert Gerseny, Trust Officer,  
Citizens Bank, Concord

**Who opposes the bill:** No one testified in opposed to the bill

**Summary of testimony received:**

- This legislation was filed as the result of an in-depth study by a large group of trust attorneys, bankers and Judge Maher who looked into the Uniform Trust Act.
- One of the sponsor's aims was to make New Hampshire more business friendly.
- Currently there are not many statutes regulating Trusts. The Courts have established some case law, but most of what's available is common law.

- Senator Clegg asked if this creates any tax loopholes. Representative Hunt responded "no."
- Attorney Susan Lehey had chaired the special committee that worked on this legislation. Because she is on vacation, Attorney John Ransmeier testified on her behalf.
- The working committee took the Uniform Trust Act and made it conform in New Hampshire. This Uniform Act closes a number of gaps in current Trust law.
- Not just wealthy people form Trusts. Many people of modest means also form Trusts, especially when they are doing Medicaid planning or providing for a special needs child.
- Representative Hunt presented amendment #2004-1123h which addresses a matter relative to 411-A and a problem under federal tax laws that created a large amount of confusion. This amendment takes 411-A out and creates a "safe harbor."
- Senator Sapareto asked if the Settlor would be required to go to Court to make changes in the Trust. Attorney Ransmeier said that the Settlor could, with the consent of the beneficiaries, change the Trust. He said that they would have to go to Court and that a Guardian Ad Litem would have to be appointed to represent the interests of any minors or unascertained children.
- Senator Sapareto asked regarding the rights of refusal relative to 411. Attorney Ransmeier said that the Uniform Disclaimer Act stays in place.
- Senator Sapareto then asked relative to compensation of trustees and that this appeared to provide a lot of latitude. Attorney Ransmeier said that compensation in this legislation is consistent with current practice. He reminded the Committee that the Court can always go in and modify the compensation.
- Senator Foster inquired regarding the membership of the Ad Hoc Committee and a copy of the membership was provided to the Chair. The Ad Hoc Committee is composed mostly of attorneys and banking officials.
- Senator Peterson asked if Administrative Rulemaking will be necessary with this legislation. Attorney Ransmeier said that he did not think it will be necessary.
- Judge Maher testified that the Probate Ad Hoc Committee has been working on Probate laws for 14 years now.
- He testified that this legislation essentially will:
  - allow the public to have a clear understanding of what is permissible in New Hampshire;
  - provide an excellent document for New Hampshire Trust practitioners;

- provide a roadmap for Judges in dealing with Trusts.
- Judge Maher further shared that this legislation is default law. He explained that if a trust does not clarify otherwise, then this is what the understanding will be.
- The State of Maine has just enacted this Uniform Trust Act.
- Senator Peterson asked how would the Court determine what is reasonable when it comes to compensation. Judge Maher responded that generally the Trust settlor would establish the terms of compensation within the document itself.
- Attorney Michael DeLucia, the Director of Charitable Trusts at the Attorney General's Office testified in support of the bill.
- He explained that for Charitable Trusts, the Uniform Act was tailored to State law. He said that section B-413 *Cy Pres* has been in existence for 33 years and has served us well (citing the examples of the change in Blue Cross/Blue Shield as well as the Matthew-Thornton Health Plan).
- Another change in order to match NH statute was in regard to the removal of trustees. He said that since New Hampshire adopted these 8 different ways of removal of trustees several years ago, Vermont has copied the same language and now the Uniform Statute has copied our language as well.
- In response to the comments relative to Fees, Attorney DeLucia said that their office has been very vigilant in reviewing fees. He cited a number of cases in which they have been involved: the Lindsay Trust with Judge Boyle, the Remick Trust, and the issue at St. Paul's School with excessive compensation.
- He explained that this bill preserves the distinction between compensation of Trustees of Charitable and non-Charitable Trusts.
- Another change that was made to the Uniform Trust Act was to use the Uniform Prudent Investor Act that was adopted a number of years ago in New Hampshire. This provides a duty to monitor and diversify investments and has been a terrific statute for us. He said that in other states that do not have this, some trusts were very heavily invested in high tech stocks and took an extremely hard hit when these stocks tanked recently. He said that this had not been the case in New Hampshire.
- Senator Sapareto asked regarding the limit of \$100,000. Attorney DeLucia responded that this would be involved in any trust of any size and said that in the case of Matthew-Thornton, this was a 501-C-3 that was very sizeable. It

required both the Attorney General and Court to approve its termination.

- In response to a question by Senator Sapareto regarding long term and short term growth, Ms. Knowles responded that this comes down to the original document itself but that they are required to have an investment policy. She explained that the Uniform Investment Trust Act (292-B) also provides for long term as well as short term growth.
- Mr. Gerseny testified that he had participated in the study. He said that over the years, Trusts used to be rather rare, but that now they are much more attractive vehicles for many people.
- Having the Uniform Code in statute has many benefits in providing uniformity and predictability.
- Senator Sapareto asked if Citizens Bank requires refinancing in order to convert to a Revocable Trust. Mr. Gerseny said that they do not require them to refinance.
- Senator Sapareto asked how do they dispose of real estate that is outside of New Hampshire. Mr. Gerseny said that they have to follow the laws of the state where the property is located.

**Funding:** Not applicable

**Future Action:** The Committee took the bill under advisement.

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[file: HB 1224 report]

Date: April 14, 2004



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Date: April 13, 2004  
Time: 10:20 a.m.  
Room: State House, Room 105-A

The Senate Committee on Judiciary held a hearing on the following:

HB 1224                      establishing the Uniform Trust Code in New Hampshire.

Members of Committee present:	Senator Peterson
	Senator Foster
	Senator Clegg
	Senator Roberge
	Senator Sapareto

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The Chair, Senator Andrew R. Peterson, opened the hearing on HB 1224 and invited the prime sponsor, Representative Hunt, to introduce the legislation.

