

The New Wisconsin Trust Code What It Means for You



Reinhart
Boerner Van Deuren s.c. Attorneys at Law

October 1 MADISON
October 9 WAUKESHA
October 14 MILWAUKEE

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THE NEW WISCONSIN TRUST CODE... WHAT IT MEANS FOR YOU

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WAUKESHA – October 9, 2014

Wendy S. Rusch

MILWAUKEE – October 14, 2014

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AGENDA

4:30 p.m.

Registration and Networking

5:00 p.m.

Seminar

6:00 p.m.

Networking Reception

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Introduction

- Effective Date: July 1, 2014
- Applies to existing trusts (most rules) as well as trusts created after July 1, 2014
- Creates "default" rules, most of which can be changed
- Adds trust administration requirements
- Sanctions new roles for the management of unique trust assets

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Topics for Today

- Directing parties and trust protectors
- Trust modification
- Reporting requirements
- Life insurance trusts
- Pet trusts

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Directing Parties

- What are directing parties?
 - A fiduciary appointed *in addition to* a trustee, allowing for a bifurcation of trustee duties
 - Directing parties can direct the trustee on investment or distribution decisions, or make investment or distribution decisions
 - Trustee is not liable for following directing party's direction
- How do you appoint a directing party?
 - Can be appointed in the trust document, by court order or in a nonjudicial settlement agreement

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Directing Parties (cont.)

- Why appoint a directing party? Directing parties are most applicable when:
 - There is a **special asset** such as: family business, concentrated holdings in publicly traded companies, real estate, or private equity or nontraditional investments; or
 - There is a **special beneficiary situation**, such as: a special needs beneficiary, a difficult beneficiary situation (spendthrift beneficiary, beneficiary with substance abuse issues or beneficiary with other challenging behavior)

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Trust Protectors

- What is a trust protector?
 - A trust protector is a person granted specific limited powers over a trust
- How are trust protectors appointed?
 - Can be appointed in the trust document, by court order or in a nonjudicial settlement agreement
- A trust protector does not need to be referred to as a "trust protector" to be considered a trust protector

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Trust Protectors (cont.)

- Why appoint a trust protector?
 - Provide additional oversight
 - Examples:
 - Interpret trust at trustee's request
 - Approve trustee reports
 - Resolve disputes between trustee and beneficiary
 - Remove and replace trustee
 - Consent to or veto distributions
 - Consent to or veto investments

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Mandatory Rules

- The following provisions of the Wisconsin Trust Code (WTC) **cannot** be modified by the trust document:
 - Duty to act in good faith
 - Power of court to modify or terminate a trust
 - Power of court to adjust compensation payable to trustee, directing party or trust protector
 - Rights of third parties when dealing with the trust
 - Statute of limitations for commencing judicial actions against trustees

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Trust Modification

- Prior to the WTC, families and trustees often had to go to court to resolve differences regarding a trust
- Under the WTC, nonjudicial modification is available via:
 - Nonjudicial settlement agreements
 - Decanting

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Nonjudicial Settlement Agreements

- Agreements that are binding to the same extent as a court order, but only as to issues that a court could have approved
- All "interested persons" must be included in the agreement (or represented by another party)
 - This includes the trustee, current beneficiaries and future beneficiaries

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Nonjudicial Settlement Agreements (cont.)

- Nonjudicial settlement agreements can address a broad variety of topics, including:
 - Trust interpretation or construction
 - Approval or waiver of a trustee's reporting or accounting obligations
 - Directions to the trustee to refrain from taking an action or giving a trustee necessary powers
 - Resignation or appointment of a trustee
 - Setting the trustee's compensation
 - Transfer of trust's principal place of administration

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Nonjudicial Settlement Agreements (cont.)

- Liability or release from liability of a trustee for actions relating to the trust
- Criteria for distributions to beneficiaries where a trustee has discretion
- Resolving disputes regarding administration or distribution of the trust
- Investment actions
- Appointment of and powers given to directing parties and trust protectors
- Directing a directing party or trust protector

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Decanting

- What is decanting?
 - A tool that allows a trustee to transfer the assets of an irrevocable trust to a new or separately existing irrevocable trust
- Who can decant?
 - A trustee, directing party or trust protector:
 - who is not a beneficiary, and
 - who has the power to make principal distributions to a beneficiary who is also eligible to receive income, a unitrust distribution or an annuity

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Decanting (cont.)

