



RON TUSLER

STATE REPRESENTATIVE • 3rd ASSEMBLY DISTRICT

Testimony on Assembly Bill 803
Assembly Committee on Family Law
January 11, 2024

Chair Rozar and committee members,

Thank you for hearing testimony on Assembly Bill 803, relating to trust administration, the Uniform Powers of Appointment Act, the Uniform Trust Decanting Act, disclosure of certain digital property, and the classification of certain digital property as individual property for purposes of determining marital property.

In 2013, the legislature restated Chapter 701, Wisconsin's law on trusts, by adopting language similar to the Uniform Trust Code (UTC) promulgated by the Uniform Law Commission (ULC). This new law was effective July 1, 2014. Since that time, the ULC has updated certain provisions of the UTC, new uniform laws have been passed by the ULC (and adopted by many other States) that impact the administration of trusts, other states have modified provisions of the UTC, and issues have arisen in Wisconsin that require the Wisconsin Trust Code to be clarified and amended.

This bill, a product of extensive collaboration and expert input, aims to clarify, enhance, and modernize the administration and regulation of trusts, digital property, and probate law in Wisconsin. The proposed changes are technical yet impactful, ensuring Wisconsin's trust code remains at the forefront of trust administration and estate planning. By adopting elements like the Uniform Trust Decanting Act and the Uniform Powers of Appointment Act, we align with national best practices, providing our citizens with a legal framework that is both modern and robust. These updates are not merely theoretical improvements but practical enhancements that will directly benefit Wisconsin's individuals and families engaged in estate planning and trust management.

In conclusion, by passing this bill, we have the opportunity to ensure that Wisconsin's trust code is clear, current, and continues to serve the best interests of its people. This isn't just a legislative update; it's a commitment to our state's legacy of legal excellence and a promise to our citizens for a more secure and prosperous future.

Thank you for your consideration.

Administration of trusts. This bill makes several technical and substantive changes to the administration of trusts, most of which are consistent with updates to the Uniform Trust Code. Important provisions include the following:

- The bill expands who may represent and bind another in a trust proceeding by providing that certain persons who hold a power of appointment may represent and bind the interests of persons whose interests may be eliminated by the exercise of the power.
- The bill allows a person to create a trust without initially funding the trust if the person declares the intention to create the trust with the intention that the trust will later be funded.
- The bill provides procedures and limitations for the resolution of debts against a deceased settlor of a trust from the assets of a trust that was revocable until the settlor's death.
- The bill provides that a trustee of a trust has an insurable interest in the life of an insured under a life insurance policy that is owned by the trust or the trustee of the trust acting in a fiduciary capacity if the insured is a settlor of the trust or is an individual in whom a settlor of the trust has an insurable interest in the life of the insured and the life insurance proceeds are primarily for the benefit of one or more trust beneficiaries who either have an insurable interest in the life of the insured or are related to the insured and have a substantial interest engendered by love or affection in the continuation of the life of the insured.

Uniform Trust Decanting Act. Under the bill, "decanting" means moving assets from a trust to a second trust or altering the terms of a trust. The trustee or other authorized fiduciary exercising the decanting power must comply with applicable fiduciary duties, including acting in accordance with the purposes of the first trust. The bill limits decanting if it would defeat a charitable or tax-related purpose of the settlor. The bill also prohibits decanting for the purpose of adjusting trustee compensation or liability without the unanimous consent of the beneficiaries or court approval. Under the bill, all trusts are presumed to contain the decanting power unless the trust instrument explicitly prohibits or limits decanting.

Uniform Powers of Appointment Act. The bill adopts the Uniform Powers of Appointment Act. Under the bill, power of appointment is a power that enables a powerholder acting in a nonfiduciary capacity to designate the recipient of an ownership interest in, or a power of appointment over, appointive property. A power of appointment allows an owner of property to appoint a third party as a powerholder to direct the distribution of the appointive property. An owner may provide certain terms for the exercise of the power of appointment, including by providing a list of permissible appointees to whom the powerholder may distribute the appointive property. Unless the terms of the instrument creating the power of appointment state otherwise, a power of appointment is presumed to be a presently exercisable power of appointment, an exclusionary power of appointment, and a general power of appointment. An exclusionary power of appointment is a power of appointment exercisable in favor of one or more permissible appointees to the exclusion of the other permissible appointees. A general power of appointment means a power of appointment exercisable in favor of the powerholder. However, the bill provides that a power of appointment is presumed to be a nongeneral power of appointment if the power is exercisable only at the powerholder's death and the permissible appointees of the power are a defined and limited class that does not include the powerholder.