Representative John Hunt: Thank you very much, Mr. Chairman. It is with great pleasure that I bring this bill to this Committee. No, we were not trying to kill trees with this bill. It just turned out to be a rather large subject matter.

Several years ago, in working as the Chairman of the House Commerce Committee, I tried to figure out how we can make New Hampshire more friendly, banking friendly, institutional friendly in terms of getting people to want to do business in New Hampshire. Clearly, when we hear about states like Delaware where they are much more known for their pro-financial institutions, that I was attempting to find what are things we can do to improve our statutes to make it more enticing to do business in New Hampshire.

One of the issues that came up is this concept that we don't really have any statutes regulating trusts in New Hampshire. Right now, all trusts are basically managed under common law through the courts. I'm sure that we don't really have a lot of case law, but we do have some. Occasionally, from year to year, we would get legislation coming through the Committee that would nip around the issue of trusts. So, the charge was to come up with an

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act to codify trust statutes in New Hampshire. At the same time, there was a commission created to create a uniform trust act across the country and in parallel we had a group of people who were working here in New Hampshire to do the same. Susan Leahy of Orr & Reno and Judge Maher, who head up this Committee, did all the work. Even though my name is on the bill, it is really a group of people who should have their names attached to this wonderful piece of legislation because I did not carry the heavy load that they carried.

It is now blended into New Hampshire statute. It folds in very nicely. It does pick up legislation that we passed in past years and, as I always like to point out in the end of a bill how many statutes we are repealing so we can roll it all into one statute and that is always a good thing.

I think that, in terms of what is in here, basically the easiest thing to say is everything we can think of when it comes to related to trusts. Clearly, a trust instrument that is signed, that is done by an individual will take precedence that that is the prevailing document, but anything that is lacking in that document or any issue that comes up, theoretically, it is addressed now in statute, and so therefore, it will streamline our processes for adjudicating controversies.

I am very proud to be the sponsor of this legislation. With that, I will thank you for giving me this chance to speak to you and take any questions that you have.

Senator Andrew R. Peterson, D. 11: Questions from the Committee?  
Senator Clegg?

Senator Robert Clegg, Jr., D. 14: Thank you. John, is there anything in here that creates new loopholes, tax loopholes that will cost the State money?

Representative Hunt: No.

Senator Robert Clegg, Jr., D. 14: Thank you.

Senator Andrew R. Peterson, D. 11: Senator Sapareto?

Senator Frank V. Sapareto, D. 19: Thank you, Mr. Chairman. Thank you for your testimony. I am looking I don't see irrevocable trusts. I'm sure that somebody ... (inaudible) ... irrevocable trusts.

Representative Hunt: Correct.

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Senator Frank V. Sapareto, D. 19: Further question?

Senator Andrew R. Peterson, D. 11: Further question.

Representative Hunt: The amendment is just an issue that came up at the end, but everything else is in here.

Senator Frank V. Sapareto, D. 19: Charitable remainder trusts, uni-trusts, all are in this?

Representative Hunt: Charitable remainder trusts, yes.

Senator Frank V. Sapareto, D. 19: Thank you.

Senator Andrew R. Peterson, D. 11: Further questions? John, I know you said, but what is the amendment that the House did to this bill?

Representative Hunt: This was just about an issue that has come up. There will be other speakers who can attend to it more precisely. Like I say, I wish I could tell you that I know trust law, but I'm no lawyer. I sat in on one of their sessions when they were discussing it and I was pretty overwhelmed with all the things that this covers. But, I would ask you to refer to others who are much more knowledgeable.

Senator Andrew R. Peterson, D. 11: We were a little surprised this bill got referred to this Committee instead of Banks, to tell you the truth. But, maybe it is because of the depth of knowledge Senator Sapareto has in this area, which is possible. I think also Senator Foster, who is not here, could give us some insight in this. I don't know why you would have any personal interest in trusts yourself. Anyway, we seem to have unanimous support for it from the people asking to testify and there are a number of them. So, we will hear from them.

But, in general, this bill puts us in line with some sort of uniform trust code that makes New Hampshire more attractive for those who have interests in trusts, i.e., the wealthy, to come to and that could be good for our state and that's the general view that you have of it.

Representative Hunt: That was the premise of this legislation.

Senator Andrew R. Peterson, D. 11: Thank you. Other questions? Hearing none, thank you for your testimony and thanks for bringing the bill. We appreciate your patience.

Representative Hunt: Thank you.

Senator Andrew R. Peterson, D. 11: I think I will just go down in order. Is that what people would prefer? I'm sorry. I'm having trouble reading your name.

Attorney John Ransmeier: It's probably me.

Senator Andrew R. Peterson, D. 11: At the top. John? Please come forward. Thank you.

Attorney Ransmeier: I apologize for my scrawl. My name is John Ransmeier. I am a lawyer in the law firm of Ransmeier and Spellman here in Concord. I was on the ad hoc committee that Representative Hunt mentioned that was involved in studying this piece of legislation. Sue Leahy was the chairperson of our committee and she has the good fortune to be on vacation in California, so she asked me to pinch hit for her today before you and I'm happy to do that.

The piece of legislation that you have, the uniform trust code, is a piece of legislation that is not to the last dotted i and crossed t of the uniform legislation that was promulgated by the uniform commissioners uniform state laws, but it is very, very close to it.

The uniform commissioners are a body that is involved in a national effort to draft legislation that will be uniform throughout the states so that we don't have odd inconsistencies between the state laws. There are commissioners appointed in each state by the Governor or the Legislature. I'm not sure how that works in New Hampshire. But, in any event, there is a national commission, which is charged with the responsibility for developing state laws. This commission took on as a project a number of years ago the endeavor of putting together the Uniform Trust Code.

