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In Support of Raised Bill 508
An Act Adopting the Connecticut Uniform Trust Code and Establishing an Alternative Rule Against Perpetuities

Judiciary Committee
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Senator McDonald, Representative Lawlor, members of the Judiciary Committee, thank you for the opportunity to appear before the committee to comment on Raised Bill No. 508, An Act Adopting the Connecticut Uniform Trust Code. My name is Suzanne Brown Walsh. I am a Principal of Cummings & Lockwood in West Hartford, am currently Chair of the Connecticut Bar Association's Estates & Probate Section and am one of Connecticut's eight Uniform Laws Commissioners. I am also past chair of the Connecticut Bar Association's Elder Law Section. On behalf of the Estates and Probate Section Connecticut Bar Association and the National Conference of Commissioners on Uniform State Laws, I respectfully request that the Judiciary Committee act favorably on Raised Bill No. 508, An Act Adopting the Connecticut Uniform Trust Code and Establishing an Alternative Rule Against Perpetuities.

The bill would enact the Connecticut Uniform Trust Code ("CUTC"), which is based on the Uniform Act. It is the first national codification of the law of trusts and has already been enacted in the following twenty (20) jurisdictions:

Alabama	North Carolina
Arkansas	North Dakota
District of Columbia	Ohio
Florida	Oregon
Kansas	Pennsylvania
Maine	South Carolina
Missouri	Tennessee
Nebraska	Utah
New Hampshire	Virginia
New Mexico	Wyoming

The UTC has been approved by the American Bar Association, the ABA Real Property, Probate and Trust Law Section and AARP.

The Estates and Probate Section believes it is vitally important that Connecticut enact the UTC. During the past 20 years, trusts have become an increasingly useful and important estate planning tool. Unfortunately, in Connecticut it is very difficult to determine what law applies to trusts, because Connecticut trust law consists largely of common-law rules set forth in appellate court decisions arising from fact-specific adjudications. Our statutory law of trusts is quite limited and there are large gaps in its coverage. Unlike a Restatement, which is most often used by courts asked to decide issues in the absence of clear statutory law, a Uniform Act can be relied upon and accessed by all of a state's citizens, whether or not they are in front of the courts. It also codifies fiduciary law, duties and principles in one central place, benefiting not only trustees and beneficiaries, but also attorneys and Judges.

Connecticut residents will benefit from the enactment of the Uniform Trust Code in many important ways. New residents of Connecticut who create a trust in a UTC state will be able to transfer its administration to Connecticut knowing that the trust will have the same legal effect. Connecticut lawyers and judges will be able to turn to appellate decisions in other jurisdictions interpreting the UTC for answers to questions, greatly reducing the time and expense that would have been required to address the issues anew. Multi-state corporate fiduciaries (such as national banks) will reduce the time spent determining and complying with individual state trust laws. Treatises and articles have already been written on the UTC, providing guidance to courts, practitioners, and laypersons. Law schools in most states now include the Uniform Trust Code as part of their trusts and estates curricula, and it is routinely mentioned in legal education courses on trusts.

The CUTC provides a comprehensive set of rules that fairly, consistently, and clearly govern trusts. Most of these are default rules (which apply absent a trust provision on a particular issue) which can be overridden if desired, but are useful if questions arise that the drafter of the instrument did not foresee. However, there are a few important and common-sense mandatory rules, such as: the requirements for creating trusts; the trustee's duty to act in good faith, in accordance with the trust's purpose; a requirement that the trust's purpose be lawful and not against public policy; and that a court may modify or terminate the trust under the limited circumstances outlined in the CUTC.

The UTC provisions governing notice to beneficiaries have been varied by most enacting states. In principal, we agreed with the UTC's national drafters that for policy reasons, notice to trust beneficiaries is desirable. Without such notice, no one will be armed with the information necessary to enforce and protect the remainder

beneficiaries' rights.[1] Nevertheless, there are those who oppose making such notice mandatory, instead of waivable.