Digital property. The bill changes the classification of digital property for purposes of the state's marital property laws and provides a method for users to allow or prohibit the disclosure of digital property to a fiduciary in certain circumstances. First, the bill establishes that an electronic account and the digital property held in the account that is created and maintained for personal use is classified as individual property unless either the account or the digital property in the account was not originally created or acquired exclusively for the personal, noneconomic purposes of the spouse holding the account or the account or the digital property in the account has at any time been used for purposes other than the personal, noneconomic purposes of the spouse holding the account. Second, the bill provides that a user may allow or prohibit the disclosure to a fiduciary of some or all of the user's digital property in a consent instrument. A consent instrument is defined as a written, notarized document in physical or electronic form evidencing the user's consent to the disclosure of the contents of electronic communications to a then acting fiduciary. However, if an online tool allows the user to modify or delete a direction regarding disclosure at all times, a direction regarding disclosure using that online tool overrides a contrary direction by the user in a consent instrument.

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- The bill allows a person to create a trust without initially funding the trust if the person declares the intention to create the trust with the intention that the trust will later be funded.
- The bill provides procedures and limitations for the resolution of debts against a deceased settlor of a trust from the assets of a trust that was revocable until the settlor's death.
- The bill provides that a trustee of a trust has an insurable interest in the life of an insured under a life insurance policy that is owned by the trust or the trustee of the trust acting in a fiduciary capacity if the insured is a settlor of the trust or is an individual in whom a settlor of the trust has an insurable interest in the life of the insured and the life insurance proceeds are primarily for the benefit of one or more trust beneficiaries who either have an insurable interest in the life of the insured or are related to the insured and have a substantial interest engendered by love or affection in the continuation of the life of the insured.

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STATE SENATOR

Eric Wimberger

DISTRICT 30

**State Senator Eric Wimberger
Assembly Committee on Family Law
Re: Trust Administration
Thursday, January 11th, 2024**

Thank you Representative Rozar and committee members for allowing me to testify on Assembly Bill 803, which would make several important changes to clarify Wisconsin law on the administration and regulation of trusts.

In 2013, the legislature restated Chapter 701, Wisconsin's law on trusts, by adopting language similar to the Uniform Trust Code (UTC) promulgated by the Uniform Law Commission (ULC). In the decade since, the ULC has updated certain provisions of the UTC and many other states have modified provisions of the UTC, which has caused issues that require the Wisconsin Trust Code to be clarified and amended.

Among the several technical changes included in this bill is the adoption of the Uniform Trust Decanting Act, which includes a more comprehensive set of rules to explain how an authorized fiduciary can modify the terms of an existing trust or distribute the assets of an existing trust to a new trust.

This bill also provides for the adoption of the Uniform Powers of Appointment Act by restating Chapter 702, Wisconsin's current law on Powers of Appointment. The Uniform Powers of Appointment Act is consistent with current Wisconsin law but will result in increased uniformity and specificity on the Powers of Appointment that will make it easier for citizens and practitioners to implement and utilize this important estate planning tool.

Some of the more significant changes to the Wisconsin Trust Code include the following:

1. Expansion of the use of nonjudicial settlement agreements to clarify trust provisions and trust disputes.
2. Expansion of the concept of representation in a trust proceeding.
3. Provision of rules for the resolution of debts of a deceased settlor of a trust that was revocable until the settlor's death.
4. Clarification on silent trusts being authorized in Wisconsin by allowing the settlor to draft a trust that expands, restricts, eliminates, or otherwise varies the right of a beneficiary to be informed of the beneficiary's interest in a trust.

Estate planning is an essential tool that can protect both assets and heirs from messy and costly conflicts. This legislation helps Wisconsinites of all income levels benefit from having the most up-to-date and clear statutes on the books, while ensuring our laws remain compatible with Federal Law and key practices from other states.

I would like to thank the State Bar of Wisconsin and the Wisconsin Bankers Association for their work and collaboration in helping draft this legislation. Thank you, again for holding a hearing on Assembly Bill 803 and I hope you will join me in supporting this bill.