You probably are aware that there are uniform statutes in place in New Hampshire which these commissioners have put together and, indeed, we have already adopted some uniform legislation in the area of trusts and the Legislature has already adopted the Uniform Prudent Investor Act or the Uniform Trustee Powers Act, which are pieces of trust law that are now in place in New Hampshire. The Uniform Trust Code is an effort to more broadly address the whole scope of legislation dealing with trusts. So, in effect, this piece of legislation adopts the Uniform Prudent Investor Act and the Uniform Trustee Powers Act, but involves also other aspects of trust law that have not previously been addressed in legislation.

If you are in a state like New Hampshire where most of our trust law is developed through the courts, we just don't have a high incidence of cases. So, the disputes that arise in our probate courts and that actually find their way to the New Hampshire Supreme Court to result in a decided case published in the New Hampshire Reports people can rely on decided law in New Hampshire. It just doesn't happen that frequently. So, in a relatively small state like New Hampshire, you have a lot of gaps in the law that aren't addressed by a decided New Hampshire Supreme Court case or by a specific New Hampshire statute. We do have some New Hampshire statutes that deal with trust law, but they are sort of ancient and spotty and we have some decided cases that deal with the important areas of trust law. But, again, they are spotty. So, we have a lot of gaps.

There is something called the restatement of trusts, which is another national effort to pull together trust law. The restatement is not a statute. It is something that our Supreme Court would go to to rely on and the restatement is an attempt to pull together with the restatement offers. You can always argue about what restatement rules should be so that, even though a rule is stated in the restatement, it is not formally the law of New Hampshire. If this Uniform Trust Code is adopted, then we know that this Legislature has passed and it is definitively the law in New Hampshire the set of rules that this piece of legislation sets forth.

The ad hoc committee that I am a member of has been over this piece of legislation carefully. The committee consists not only of lawyers, by the way. I think there are thirty-five or forty people on the committee. There were also representatives of bank trust departments and other people with an interest in the topic. We have been over this piece of legislation to try to see how it would relate to what we think the existing law is in New Hampshire, what changes would work. Our general notion is that this piece of legislation is essentially what the restatement adopts as a national body of rules of trust law. It is essentially what we think our trust rules probably are if they were to be litigated in a disputed context. But, if this piece of legislation is passed, then we do have a statute that everybody can go to which will provide settled rules and presumably provide guidance to the courts and guidance to parties and guidance to counsel in drafting documents that really should make the whole process appealing to trusts smoother and cheaper and more practical for all people who are involved in trusts.

And, by the way, they are not just affluent people who are involved in trusts. There are a lot of people of modest means who are adopting trusts to deal with medicaid planning issues or planning for children with disabilities and so forth. So, it is not just the super affluent who are concerned with this issue.

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Senator Andrew R. Peterson, D. 11: I appreciate that. I had an assumption that somebody would point that out before too long so I threw that gauntlet out.

Attorney Ransmeier: And, we do work for those people and they count on having an appropriate body of law that gives some definition to what is going on. I suppose in a way those people are least able to deal with the uncertainty because, if you have a squabble, then the cost of the dispute or reaching some adjudicated resolution of a controversy or a bigger piece of the whole if you've got a relatively small fund that you are working with.

In any event, this trust code sort of starts with the beginning of trust laws. It deals with how trusts are created and how trustees are appointed and then how they are modified or terminated. It deals with what is involved in trustee resignation, trustee removal. It states the duties that a trustee has in administering the trust. It deals with how co-trustees work together, what trustee liabilities are, what statute limitations are that relate to trusts. I don't think you're interested in having me go through the description of the statute as a whole, but suffice it to say that this is a way to pull together in one uniform piece of legislation a good outline of what this ad hoc committee really thinks the rules in New Hampshire have been all along, but setting forth with some specificity the way things will work out so that there will be a statutory set of rules that control and people will have less to argue about.

The statute does substantially conform to the restatement and it conforms to New Hampshire, to the extent that we needed to make adjustments because we have cross-references and so forth to other pieces, to other sections of the RSAs. The committee has made the adjustments so that we think that if this piece of legislation is passed, we won't have inconsistencies or unneeded duplication or room for people to argue about why something in this piece of legislation is different from something that shows up elsewhere in the RSAs.

The committee, I think wholeheartedly believes this piece of legislation should be passed. So, with that as a description of the general statute, I want to just speak for a moment about the amendment.

In the last ninety, sixty to ninety days, an issue has come up on the federal tax scene which involves chiefly section 411 (a) of the code as it was drafted by the commission and initially presented to you people for consideration. Section 411 (a) would say that, in the case of an irrevocable trust, an irrevocable trust is a trust that, once created, theoretically can't be changed. It is irrevocable and can't be amended. But section 411(a) would say that if the settlor, who is alive, has created an irrevocable trust, that trust can be

amended or terminated despite the fact that it is otherwise irrevocable, if the settlor himself and all the beneficiaries agree and consent to the change.

I guess the underlying theory of that is that, if all the people with an economic interest in the trust in the first place and all the people with a beneficial interest agree, then all the ownership interest in the trust agreeing to a change and there is no legal reason why it shouldn't be revised. So, that's the spirit of 411 (a) as it reads in the code as it was first submitted to you.

The problem with that, and the rule is that the settlor, with the consent of all beneficiaries, could change an irrevocable trust. The problem is that under the federal tax laws, if a settlor, while he was alive, had the right, in conjunction with other people, to affect the use or enjoyment of property or to amend or alter a trust, then the trust assets will be included in that decedent's estate, even though he created an irrevocable trust by which he thought he had given or she thought she had given the property away while she was alive and that the property was not going to be included in the taxable estate.

