

FRED A. RISSER
Wisconsin State Senator



November 6, 2013

Senator Paul Farrow, Chair
Senate Committee on Government Operations, Public Works and Telecommunications
323 South, State Capitol
Madison, WI 53707

Dear Chairman Farrow,

Thank you for holding a hearing on Senate Bill 384. I am pleased to have co-authored this bill with you.

The purpose of this bipartisan bill is to implement long overdue revisions to Wisconsin trust statutes through the adoption, with certain modifications, of the Uniform Trust Code (UTC), as recommended by the National Conference of Commissioners on Uniform State Laws (NCCUSL). I am a Commissioner with both the Wisconsin and National Uniform Law Commissions.

I will defer to Adam Weinsch of the Wisconsin State Bar and Victor Schultz from the Wisconsin Bankers Association, to speak to the minutia of the bill and answer specific questions about this measure. However I do want to say that Wisconsin's trust laws have not been updated since 1972. This bill has been in the works for over 7 years, and I have had a hand in it for roughly 4 years. The State Bar and the Bankers Association have worked together very hard, and through many drafts, to put together a consensus bill that updates and modernizes Wisconsin's trust laws.

I appreciate your willingness to schedule this measure for a public hearing and I urge the committee to look favorably upon this important legislation.

Most Sincerely,


FRED A. RISSER
Wisconsin State Senate

FAR:tet
Cc: Senate Committee on Government Operations, Public Works and Telecommunications

Testimony of

Victor Schultz

On behalf of the

Wisconsin Bankers Association

before the

Senate Committee on Government Operations, Public Works and
Telecommunications

Senate Bill 384

November 6, 2013

Chairman Farrow and Members of the Senate Committee on Government Operations, Public Works and Telecommunications, my name is Victor Schultz and I am the past Chair of the Wisconsin Bankers Association (WBA) Trust Section. I appreciate the opportunity to testify in favor of SB 384 today.

SB 384, the proposed Wisconsin Trust Code (WTC), is a complete restatement of Wisconsin Chapter 701 on Trusts. The WTC is a modified version of the Uniform Trust Code (UTC), which was promulgated by the Uniform Law Commissioners in 2000 and last amended and revised in 2010. The UTC is the first national codification of the law on trusts. The UTC was drafted in response to the greater use of trusts, both in family estate planning and in commercial transactions. The UTC provides precise, comprehensive and organized guidance on trust law questions, including guidance on many issues where state law is unclear, unknown or divergent with other states.

Existing Wisconsin statute chapter 701 was adopted in 1971. While there have been some amendments to the chapter, there has not been a comprehensive revision of the law on trusts in Wisconsin for more than 40 years. Since that time, the use of trusts has increased dramatically. Forty years ago, trusts were usually only created upon the death of an individual and frequently the trust was created under a will established by an individual (referred to as a “testamentary trust”). Today, trusts often replace the will as the main estate planning document and are usually created during the lifetime of an individual (referred to as a “revocable trust” or “living trust” or “inter vivos trust”). Compared to other states, Wisconsin’s law on trusts is thin and relies heavily on case law or common law to supplement the statutory rules in chapter 701.

The WTC provides comprehensive statutory guidance on trust law issues. A primary purpose of the new law is to eliminate the uncertainty of what the common law provides to supplement existing chapter 701. Another primary purpose is to provide a framework

that is similar to other states' laws on trusts so that Wisconsin law is competitive with other state laws. While both the WTC and UTC provide certain mandatory rules that cannot be drafted around in a trust instrument, both the WTC and UTC are primarily default statutes, meaning that the statutory rules only apply if the trust instrument does not specify how administer a trust.

The following are the most significant differences between the WTC and current Wisconsin chapter 701:

1. The WTC includes a comprehensive set of definitions – there are 31 defined terms compared to 8 defined terms in chapter 701. The WTC introduces definitions for “qualified beneficiaries”, “directed trust property” and “trust protector.” The Chapter 701 definitions for a “private trust”, “testamentary trust” and “living trust” are no longer used.
2. Nonjudicial settlement agreements are authorized as a means to resolve issues among the interested parties of trust without requiring court approval. Chapter 701 provides very few nonjudicial remedies to address trust issues.
3. Court supervision of a trust is no longer required unless supervision is invoked by an interested party or required by law. Chapter 701 requires ongoing supervision of testamentary trusts.
4. The WTC allows a beneficiary to be represented by a person having a substantially identical interest (“virtual representation”) or by a fiduciary appointed to represent a person’s interests, an agent under a power of attorney, a parent with respect to a minor or unborn child, or a person appointed by the trustee. Chapter 701 generally required a guardian ad litem to be appointed to represent the interests of a beneficiary who is unable to represent himself or herself.
5. The trustee may terminate a trust, after notice to the interested parties, if the value of the trust is less than \$100,000, as adjusted for inflation every five years. Prior law authorized a court to terminate a trust if the value of the trust was less than \$50,000.
6. Trustees are authorized to appoint the assets of a trust to a new trust if the trustee has a discretionary distribution power. Neither the UTC nor Chapter 701 addresses this issue.
7. Trusts are presumed revocable unless the terms of the trust specify the trust is irrevocable. Current law presumes a trust is irrevocable unless the trust instrument specifies otherwise.
8. A one-year statute of limitations is created to contest the validity of a revocable trust. Current law is silent on how long a person has to contest a revocable trust.

