




# Wisconsin Trust Code Trailer Bill





**On March 23, 2024, legislation amending the Wisconsin Trust Code, Wis. Stat. chapter 701, took effect. The Trailer Bill provides numerous enhancements to the depth and efficacy of Wisconsin’s trust law. Among the topics covered are classes of beneficiaries, representation of beneficiaries’ interests, nonjudicial settlement agreements, and the treatment of digital property owned by married persons.**

BY MARK A. SHILLER

 On March 21, 2024, Governor Tony Evers signed into law 2023 Wis. Act 127, authored by Sen. Eric Wimberger (R-Green Bay) and Rep. Ron Tusler (R-Harrison).

Known informally as the Trust Code Trailer Bill (Trailer Bill), the new law represents a multi-year, collaborative effort by many individuals from the State Bar of Wisconsin’s Real Property, Probate and Trust Law (RPPT) and Elder Law and Special Needs sections, the Wisconsin Register in Probate Association, and the Wisconsin Bankers Association.

Several of these groups were also active in the work that resulted in the restatement of the Wisconsin Trust Code that became effective in 2014 (2014 WTC), as well as other subcommittees regarding digital assets and the Uniform Power of Appointment Act. Drafting and passage of the Trailer Bill also was a response to feedback and experience of estate planning attorneys, consumers, and financial service professionals throughout Wisconsin over the past decade.

In many ways, the Trailer Bill might be seen more as a natural progression of the law than as a radical departure from the 2014 WTC or even older law. Even so, the Trailer Bill provides numerous enhancements to the depth and efficacy of Wisconsin’s trust law. This article summarizes some of the more notable statutory changes and additions in the Trailer Bill.

**Classes of Beneficiaries**

Among the foundational questions for any trust are which persons are interested in the trust, in what capacity these persons have interests in the

trust, and when the interests are determined.

The language of the Uniform Trust Code (UTC) was largely adopted in the 2014 WTC.

However, the UTC’s simple approach of defining “qualified beneficiaries” as a subset of “beneficiaries” proved somewhat limiting given the broadening of trust and related law along with the proliferation and promulgation of other uniform acts. Further, questions arose regarding parties that might technically meet the definition of a “qualified beneficiary” under prior law but whose inclusion in the class might be seen as problematic or as creating inefficiencies or other issues.

The Trailer Bill provides more specific delineation among beneficiaries. Under Wis. Stat. section 701.0103(5w), a *current beneficiary* is a beneficiary who, “on the date that the beneficiary’s qualification is determined[,] is a distributee or permissible distributee of trust income or principal.” While anyone deemed a current beneficiary would, as under prior law, still be considered a “qualified beneficiary,” only future beneficiaries who are deemed to be “presumptive remainder beneficiaries” are now included as qualified beneficiaries.

The Trailer Bill’s drafters sought to avoid including potential or remote contingent beneficiaries whose connections were especially limited, tenuous, or uncertain to a trust matter while also preserving the property rights or interests of such beneficiaries with true, meaningful interests in the trust. As a result, only those remainder beneficiaries whose interests will arise upon the termination of the subject trust – and not those whose interests are potentially multiple contingencies down the line – are included.

Not all perceived issues associated with the



identification of qualified and nonqualified beneficiaries have been solved. For instance, remote contingent beneficiaries of multigenerational or dynastic trusts will still be considered qualified beneficiaries entitled to notice of certain trust-related proceedings and their consent or participation might be required for nonjudicial settlement agreements (NJSAs), certain court proceedings and the like.

## The Trailer Bill's drafters sought to avoid including potential or remote contingent beneficiaries whose connections were especially limited, tenuous, or uncertain to a trust matter while also preserving property rights or interests of beneficiaries with true, meaningful interests in the trust.

Further, the Trailer Bill does not explicitly lay out whether a trustee of a current or successive trust will also be considered a beneficiary whose participation will be required in an NJSA. Although it is clear that any modification or action involving such a trust would necessarily require notice (whether *de jure* or *de facto*) to a trustee, lawyers – and perhaps eventually the courts – will need to consider whether the trustee should be counted among the subject trust's beneficiaries as a required party. One view (shared by this author) is that although a trustee always should be provided notice of any NJSA involving the trust, the trustee generally does not have interests that are relevant to most NJSAs. Rather, the trustee's role is to ensure that no material purpose of the trust has been overridden or negatively affected by an NJSA and that the proposed modification is a permissible subject of an NJSA.