So, for example, if somebody created an irrevocable trust and gave the property to their children, grandchildren and thought that was a taxable gift, maybe filed a gift tax return. The effect of this code is to say that the beneficiary, with the consent of the children, could go back and get the property back if it ought to be included in the federal taxed estate. Suffice it to say that this produced a big brouhaha nationally because people were concerned that the presence of 411 in this statute might mean all irrevocable trusts were going to be taxed federally, even though the supposition has been for years that they weren't, and the national commissioners of uniform state laws are now saying that section 411 is optional and need not and probably should not be adopted in the states.

So, the thrust of this amendment is to take 411 out and, with 411, to also take out some other sections that are problematic for federal tax purposes. These would only really relate to the right of the settlor to change or modify a trust while the settlor is still alive. The concern is that, if the settlor has the rights to modify a trust, even if he has those rights, only by going to the court and getting a judge to bless it through a petition filed by the settlor, that might present a federal tax problem which nobody wants this piece of legislation to walk us into by inadvertence. So, the legislation takes those provisions out and leaves us with old law as to the rights of a settlor to modify an existing trust. Old law would maybe allow that to be done with the appropriate appointment of guardians and so forth for unborn minors. The committee thinks that the amendment is appropriate and a safe harbor and if

the storm passes and the national tax problem is sorted out, then it may be that we would be back in two or three years and ask that these provisions be put back in. So, that's the gist of my testimony.

Senator Andrew R. Peterson, D. 11: Thank you for your testimony. Are there questions from the Committee? Senator Sapareto for a question.

Senator Frank V. Sapareto, D. 19: Thank you, Mr. Chairman.

Senator Andrew R. Peterson, D. 11: I wanted to just announce as well for those interested in this bill that this is the record bill that I have seen this year in terms of number of pages. So, I'm not going to be disposed to exec it this week since it is not an FN bill. But, we've got a schedule that is quite full and we will need to get it out by next week. So, I would ask Committee members to read it. Anyone who has additional information, give it to the Committee to do so and just to remind all that, although we have on the schedule apparently three bills today, the air cannot fill that available balloon as we have a number of things that the Committee needs to do today. Senator Sapareto?

Senator Frank V. Sapareto, D. 19: Thank you, Mr. Chairman. I have a couple of questions on the amendment. I will start with that.

...(inaudible)... wish respected, you mentioned that it is automatically changed. How is the original amended? Are there important changes?

Attorney Ransmeier: Well, under existing New Hampshire law, if the settlor has created an irrevocable trust, our case law would say that the settlor could, with the consent of beneficiaries, change the trust. And, we're not repealing that old case law. So, that old case law is still out there.

What we're doing is leaving that decided case in place and we're not rubbing the IRS's nose in that right by adopting a statute that makes it very clear that as a matter of statutory law in New Hampshire, the settlor could change a trust with the consent of beneficiaries. Then, in order to accomplish that change under current law, typically you have to go to court and get Guardian ad Litem appointed to represent the interests of minor children or unascertained children and, by repealing the provision of 301, we have eliminated what the statute would permit, which is that a settlor could say, speak for the interests of his own minor or unborn children. So, you are going to have still, probably, in most cases in which a settlor would want to take advantage of existing law, he will have to go to court and have to get Guardians ad Litem appointed and so forth and it won't just be something



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that the settlor could accomplish unilaterally, which is really what triggers the most provocative case from a federal tax perspective.

Senator Frank V. Sapareto, D. 19: Follow up?

Senator Andrew R. Peterson, D. 11: Further question.

Senator Frank V. Sapareto, D. 19: Thank you, Mr. Chairman. What about the rights of refusal on IRS 411? Aren't they still preserved as far as the rights of refusal if they want to...

Attorney Ransmeier: Do you mean disclaimer and so forth?

Senator Frank V. Sapareto, D. 19: Exactly.

Attorney Ransmeier: Oh, yeah. This doesn't reach that at all, Senator. There is nothing to say that the beneficiary needs to accept the trust.

Senator Frank V. Sapareto, D. 19: Once they file that with the court.

Attorney Ransmeier: There is a Uniform Disclaimer Act in place. That piece of legislation will remain in place.

Senator Frank V. Sapareto, D. 19: Okay. I also notice that compensation to trustees that you seem to give them broad latitude in that. Are you adopting the federal language?

Attorney Ransmeier: There is no federal law that deals with trustee compensation that I'm aware of other than excessive compensation might somehow produce tax changes. I think that the compensation arrangements in the Act are probably consistent with the accepted principles that they have.

Senator Frank V. Sapareto, D. 19: I am referring specifically to page 20, line 18, 564-B:7-708, Compensation of Trustees and going down to line 27, Reimbursement of Expenses. It just seems to be broad latitude.

Attorney Ransmeier: What this is saying basically is, I think, and I am reading fast here. I didn't have personal responsibility for this section of the code. But, I think what it is saying is that the rules of the document will apply. If the terms of the trust specify a regime for compensation, then the rules of the document would apply. So, the creator of a trust can give authority to collect compensation. But, even so, the court can always go in

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and modify it if they think that the compensation arrangements are unreasonable or inappropriate.

Senator Frank V. Sapareto, D. 19: One final, Mr. Chairman?

Senator Andrew R. Peterson, D. 11: Final.

Senator Frank V. Sapareto, D. 19: Thank you, Mr. Chairman. I am also noticing on page 25, you've got 1986 provisions. Is this entire section of this going to have to be redone again in 2011 when we revert back to the original?

Attorney Ransmeier: You are referring to page numbers that I don't have. What section are you in?

Senator Frank V. Sapareto, D. 19: Actually, I'm in page 26, 564-B:8-814 Discretionary Powers; Tax Savings.

Attorney Ransmeier: 814. What page are you on?

Senator Frank V. Sapareto, D. 19: Page 25. Going down to line 8 and beyond that where it identifies the Internal Revenue Code of 1986 and further down where it further references 1986 and in 2011 we will revert back to the old rules again. My concern is that we are going to have to redo these entire sections again. It is not well within what we normally address when this section was drafted.