State Capitol • PO Box 7882
Madison, WI 53707-7882
(608) 266-5670 • (800) 385-3385
Sen.Wimberger@legis.wi.gov



Testimony of Wisconsin Bankers Association

**Lorenzo Cruz-VP Government Relations, WBA and Victor Schultz, President
and Chief Fiduciary Officer of the Trust Division, Waukesha State Bank**

Assembly Family Law Committee-AB 803

January 11, 2024

Good morning, Chair Rozar and members of the Assembly Family Law Committee.

My name is Lorenzo Cruz Vice of Government Relations for the Wisconsin Bankers Association (WBA) and joining me today is Victor Schultz, President and Chief Fiduciary Officer of the Trust Division, Waukesha State Bank. He served on the trust committee section board for over 20 years and served as co-chair of the joint State Bar/WBA study group that worked on the proposed legislation.

WBA is the largest financial industry trade association in the state, representing over 200 banks of all sizes and over 30,000 employees. Ninety-eight percent of the banks are members of WBA.

I would like to thank Chair Rozar and committee members for the opportunity to testify today in favor of Assembly Bill 803. The legislation is designed to update, modernize, and clarify certain issues that have arisen since the Trust Code's original adoption, effective July 1, 2014. WBA greatly appreciates the leadership of Senator Eric Wimberger and Representative Ron Tusler for moving this legislation forward.

The WBA has prepared a short summary describing the more significant changes. We expect the trailer bill will not be controversial and has the approval of the State Bar and WBA. The bill is revenue neutral, except for the provision that will impose a fee to commence a legal proceeding involving a trust. At this time, I would like to turn the microphone over to Victor who will provide a brief overview of the key provisions and answer any questions that anyone may have about the Trust Code trailer bill.

(over)

Highlights of the key provisions are:

- The bill enacts the Uniform Trust Decanting Act as subchapter 13 of the Code and enacts the Uniform Powers of Appointment Act as restated Chapter 702.
- The bill serves as a trailer bill to the Revised Uniform Fiduciary Access to Digital Assets Act, a uniform law that gives fiduciaries the right to manage a person's online accounts after the person dies or becomes incapacitated.
- The bill makes several minor changes to the Wisconsin probate code. These changes will eliminate the use of the letters of trust in a probate proceeding, impose a \$250 filing fee for petitions to commence a judicial proceeding relating to a trust (currently there is no fee), and clarify the attorney-client privilege rule when an attorney's client is a fiduciary.
- The most significant changes to the Wisconsin Trust Code include amendments regarding (1) the use of non-judicial settlement agreements (701.0111), (2) representation (subchapter III), (3) handling of debts of deceased settlor and claims of creditors (701.0508 and 701.0509), (4) the trustee's duty to inform and report (701.0813); and (5) adoption of the Uniform Trust Decanting Act ("UTDA") (which will restate 701.0418).

In closing WBA strongly urges the Legislature to support passage of AB 803. Thank you, Chair Rozar and members, for taking the time to listen and consider WBA's testimony today. We would be happy to answer any questions you may have.



Wisconsin Trust Code Trailer Bill Summary (SB 759/AB 803)

The Wisconsin Bankers Association supports SB/759/AB 803, the Trust Code trailer bill which will update, modernize, and clarify certain issues that have arisen since the Trust Code's original adoption, effective July 1, 2014. The bill enacts the Uniform Trust Decanting Act as subchapter 13 of the Code and enacts the Uniform Powers of Appointment Act as restated Chapter 702. The bill serves as a trailer bill to the Revised Uniform Fiduciary Access to Digital Assets Act, a uniform law that gives fiduciaries the right to manage a person's online accounts after the person dies or becomes incapacitated. Finally, the bill makes several minor changes to the Wisconsin probate code. These changes will eliminate the use of the letters of trust in a probate proceeding, impose a \$250 filing fee for petitions to commence a judicial proceeding relating to a trust (currently there is no fee), and clarify the attorney-client privilege rule when the attorney's client is a fiduciary.

The most significant changes to the Wisconsin Trust Code include amendments regarding (1) the use of non-judicial settlement agreements (701.0111), (2) representation (subchapter III), (3) handling of debts of deceased settlor and claims of creditors (701.0508 and 701.0509), (4) the trustee's duty to inform and report (701.0813); and (5) adoption of the Uniform Trust Decanting Act ("UTDA") (which will restate 701.0418).