### Representation of Beneficiaries' Interests

A common topic of discussion regarding the 2014 WTC related to representation of beneficiaries' interests in trust matters. Although the 2014 WTC provided great latitude to establish

representation structures in trusts, there were situations for which lawyers determined that specific enabling language and definition of such matters would be beneficial. Some of that latitude is now made explicit; for example, the Trailer Bill spells out the ability of a settlor to name a representative for certain interests in a trust instrument.

With the enactment of the Trailer Bill, the Trust Code now provides that

parents can represent the interests of not only their minor and unborn children but also their more remote minor and unborn issue. Also, people holding a general power of appointment or a broad limited power of appointment (a new defined term which means a power of appointment exercisable in favor of anyone other than the powerholder, the powerholder's estate, the powerholder's creditors, and creditors of the powerholder's estate) may represent the interests of all persons whose interests might be eliminated, regardless of whether there is a conflict of interest. Holders of other powers of attorney may also represent the interests of those whose interests may be limited by the exercise of the power if no conflict of interest is present.

In addition, presumptive remainder beneficiaries may now represent the interests of contingent successor remainder beneficiaries, including successive, more remote contingent successor beneficiaries, even if such beneficiaries lack capacity. This type of representation can be exercised only if there is no conflict of interest.

### Nonjudicial Settlement Agreements

The Trailer Bill clarified the intent of

the original drafters of the 2014 WTC legislation, which was that NJSAs are a tool that can be used to address many circumstances without requiring court involvement, if all interested persons affected by the matter participated in the NJSA and a court could have approved the result of the NJSA.

Despite the clear intent of the 2014 WTC's drafters to create a nonexhaustive list of 12 matters that could be addressed by NJSAs, the absence of certain items from the original list seemed to give some lawyers and trustees pause on whether certain topics could be so addressed. To assuage those concerns, the Trailer Bill specifically states that the removal and replacement of a trustee and the modification or termination of a trust are appropriate subjects of NJSAs. Other matters that could be approved by a court that the Trailer Bill did not add to the list of potential NJSA subjects in Wis. Stat. section 701.0111(5) are not thereby forbidden; the intent remains that the statutory list is not exhaustive.

### Notice and Permissible Communications

Another focus of the work on the Trailer Bill was notice and the appropriate flow of information. In part, this was a response to the increased use of other "offices" within a trust – significantly, trust protectors and directing parties. References to these additional actors



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are sprinkled throughout the Trailer Bill, including in provisions regarding distribution of information that in the UTC and the 2014 WTC were explicit only as to trustees.

In recognition of a settlor's continuing interest in an irrevocable trust and the practicalities of communicating with people who might think they have an interest in a trust, some provisions regarding permissible and required distribution of information were added or amended. For example, a living settlor of a trust must receive notice of a pending NJSA at least 30 days before its effective date and notice of any proposed exercise of a decanting power. A settlor now has an explicit right to receive a copy of a trust instrument of a trust that the settlor established. And trustees are now explicitly permitted, but not required, to share information with the settlor about the administration of the trust established by that settlor.

The 2014 WTC's provisions concerning the release of information to nonbeneficiaries were not very robust. Because of a trustees' duty of confidentiality, this created a potential dilemma for trustees receiving requests from persons – such as a settlor's close relatives – who might have had legitimate reasons to expect to have been beneficiaries of a settlor's estate plan.

Releasing information about an individual's non-inclusion might technically violate a duty of confidentiality whereas withholding such information without explanation might invite suspicion, family strife, or litigation. To address this tension, Wis. Stat. section 701.0802(9) now provides that “[a] trustee is not liable for releasing information, including a copy of all or any portion of the trust instrument, to any deceased settlor's heir-at-law or other person indicating that the person is not a beneficiary of the trust if the trustee reasonably believes that doing so will not harm the beneficiaries of the trust and that doing so will reduce the likelihood of litigation involving the trust.”

The Trailer Bill also includes several provisions regarding information flow that clarify the intent of the 2014 WTC. For example, questions arose regarding the extent to which trustees were required to release accountings or related financial information to trust beneficiaries with limited interests. The law now explicitly states that trust beneficiaries with limited interests are entitled only to information relevant to their interest – meaning that a recipient of a small, specific gift would not be entitled to a full accounting.