- Why decant?
 - Correct a drafting error in the first trust
 - Extend the duration of the first trust
 - Modify investment provisions contained in the first trust, including those related to permissible investments, use of investment advisors or self-dealing transactions
 - Appoint a directing party or trust protector
 - Change the governing law or principal place of administration of the trust
 - Merger of first trust with one or more trusts
- How to decant?
 - With court order
 - Without court order

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Decanting (cont.)

- When you cannot decant
 - The trust document prohibits it
 - Decanting reduces any beneficiary's fixed income, unitrust or annuity rights
 - Decanting creates a federal gift or estate tax charitable deduction or marital deduction problem
 - Decanting violates the "Rule Against Perpetuities"
 - Decanting would impair presently exercisable withdrawal rights
 - Decanting impairs the essential purpose of a disabilities trust

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Decanting (cont.)

- For certain modifications, a trustee must have an "absolute power" to invade trust assets
 - Examples of an **absolute power** include: "beneficiaries' best interest, welfare, comfort or happiness," or any power not limited by a specific or ascertainable standard
- These modifications include:
 - Changing beneficial interests
 - Creating new powers of appointment

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Reporting Requirements

- Under the WTC, a trustee has a "duty to inform and report" to the beneficiaries **UNLESS** the trust modifies this duty

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Reporting Requirements (cont.)

- The Trustee must keep all current beneficiaries reasonably informed about the administration of the trust
 - And future beneficiaries who request the information
- Upon request, a trustee must provide a current or future beneficiary with a full or redacted copy of the trust
- Upon acceptance of trusteeship, the trustee must notify all current and future beneficiaries of the trustee's name, address and phone number (post-June 30, 2014 trusts only)

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Reporting Requirements (cont.)

- When a post-June 30, 2014 trust becomes irrevocable, the trustee must notify all current and future beneficiaries of the following:
 - The trust's existence
 - The identity of the settlor or settlors
 - The name, address and phone number of each directing party and trust protector
 - The beneficiaries' right to request a copy of, and information about, the trust
 - The beneficiaries' right to request a "trustee's report"

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Reporting Requirements (cont.)

- The trustee must notify the current beneficiaries of any change in the method or rate of the trustee's compensation
 - And future beneficiaries who request the information

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Reporting Requirements (cont.)

- At least annually, and upon termination of the trust or upon a vacancy in trusteeship (unless co-trustee remains in office), a trustee must provide a "trustee's report" to:
 - Current beneficiaries; and
 - Future beneficiaries who request the information (post-June 30, 2014 trusts only)
- A "trustee's report" includes disclosure of the trust property (including the assets of the trust and their respective market values, if available), liabilities, receipts and disbursements (including source and amount of the trustee's compensation)

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Reporting Requirements (cont.)

- Why you should provide disclosure
 - Shorten the statute of limitations for litigation
 - One year (if disclosed on report received by beneficiary)
 - If not disclosed, five years after the earliest of:
 - The trustee ceases to serve
 - The beneficiary's interest in the trust terminates
 - The trust terminates

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Reporting Requirements (cont.)

- These are default rules
- Why you may want to draft around these default rules:
 - Privacy for settlors
 - Knowledge of a future inheritance may lead to fighting among beneficiaries, prevent them from working toward their own financial independence or possibly even litigation

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Life Insurance Trusts

- In general, a trustee has a duty to invest and manage trust assets as a prudent investor would, considering the purposes, terms, distribution requirements and other circumstances of the trust
- If a principal purpose of a trust is to hold a life insurance contract, the trustee does not have a duty to determine whether the contract is or remains a proper investment of the trust
- A trustee is not liable for a loss that arises because the trustee did not take action with regard to a policy
- Applies to post-June 30, 2014 trusts only, unless the trustee notifies the beneficiaries

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Also New for Wisconsin

Pet Trusts now allowed!

- Requirements
 - For the care of an animal alive during the settlor's life
 - Enforced by person appointed in trust
 - Property applied only to its intended use, but if court determines value of trust exceeds the amount required for the intended use, overage back to settlor or beneficiaries

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You may ask why this is relevant

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Stockswatch

More U.S. families own cats than stocks

by Matt Egan @mattmegan5 September 9, 2014 4:09 PM ET



While less than 14% of families directly held stocks in 2013, 30% of households own at least one cat, according to the [American Veterinary Medical Association](#)

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Questions?

Thank you!