Attorney Ransmeier: Well, I finally found page 25. Which section are you on?

Senator Frank V. Sapareto, D. 19: That entire page talks about...

Attorney Ransmeier: I don't think this has anything to do with the provisions of ...(inaudible)... which is the federal statute that created the estate tax exemptions and so forth, which sunsets in 2011. This is a much more general provision dealing with how trustees should deal with tax issues generally, not connected to the 2011 sunset provision. So, I don't think that there would be anything that we would have to change here in 2011.

Senator Frank V. Sapareto, D. 19: Thank you.

Senator Andrew R. Peterson, D. 11: Thank you, Senator. Further questions from the Committee? Senator Foster for a question.

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Senator Joseph A. Foster, D. 13: Good morning. I'm sorry if this was already testified to as I came in late. Would you be able to share with us the members of the ad hoc committee that you worked on? I know there were a number of folks.

Attorney Ransmeier: Yes, I'm sure we can get a roster to you. It was a group of maybe thirty-five or forty people, substantially comprised of lawyers, but also bank trust officers and judges. I think we can get a roster to you.

Senator Andrew R. Peterson, D. 11: I have heard reference to this as a commission, an ad hoc committee. Is it a self sort of...?

Attorney Ransmeier: That's a good question. I don't really know how I got my status as a committee member. My impression is that Judge Maher, who is the Administrative Judge responsible for the Probate Courts, was interested in this project and has been interested in simplifying trust law generally, and that there was kind of an alignment. He convened this committee through Sue Leahy and a bunch of us volunteered and here we are.

Senator Andrew R. Peterson, D. 11: He is going to come and testify, so I will leave off on that. One of the reasons that we try to, in line with our responsibilities, look carefully at long bills just because, on average, law passed in this Legislature has about fifteen pages of rules attached to it and so you actually generate a significant amount of verbiage that has the force and effect of law that people have to live under. I don't see in this bill, in a quick read of it, a reference to 541-A or rulemaking authority given to any agency of state government. Is that correct or is that in here?

Attorney Ransmeier: I don't believe that there would be a need for an agency of state government to issue rules and regulations under this statute.

Senator Andrew R. Peterson, D. 11: In other words, what we are trying to do is have a statute which now goes on the books that sets up the rules as they exist and be able to refer to statute when setting up trusts. Is that correct?

Attorney Ransmeier: That is correct. The courts would refer to this in deciding cases and people doing planning would look at this and decide how they want to draft documents. But, this is not something that would require further action by a state agency like the Department of Revenue Administration.

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Senator Andrew R. Peterson, D. 11: Thank you. You had said that this mostly follows on Uniform Trust Code legislation sweeping the nation and falling on changes in federal law perhaps I thought I understood. The ways in which it differs, I think you referenced by saying relate to different references to our existing statutes and the amendment that you just pointed out. Are there other ways in which it differs that we would do well to be aware of?

Attorney Ransmeier: Well, what our committee endeavored to do was to go through this piece of legislation, the Uniform Trust Code, which has been developed by the commissioners and to see where it deviated from our established case law or statutes as we understand them. I think it is fair to say that we didn't see very many instances where it really was different.

What it is doing more is taking places where we don't have decided rules and where we might think that we know kind of in our heads what the right rule is because it is the rule in Massachusetts or it is the rule in Pennsylvania or something, but, it isn't a rule in New Hampshire. There might be a case in West Virginia that says something different. So, people would have maybe some basis for litigating over a rule that you think you know where the center of gravity is, but there is an outlying case that provides basis for dispute. The intent here is to put together a good set of rules that fills in areas of New Hampshire law where we have gaps, but without doing anything that is controversial.

I think our committee felt pretty comfortable that we really aren't working substantial changes in what we think New Hampshire law is. We are trying, in a sense, to codify what this committee thought New Hampshire law is and to see whether there are places where we need to dovetail this statute in terms of its text so that we are not having screwed up cross references to other statutes.

Senator Andrew R. Peterson, D. 11: Thank you. Further questions from the Committee? Seeing none, thank you for your testimony. I would like to call Judge Maher at this time.

Judge John Maher: Thank you, Mr. Chairman. My name is John Maher and I am the Administrative Judge of the Probate Courts.

Senator Andrew R. Peterson, D. 11: Welcome.

Judge Maher: Thank you. Thank you for allowing us to be here. A little history for Senator Foster and others. Professor David English, who is a professor of law at the University of Missouri, and I worked on the

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Commission for Law and Aging. We were chatting one afternoon and he asked me about the Uniform Trust Code and whether we had it in New Hampshire. Actually, he knew that we didn't. I have always been concerned with the trust law in New Hampshire and that conversation developed and he offered to come to New Hampshire and to address a number of individuals who would be interested and knowledgeable in that area.

We have had an ad hoc committee try to update probate trust law for the last fourteen years and we have settled that group and added because the Uniform Trust Code is a comprehensive document. And, in response to Senator Foster's inquiry as to who were the committee members, here is the list.

**Please see "Orr & Reno Professional Association, New Hampshire (UTC) Committee Members", attached hereto and referred to as Attachment #1.**

Essentially, we tried to go throughout the state and select those individuals, men and women, bankers, trust attorneys, probate attorneys who had become well known in the field. We have worked successfully together for a number of years in that regard.

Susan Leahy, at one of our earlier subcommittee meetings, volunteered to chair it and I'm very pleased that she did because she was simply a dynamo and marshaled us all. We quickly got into lock step with Susan and she assigned us all different chapters. Our subcommittees went out and reviewed the chapters in relation to the existing case law or statutory law in the State of New Hampshire. We then met back together and Professor English came up and addressed specific particular issues. After that, Susan again had us draft individual sections.