Somewhat relatedly, the Trailer Bill explicitly authorizes “silent trusts”: trusts for which the settlors require or expect that trustees will not share accountings or other information with one or more of the trust's beneficiaries. The authorization of silent trusts is a response to a reported reluctance of several fiduciaries to administer Wisconsin-based silent trusts (although the original drafting committee of the 2014 WTC always intended that the 2014 WTC would enable silent trusts in Wisconsin). Explicitly authorizing silent trusts should allow for more effective use of such trusts when appropriate and reduce the number of such trusts for

Wisconsin residents that are set up and administered outside the state.

## Claims and Debts of a Deceased Settlor

The 2014 WTC did not deal in any depth with the disposition and management of claims against a deceased settlor. The drafters of the Trailer Bill took a different approach, in part in response to expressions of interest in statutory formalities regarding creditor claims that might be payable through a deceased settlor's revocable trust. New Wis. Stat. sections 701.0508 and 701.0509 contain rules and procedures that are similar to those in Wis. Stat. chapter 859 but specifically apply to a nonprobate, trust context. The new sections contain provisions for the submission, verification, and processing of claims against a deceased settlor; how to manage and compromise such claims; priority of claims against a deceased settlor; and the like.

## Uniform Trust Decanting Act

Shortly after the enactment of the 2014 WTC, the Uniform Law Commission (ULC) promulgated the Uniform Trust Decanting Act (UTDA). With the



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encouragement of the ULC, the Trailer Bill committee evaluated the UTDA and determined that replacing Wis. Stat. section 701.0418 with the UTDA was consistent with the intentions of the older statute and has the benefit of providing greater uniformity between Wisconsin's and other states' trust-related laws. The UTDA provisions now are in subchapter XIII of the Wisconsin Trust Code, Wis. Stat. chapter 701.

### Uniform Power of Appointment Act

The Trailer Bill also adopted Wisconsin's version of the Uniform Power of Appointment Act (UPOAA), by recreating Wis. Stat. chapter 702. Statutory and common law in Wisconsin was very much in alignment with the UPOAA, so adoption of the UPOAA will not require lawyers to vary their practices in any significant ways. The UPOAA subcommittee did, however, preserve several useful facets of the earlier law that lacked counterparts in the UPOAA.

### Classification of Certain Digital Property

The Trailer Bill modified Wisconsin's general marital property law regarding certain digital property. Digital

property that is established for personal, noneconomic use, such as personal email accounts, is now classified as the individual property of the account-holding spouse. In part, this change is in recognition of the personal and perhaps private nature of such digital assets and individuals' expectations regarding their rights to these assets. If, how-

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ever, such an asset or account is sold, proceeds of the sale will be classified as generally provided under the Marital Property Act.

### Other Trailer Bill Provisions

The Trailer Bill adjusted the 2014 WTC in additional ways, including the following:

- Greater specificity is provided for trusts for the care of animals.
- Protective provisions for trusts for individuals with disabilities have been expanded.

• Settlor's rights and standing in certain proceedings have been expanded or made explicit.

• Provisions regarding the modification and termination of irrevocable trusts are now more fully developed.

• A filing fee of \$250 was set for judicial proceedings under the Wisconsin Trust Code.

One item not addressed in the Trailer Bill is a statute regarding domestic asset protection trusts (DAPT). Many states now allow this type of trust, but DAPTs are a significant departure from long-standing law that limits the asset protection available to settlors who retain interests in trusts that they create. The Trailer Bill's drafters decided to not include a DAPT statute in the Trailer Bill. This decision seems correct, given Governor Evers' strongly worded veto of a bill (S.B. 667) that dealt explicitly with DAPTs.

### Conclusion

The RPPT Section, other State Bar sections, and other interest groups will continue to evaluate DAPTs and trust-related tools and laws. It is likely there will be legislation in the near future regarding new uniform acts, such as the Uniform Directed Property Act and the most recent iteration of the Uniform Principal and Income Act, and topics related to procedural and administrative aspects of trusts. Lawyers' participation in section matters, including the RPPT Section's electronic lists, was influential in creation and passage of the Trailer Bill. Accordingly, State Bar members should continue to use these methods to help suggest and guide legislation. **WL**

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