Non-judicial settlement agreements have become an important tool used in the administration of trusts since the adoption of the Wisconsin Trust Code. Such agreements are now commonly used to approve accounts, change the place of administration, resolve disputes, among other actions. The trailer bill will confirm that such agreements can be used to modify and terminate a trust, or to remove and replace a trustee. Any interested person affected by the agreement may ask a court to approve the agreement. Prior to any such agreement being effective, a copy of the agreement must be given to the settlor (if living), the trustee, and any other fiduciary named in the trust instrument.

Representation is a concept that allows a person to represent the interests of a beneficiary of a trust. Currently the Wisconsin Trust Code allows representation in certain situations, including where a person holds a general power of appointment, a parent has a minor child, and where a beneficiary is a minor, lacks capacity or cannot be located and there is another beneficiary with a substantially identical interest (the concept of virtual representation.) Similar to laws adopted by other states (the bill is modeled after the law in Delaware), the trailer bill will expand the concept of representation to allow persons who hold both general and limited powers of appointment to represent the class of persons who are permissible appointees. A parent will be allowed to represent the interests of both a minor child and the unborn issue of that child. The concept of virtual representation will be expanded to allow a presumptive remainder beneficiary to represent a contingent successor beneficiary. Finally, the settlor will be authorized to designate a representative to represent and bind any beneficiary.

Subchapter 6 of the Wisconsin Trust Code deals with revocable trusts, which are typically trusts created under an estate plan established by an individual. Current law does not address how a creditor can make a claim against the revocable trust when the settlor dies. The trailer bill will clarify the claims period that applies if the creditor is known or not known by the trustee. In addition, the trailer bill includes a detailed set of procedures to explain how a creditor may make a claim and how a trustee must respond to a claim. These procedures are modeled after probate code chapter 859.

Changes will be made to the rules on the trustee's duty to inform and report. A beneficiary of a specific amount will only be entitled to receive information about that specific amount. The settlor will be allowed to receive information about a trust in the discretion of the trustee. A provision will be added that authorizes the settlor to create a "silent trust", where a beneficiary is not required to be informed about the existence of a trust until certain defined conditions are met.

The Wisconsin Trust Code authorized the concept of "decanting," which allows a trustee with discretionary distribution powers to use those powers to distribute assets from one trust to another trust. After the Code became effective, the Uniform Trust Decanting Act (UTDA) was approved by the Uniform Law Commissioners. The trailer bill will adopt the UTDA, which will clarify, improve, and make Wisconsin's law uniform with other states that have adopted decanting statutes.

We expect the trailer bill will be revenue neutral, except for the provision that will impose a fee to commence a legal proceeding involving a trust. This will create a slight amount of additional revenue.

If you have further questions, please contact Lorenzo Cruz lcruz@wisbank.com or Tyler Foti tfoti@wisbank.com.

REAL PROPERTY, PROBATE & TRUST LAW SECTION

Date: January 11, 2024
To: Assembly Committee on Family Law
Re: Support of AB 803– Trust Administration, Adoptions of the Uniform Powers of Appointment Act and the Uniform Trust Decanting Act and Updates to Uniform Digital Assets Act

The Real Property, Probate and Trust (RPPT) Section of the State Bar of Wisconsin supports AB 803 dealing with several trust law changes. The RPPT Board would like to thank Representative Tusler and Senator Wimberger for sponsoring this important legislation and for their work as members of the Uniform Law Commission. Members of RPPT strongly support the ongoing review of Wisconsin's trust laws to both keep pace with other states' action and to benefit many residents that do estate and trust planning in Wisconsin. This legislation is a joint effort with the Wisconsin Bankers Association's Trust Committee.

The size of this bill can be intimidating, yet we want to assure you that the primary purpose is to clarify and update the Wisconsin Trust Code (Chapter 701) and address various issues that have arisen since the Code's original adoption, which was effective July 1, 2014. In addition to changes within Chapter 701, the bill also adopts the Uniform Powers of Appointment Act, which will restate Chapter 702. The Bill also serves as a trailer bill to the Revised Uniform Fiduciary Access to Digital Assets Act, a uniform law that was adopted in Wisconsin in 2016. Most of these changes update the uniform law to reflect the marital property ownership concept in Wisconsin. Finally, the Bill makes several minor changes to the Wisconsin Probate Code. These changes will eliminate the use of the letters of trust for testamentary trusts, impose a \$250 filing fee for petitions to commence a judicial proceeding relating to a trust (currently there is no fee), and clarify the attorney-client privilege rule when the client is a fiduciary.