I am very proud of the document. I'm proud of the people who worked on it. Michelle Arruda, when it was in House Commerce, I don't know that Michelle ever got a chance to testify. She was kind of like batting clean-up, but it went smoothly and she never actually had to come to bat. But, she is back there today. Of course, Mike DeLucia and Terry Knowles have been the backbone at the Attorney General's Office of charitable trust law in the State of New Hampshire. I am sure that you folks are well aware of the quality of people that they are and what they do for the people in the State of New Hampshire. And, John Ransmeier has pitched in today for Mary Susan who, as you know, is on vacation.

Essentially what this will do is threefold. It will allow private citizens, the public, to have a much clearer understanding of what they can and cannot do,

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what is permissible in the State of New Hampshire. It is an excellent document for lawyers and trust officers because there will be much brighter lines as to what the law is in the State of New Hampshire. And, for judges, it is an excellent document also because it will create a road map actually for continuing legal education and judicial education, not only for trust officers and attorneys, but judges as well. This is a very comprehensive field. It gives everyone an opportunity to know the layout and what is permissible.

There is one thing I think you should know. This isn't default law. It doesn't mean that a settlor can't create something different. It just means that, and this goes to your question, Senator Sapareto relative to compensation. It doesn't say that this is what the law is. It says that, if you don't articulate this specific section, this will be the default provision. Even then, it would be subject to court scrutiny if in fact there was a question.

So the probate courts, over the past fourteen years have been interested in making it easier and more comprehensive for the public and providing lawyers with a framework to keep their clients out of court. We are best served if in fact these decisions by settlors can be so clearly drafted that in fact they don't come to court.

Three or four probate judges worked on this committee. Several members worked on this committee. A number of trust officers worked on this committee. In fact, the committee also had judges from Maine and Vermont. So, I am just told by Warner Price, who is from Portland, Maine and may testify today, that Maine just passed... So, needless to say, we are quite pleased that we have come this far and we hope that we will be able to complete this.

Senator Andrew R. Peterson, D. 11: Thank you for your testimony. Are there questions from the Committee? Thank you. For example, on the compensation issue for a trustee, can you give us a sense of how the court would determine what reasonable compensation is for a trustee?

Judge Maher: Well, hopefully, that would have been spelled out specifically between the settlor and the beneficiaries and the trustee.

Senator Andrew R. Peterson, D. 11: I read that. But, if we went to this default provision here, essentially saying it has to be reasonable and the court has to look at it. I understand it would be easier if we just simply put a dollar figure in statute like we have with our legislative salaries, for example, and leave it there.

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Judge Maher: I'm sure you would get a lot of trustees. I can tell you, Senator, this is how...

Senator Andrew R. Peterson, D. 11: How do you determine that?

Judge Maher: I would evaluate that. I would look at the hours, time and hourly rate of the individual. I would look at the expertise of the individual. I would be looking at the particular difficulties involved in what the trustee was attempting to accomplish. There would be probably a six or seven step test where I would make findings of fact as to whether or not the compensation was reasonable and make a decision based on that. Certainly the hourly rate of the individual would factor highly in that.

Senator Andrew R. Peterson, D. 11: So, in other words, you would be well advised to go ahead and put that type of thing in your trust document to begin with rather than having it sorted out is what you're saying to me.

Judge Maher: Yes. As a matter of fact, we have some information on that. In Re: Rolfe, which was Red Rolfe, that famous baseball player. That is a very significant probate case where there was, before this time it was based on a percentage. Fees were based on 2 ½% for the executor and 2 ½% for the attorney of the entire estate. The Supreme Court threw that out, I think, in 1993 or 1992 and created a framework for us to follow, a road map where we make findings of fact to determine compensation. The same thing would be true in trusts if that was the argument.

Senator Andrew R. Peterson, D. 11: Thank you.

Judge Maher: You're more than welcome.

Senator Andrew R. Peterson, D. 11: Further questions? Seeing none, thank you for being here.

Judge Maher: It is my pleasure, as always.

Senator Andrew R. Peterson, D. 11: Michael DeLucia and Terry Knowles, did you wish to speak together, representing the Attorney General's Office? Welcome to you both.

Attorney Michael DeLucia: Thank you, Mr. Chairman. My name is Michael DeLucia. I am Director of Charitable Trusts at the Attorney General's Office and Terry Knowles is the Registrar at the Attorney General's Office in that unit.

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Our comments are very brief. The topics that I would like to touch upon are the ones that you just finished talking about – compensation and the uniqueness of New Hampshire law.

Let me make it clear from the start that the Attorney General's Office does support this legislation and we were involved in the ad hoc group that was put together to look at it.

I believe New Hampshire and I hope someone will correct me if I'm wrong, I believe New Hampshire would be the fourth, perhaps the fifth state to adopt this uniform statute. Uniform statutes are put together by the commissioners, the NCUUSL in Chicago at the conference of commissioners. They put together state uniform or model acts for each state to consider. But, that doesn't mean that each state is going to accept that model statute and fly with it. What the ad hoc did was to comb through the model statute that had been crafted in Chicago and, to some extent, adapted it to New Hampshire law and those are the provisions that I want to point out to you because they affect what Terry and I do, which is charitable trusts. I guess it is an indication of how even a good model statute has to be tailored a bit for state law.

The provisions I want to point to are the provisions on Cy Pres, which is section B:4-413. I don't have the same copy you do, so I don't have the numbers on the page, but it is section B:4-413, Cy Pres. The model act has been revised to accommodate New Hampshire law. This Cy Pres section that you see...

Senator Andrew R. Peterson, D. 11: We're on page 12, line 16 and on. Thank you.

Attorney DeLucia: The New Hampshire Cy Pres statute has been in existence for thirty-three years. It has served this state very well. The Cy Pres statute has been used with the termination of Blue Cross/Blue Shield entity and created a \$87 million foundation using this statute, in fact using just the three first lines of the statute. It was also used in the termination of the Matthew Thornton Health Plan a number of years back and the creation of a \$12 million foundation for that. It is also used for smaller terminations of trusts. The New Hampshire statute on Cy Pres is more liberal. We basically did incorporate the New Hampshire Cy Pres statute into what is the model act and that's the first example I think of accommodating New Hampshire law.