9. The WTC permits a trustee to resign or be removed under certain circumstances. Unless the trust instrument provides otherwise, current law only permits resignation or removal with court approval.
10. The specific duties of a trustee are codified, including the duty of a trustee to inform and report to the trust beneficiaries. Current law relies on common law to establish the trustee duties.
11. The WTC includes a comprehensive provision on directed trusts – trusts where the trustee is directed to follow the instructions of another party to invest or distribute the trust assets. A trustee has no liability for following the directions of a directing party and a directing party is considered a fiduciary, with duties similar to a trustee. Chapter 701 does not address the concept of a directed trust.
12. Upon the partial or full termination of a trust, the right of a beneficiary to object to a distribution is limited to 30 days if a proposal for distribution is sent to the beneficiary. Current law does not limit the right of a beneficiary to object to a distribution unless the court has approved the distribution.
13. The WTC includes a comprehensive provision on trust protectors – persons who are granted a power over the trust in a capacity other than as a trustee or directing party. The provision establishes under what situations the trust protector must act in a fiduciary capacity or in good faith, or may act in the trust protector’s own personal interests. A trustee or directing party is not liable for following the directions of a trust protector unless the direction is manifestly contrary to the terms of the trust or would constitute a serious breach of the trustee’s duties. Chapter 701 does not address the concept of a trust protector.
14. If a principal purpose of a trust is to hold or purchase a life insurance contract, the trustee has no duty to determine if the life insurance contract is a proper investment and the prudent investor act does not apply to such a trust. Neither the UTC nor Chapter 701 includes such a provision.
15. Actions against a trustee are limited to one year from the date of notice of a potential claim or five years from the earlier of the removal, resignation or death of the trustee, termination of the beneficiary’ interest in the trust or the termination of the trust. Chapter 701 provides a two-year limit on actions against a trustee where written notice has been provided or potentially a six-year limit beginning at the date the trust terminates if no written notice is provided.
16. Third parties are authorized to rely on a trust certification rather than a complete copy of the trust instrument. Current law does not authorize use a summary of trust in lieu of the complete trust document.

17. The WTC modifies chapter 702 to limit the claims of a creditor of a person holding a general power of appointment over trust assets if the general power is only exercisable at death, the power is not exercised and the power is not held by the settlor of the trust or the settlor's spouse. Current chapter 702 allows a creditor of a person holding a general power of appointment to reach any assets that are subject to the general power at the death of the power holder, whether or not the power is exercised.

SB 384 also addresses certain issues relating to the estate recover and divestment provisions of the state's Medical Assistance program. The Wisconsin Bankers Association is supportive of these changes with a slight amendment clarifying the status of irrevocable trusts.

I thank you for the opportunity to testify today and would be happy to answer any questions.

Established in 1892, WBA is the state's largest financial industry trade association, representing over 270 commercial banks and savings institutions, their 2,300 branch offices and 27,000 employees.

WISCONSIN UNIFORM TRUST CODE

Statement of the Wisconsin Study Group in Support of Senate Bill 384 November 6, 2013

The Wisconsin Study Group, described and identified below, supports the adoption of the Wisconsin Uniform Trust Code (the Wisconsin UTC), embodied within Senate Bill 384. The Wisconsin UTC is based on the Uniform Trust Code approved by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) (now known as the “Uniform Law Commission”) and recommended for enactment in all states.

The current Wisconsin Trust Law, Chapter 701 of the Wisconsin Statutes, initially became effective in 1971 and only minor changes have been made since then.

Since 1971 the trust laws in the United States have undergone significant changes. Wisconsin’s current trust law puts Wisconsin at a competitive disadvantage relative to other states.

In response to the promulgation of the Uniform Trust Code the Wisconsin Study Group was formed by the Real Property, Probate and Trust Law Section of the State Bar of Wisconsin.

The Uniform Trust Code is the first effort to codify the law of trusts in the history of the United States. The purpose of the Study Group was to review the Uniform Trust Code in the context of the existing Wisconsin Trust and Marital Property Law and to make suggestions for consideration by the Wisconsin State Legislature.

The Wisconsin Study Group was comprised of experienced practitioners and professionals from a wide variety of backgrounds. Study Group members included individuals from the trust section of the Wisconsin Bankers Association and from the Elder Law Section of the State Bar of Wisconsin. This diversity was intended in order to obtain the broadest perspective possible in the Study Group’s review of the Uniform Trust Code. While the Study Group included members who represented a divergence of clientele, they approached the task at hand with the intention of proposing legislation that would be in the overall best interests of the State of Wisconsin.

The Wisconsin UTC, in the form of Senate Bill 384, represents the collective wisdom and effort of all of the members of the Study Group. The Study Group met many times over a period of years. Subgroups were formed who were tasked with analyzing specific articles and reporting back to the main group with suggested language. Extended discussion occurred regarding specific issues presented under the Uniform Trust Code. Long hours were spent at meetings in the process of analyzing the Uniform Trust Code and existing Wisconsin law on a line-by-line



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basis. At all times, the interchange of ideas, opinions and perspectives occurred in a collegial and respectful manner.

The Wisconsin UTC also includes a number of provisions that are not included in the Uniform Trust Code but that are present in many states' trust laws. These provisions, such as directed trusts, trust protectors and trust "decanting" provide Wisconsin residents additional flexibility in structuring their trusts, eliminating the need to move trusts out of state to take advantage of other states' more favorable laws. These additional provisions supplement the Uniform Trust Code.

Respectfully submitted:



Adam J. Wiensch
Chair, Wisconsin Study Group
Milwaukee, Wisconsin
November 6, 2013

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.

If you have questions about this memorandum, please contact Cale Battles, Government Relations Coordinator, at cabattles@wisbar.org or (608) 250-6077.