The most significant changes to the Wisconsin Trust Code include amendments to the rules regarding (1) the use of non-judicial settlement agreements (701.0111), (2) representation (subchapter III), (3) handling of debts of deceased settlor and claims of creditors (701.0508 and 701.0509), (4) the trustee's duty to inform and report (701.0813); and (5) adoption of the Uniform Trust Decanting Act ("UTDA") (which will restate 701.0418).

Non-judicial settlement agreements have become an important tool used in the administration of trusts since the adoption of the Wisconsin Trust Code. Such agreements are now commonly used to approve accounts, obtain releases of liability, approve a change in fiduciary, change the place of administration, resolve disputes, among other actions. The trailer bill will confirm that such agreements can be used to modify and terminate a trust, or to remove and replace a trustee. Any interested person affected by the agreement may ask a court to approve the agreement. Prior to any such agreement being effective, the agreement must be provided to the settlor (if living), the trustee, and each trust protector and directing party named in the trust instrument.

Representation is a concept that allows a person to represent the interests of a beneficiary of a trust. Currently the Wisconsin Trust Code allows representation in certain situations, including where a person holds a general power of appointment, a parent has a minor child, and where a beneficiary is a minor, lacks capacity or cannot be located and there is another beneficiary with a substantially identical interest (the concept of virtual representation.) Like laws adopted recently by other states (the bill is modeled after the law in Delaware), the Trailer Bill will expand the concept of representation to allow persons who



STATE BAR OF WISCONSIN

hold both general and limited powers of appointment to represent the class of persons who are permissible appointees. A parent will be allowed to represent the interests of both a minor child and the unborn issue of that child. The concept of virtual representation will be expanded to allow a presumptive remainder beneficiary to represent a contingent successor beneficiary, regardless of whether the successor beneficiary lacks capacity. Finally, the settlor will be authorized to name a representative to represent and bind any beneficiary.

The Wisconsin Trust currently includes a provision that allows a trustee to shorten the creditor claims period that applies when the settlor of a revocable trust dies. Like the rules under the Wisconsin Probate Code, the claims period may be shortened to four months. The Trailer Bill will clarify the claims period that applies if the creditor is known or not known by the trustee. In addition, the Trailer Bill will provide a detailed set of procedures that apply to explain how a creditor may make a claim and how a trustee must respond to a claim. These procedures are modeled after Wisconsin Probate Code chapter 859. Under the Wisconsin Trust Code, no procedures are currently provided to how to make and respond to creditor claims after the death of a settlor of a revocable trust.

Under the current Wisconsin Trust Code, a settlor has no right to information about a trust unless the settlor is also a beneficiary. A current beneficiary, even a beneficiary of a specific amount, is entitled to a full accounting of the trust assets. The Trailer bill will change this to give the trustee discretion to inform the settlor about trust administration. A beneficiary of a specific amount is only entitled to receive information about that specific amount. In addition, a provision will be added that specifically allows the settlor to expand, restrict, eliminate, or vary the right of a beneficiary to be informed about the trust. This specifically authorizes the creation of a "silent trust", where a beneficiary is not required to be informed about the existence of a trust until certain defined conditions are met.

Finally, the Trailer Bill incorporates the Uniform Trust Decanting Act into the Wisconsin Trust Code. The concept of "decanting" allows a trustee with discretionary distribution powers to use those powers to distribute assets from one trust to another trust. This power exists in the Wisconsin Trust Code in section 701.0418, where the trustee has the power to appoint assets under certain conditions from one trust to a second trust. The UTDA was not promulgated until 2015 and it addresses several issues that are not addressed in Wisconsin's current law. Adoption of the UTDA will clarify, improve, and make Wisconsin's law uniform with other states that have adopted decanting statutes.

RPPT welcomes the opportunity to discuss the Trust Code changes further and would appreciate your support of AB 803. If you have any questions, please contact Cale Battles, Government Relations Coordinator at the State Bar of Wisconsin, at cbattles@wisbar.org or (608) 695-5686.

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.