The second has to do with Section 706. Again, I don't know what page that is on, but it is section B:7-706, Removal of Trustees.



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Senator Andrew R. Peterson, D. 11: Page 19.

Attorney DeLucia: The New Hampshire Legislature, a number of years back after some discussion, took part of the trustee section of our existing statute and revised the section called Removal of Trustees. It created eight different ways in which to remove a trustee, or reasons or causes for removing a trustee. Terry Knowles tells me that the State of Vermont has now adopted our state way of removing trustees. They now have legislation which is word for word, pretty verbatim, to what we have done here in New Hampshire. In 706, Removal of Trustees, they have adopted uniform statute that has been revised a bit to adopt the New Hampshire way by, in section B saying, in addition, the power to remove a trustee pursuant to RSA 564:9, they reserve that New Hampshire. That's the second thing.

Third, on fees, which have raised a number of questions. It is Section B:7-708, Compensation of Trustees.

Attorney Knowles: That is page 20, line 18.

Senator Andrew R. Peterson, D. 11: Thank you.

Attorney DeLucia: I think the question that came up was how a court would determine reasonable fees and that is a very tough issue, but let me say that not only are the courts fairly vigilant in that area, but my office is as well. In the last couple of years, we have had at least two or three major court cases or cases involving excessive compensation with respect to trusts, one of which was the Lindsay Trust, with Judge Boyle up in the northern part of our state. Another was one involving a trust in Tamworth, the Remick Trust, and more recently, although it is not a court case, we have had some dealings with St. Paul's School over excessive compensation. So, the issue that I think the Chair was raising, namely, how do you deal with issues of excessive compensation is one that both the courts and the Attorney General's Office is very, very much aware of.

Again, in this Section 564-B:7-708, it makes reference to New Hampshire law and it is referring to, it preserves the New Hampshire distinction between compensation for trustees of non-charitable trusts and compensation for trustees of charitable trusts, and there is a difference between both of those. 564:21 and 564:21-A. Again, the model act, although it was crafted to serve all fifty states, I think you will see that, as it moves through other states and is adopted, there will be some tinkering here and there.

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Then, I think one final section that is very important to my office and the uniform statute has preserved what New Hampshire did a number of years ago, and that is Section B:9.

Attorney Knowles: That's page 29, line 12.

Attorney DeLucia: Page 29, line 12 is called the Uniform Prudent Investor Act. A number of years ago, Judge Maher and a group of attorneys working in this area had recommended to the Legislature that it adopt the Uniform Prudent Investor Statute and that is a critical statute. It basically mandates how a trust or a group of trustees or the board of a non-profit charitable entity has to handle their portfolio. The duty to monitor. The investment advises, they hire, the duty to diversify the trust and protect itself against large swings in the market. It is a terrific statute and it is part of the statute that you are looking at today. The interesting thing about B:9 is it put so much emphasis upon diversification and over the last few years, a number of charities have gotten involved in the situation of investing too much in high tech stocks and have suffered badly, not necessarily in our state, but in other states. Our statute says you cannot do this, you must diversify.

So, I guess the reason that we're here is to recommend that you consider the statute. Not only is it a good model statute devised by people outside of our state, but it has been tailored to New Hampshire law, which I think is the proper way to do it. Terry Knowles may have some comments to add on here.

Attorney Knowles: Thank you, Mr. Chairman. Just one quick thing. I just want to reiterate what you previous speakers have said. In New Hampshire we receive a lot of questions about charitable trust law and also about trust law in general. This fills in a lot of the holes that the court has been required to fill in prior to now. So, it is very helpful, both to us and to practitioners to have this bill.

Senator Andrew R. Peterson, D. 11: Thank you. Senator Sapareto for a question.

Senator Frank V. Sapareto, D. 19: Thank you, Mr. Chairman. As I recall, Cy Pres deals with dissolution of trusts that are limited to \$100,000. Am I correct in that assumption?

Attorney DeLucia: Cy Pres can deal with the termination of any trust of virtually any size. It can go from the very small charities. For example, a charity with less than \$100,000. Under this statute, it would say that can be terminated. But, take Matthew Thornton for example. Matthew Thornton Health Plan was a 501-C3 that was founded by Dr. Squires in 1973, one of

the earliest of the non-profit HMOs. That is a charitable trust as well and the only way they can terminate that would require the approval of the Attorney General's Office and also court approval using Cy Pres.

So, that wonderful little three lines that we looked at, it is a very elastic sort of guideline. Many say it is very restrictive in Cy Pres. In our state, we give a little more deference to the court and the court's judgment. So, you will see Cy Pres applied to the smallest of charities and you will see it applied to some really amazing institutions that are having financial trouble.

Senator Frank V. Sapareto, D. 19: Follow up?

Senator Andrew R. Peterson, D. 11: Senator Sapareto for a follow up.

Senator Frank V. Sapareto, D. 19: Thank you, Mr. Chairman. One of the things on the Prudent Investor Act I noticed is that there are updated changes, your objective is for long term growth and the trust may run for one hundred twenty-one years and nine months or something. You try to get that to build to that point. There are some things that may with investors to have that. Have you addressed... It is in the statute for retirement accounts and other things and just applying it here.

Attorney DeLucia: I think, to a lot of extent, it really defers to the discretion of the trustees to not only retain, in a large trust, retain expert investment guidance, but also to monitor that agent that has been hired and then, I think at the beginning of the section, it said that the trustees have to ask themselves, what is the purpose of this trust, which would be getting to your question.

Senator Frank V. Sapareto, D. 19: Follow up?

Senator Andrew R. Peterson, D. 11: Follow up.

Senator Frank V. Sapareto, D. 19: I am concerned about situations where people look at the short term and are looking at the value of the trust being too short a period. The objective of the trust would be to provide, let's say, for generation skipping or something that is years down the road where diversification is important and maybe an aggressive position would be appropriate. But, some trustee who is disgruntled because the market may have dropped for three or four years, brings this to court and makes a big issue out of it. Have we addressed that?

One of the last things a financial planner wants is to go and testify their recommendations. I am hoping that somewhere along there, the trust is

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going to specify its financial objectives clearly so that it doesn't become an issue where the judge has to now become an investment adviser and determine what is appropriate and not appropriate.

Attorney Knowles: You're right. It does come down to the organization. When we deal with charitable trusts, one of the unique trusts is forever. They are forever. You have a question about whether you want to invest for today or invest for tomorrow and that is always a question that is put to the trustees. They are required to have an investment policy and that investment policy has to lay out their clear objectives and their goals and that, of course, drives the asset allocation and drives how they invest and so on and so forth.

There is another law that is not before you today called the Uniform Management and Institutional Funds Act, RSA 292-B. That allows for some parity between the generations. In other words, it allows you to use some of your money today, but also provide for the long term growth of the portfolio, which is what you're talking about. So, that uniform law is also here. This law would compliment that.

Again, the Prudent Investor rule does give your trustees the ability to bring some risk into their portfolio and to invest both long term and short term.

Senator Frank V. Sapareto, D. 19: Regardless of 565?

Attorney Knowles: Right.

Senator Frank V. Sapareto, D. 19: Thank you.

Senator Joseph A. Foster, D. 13: Any further questions from the Committee? I just have one. The testimony is that this is a default which is primarily 105 on page 3 talks about ...(inaudible)... not defaulted and take precedence regardless of ...(inaudible)... Are those fourteen items for the typical uniform trust laws that you see or is this maybe unique to New Hampshire law?

Attorney DeLucia: I would defer to Judge Maher that question for this reason. Our interest in the statute was to focus on charitable trust to make sure that the way New Hampshire has evolved was preserved.

The other parts of the statute, I think, are very well thought out and we did hear from Professor David English, who came here to speak to the group. There was a lot of work done with it. I did have the opportunity to attend one of the national meetings on another statute. I sat in and listened to their

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discussion and it really was, on the national level, a really hard working group of individuals trying to consolidate. Hopefully, a majority of the states will adopt it. I don't believe that is the case now.

Senator Joseph A. Foster, D. 13: Thank you.

Attorney DeLucia: Thank you.

Attorney Knowles: Thank you very much.

Senator Joseph A. Foster, D. 13: Robert Gerseny?

Robert Gerseny: My name is Robert Gerseny from Concord. I represent the New Hampshire Bankers Association Trust Committee this morning.

I think we have probably covered just about all the ground and the purpose of my testimony is to assure the Committee that the trust officers in the various and sundry banks in our Association have participated, we have been honored to participate in the process. We are fully agreeable and support the legislation as it has been presented to you.

Our sense is that over the years trusts were operated, drafted, created in a fairly rarified atmosphere and that's one of the reasons why there is very little statutory law and case law. But, as trusts have become a much more attractive financial vehicle for a greater number of people, they have become much more numerous and the need for some comprehensive code presents itself, not only for trusts that the banks service trustees, but also and very much so for trusts for family members service trustees.

So, we find that the code has in fact many benefits, both for us in terms of creating some uniformity and some consistency and some predictability for our customers, but also for individual trustees. We think Representative Hunt is on the right track, that this bill will make New Hampshire at least as attractive and in many cases more attractive than other jurisdictions and the likelihood is that dollars will come in our direction.

I am happy to answer questions.

Senator Joseph A. Foster, D. 13: Thank you. Senator Sapareto?

Senator Frank V. Sapareto, D. 19: Thank you. Does your bank recognize the irrevocable trusts with exactly the same owners without having to refinance? In other words, the owners of property, that your bank would

okay and they would convert over to revocable trusts. Does your bank recognize that?

Mr. Gerseny: We do not require them to refinance in that case.

Senator Frank V. Sapareto, D. 19: Thank you.

Senator Joseph A. Foster, D. 13: Any further questions? I just have one. You said that, in your testimony, that it may attract trust owners to the state. What about the statute? Does this add certainty to the process?

Mr. Gerseny: I think the certainty and the predictability. I think part of the issue is how mobile society is. People have multiple homes in multiple states. In a sense, New Hampshire competes for dollars with other states. Having this law allows for a certain level of predictability and consistency that is attractive to trust grantors and families that use trusts.

Senator Joseph A. Foster, D. 13: Thank you. Senator Sapareto?

Senator Frank V. Sapareto, D. 19: Thank you, Mr. Chairman. How does it identify the disposition of real property located outside of the state in relation to this?

Mr. Gerseny: You essentially have the same issue you have today. You typically have an ancillary jurisdiction where you have to conform to the law of the state the real property is located in.

Senator Frank V. Sapareto, D. 19: I'm assuming that if every state adopted this, there would be an issue.

Mr. Gerseny: If every state adopted this, it would simplify things dramatically.

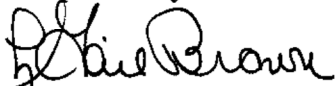
Senator Frank V. Sapareto, D. 19: Thank you.

Senator Joseph A. Foster, D. 13: Any other questions from the Committee? Thank you very much. Does anyone else wish to speak on HB 1224?

Prior to closing, I want to state for the record that some of my partners who practice in this area worked very hard on this ad hoc committee. I do just want to recognize that. I am going to close the hearing.

Hearing concluded at 11:20 a.m.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "L. Gail Brown". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

L. Gail Brown

Senior Senate Secretary

4/16/04

1 Attachment