As a compromise, we have followed several other states' leads and allowed mandatory notice to be given to a "beneficiary surrogate" designated by the Settlor. This gives someone the information and ability to enforce beneficiary interests while it satisfies those who value privacy over beneficiary rights to information. The other widely varied portion of the UTC is Article 5, on creditors' rights. We have similarly tailored this provision to Connecticut law and believe that it substantially improves existing law on creditor access to trust assets after the settlor's death.

In addition to these notice and creditors' rights provisions, the UTC provides many benefits to both trustees and beneficiaries, including:

Basic default rules. The UTC is primarily default law that settlors can draft around. Where a trust instrument is silent, however, the UTC often provides answers to difficult issues.

Modification and termination provisions. The UTC liberalizes the ability to modify or terminate a trust without disregarding the key principal of honoring the settlor's intent. These improvements are important because long-term trusts are becoming much more popular. For example, as tax laws change, clients often wish to undo that which they had created solely to take advantage of prior law. The federal estate tax exclusion is presently $2.0 million and many existing plans create trusts drafted around the former $600,000 exemption. Or, individuals may simply wish to terminate what has become an obsolete, small and expensive fund to administer. Trust modifications are frequently needed to correct scrivener's error, or simply to effectuate the Settlor's intent, and they are virtually impossible to do under present law.

Spendthrift protection and creditor access. The bill will provide clear statutory law in Connecticut regarding (1) spendthrift protection for trust beneficiaries, (2) the rights of a trust beneficiary's creditors to reach trust assets, (3) the rights of creditors to reach charitable funds, (4) the rights of the settlor's creditors upon the settlor's death, and (5) statutes of limitation applicable to revocable trusts upon the death of the settlor.

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[1] For example, beneficiaries entitled to the trust after an income beneficiary dies might not learn of the trustee's improper investments for many years. If the trustee is an individual, their right to sue the trustee for the loss in the trust's value might be worthless. Both trustees and beneficiaries benefit from notice, which not only gives beneficiaries information, but requires them to act upon it in a timely manner or lose their right to do so.

The bill does NOT, in any way, change or limit the State's rights to recover from trusts or trust beneficiaries for public assistance paid. The state is and remains free to provide in its statutes for such recovery. Nor does the bill affect in any way the state's rights to be repaid for assistance from so-called OBRA '93 or payback special needs trusts.

Charitable trusts. The UTC provides a statutory structure for charitable trusts, codifying trust purpose and the common law doctrine of cy pres. The bill's charitable provisions have been extensively reviewed and modified by the Connecticut Attorney General's Office.

Revocable trusts. The UTC recognizes revocable trusts and devotes an Article to the subject. Revocable trusts are generally viewed as a will substitute and are the most popular, modern trust form for estate planning. For the first time, our law will describe the capacity required to create a trust and trusts will be presumed to be revocable, instead of irrevocable as under current case law. The UTC will also deal with the procedure for adjudicating claims filed after the settlor's death against a funded revocable trust.

Trustee's duties and powers. The UTC specifies trustee powers and duties, in detail, and provides numerous procedural rules on a trust's administration. For example, trustees will be allowed to supply certificates evidencing their authority, instead of carrying around and producing the entire trust for inspection during financial transactions.

Trustee Liability. The UTC remedies the unfair and for most, unexpected, imposition of personal liability on a trustee for contractual obligations. As a result, such documents will no longer need to contain express waivers of personal liability. Under the Restatement, the laws of most states and the UPC, a Trustee is personally liable on contracts entered into as Trustee (subject to indemnification out of trust assets) unless the contract specifically provides that the Trustee is not to be personally liable. This means that absent such a provision, if the Trust assets are not adequate to satisfy a contractual obligation, then the Trustee is personally liable on the contract. Not a happy result. Under the UTC, if the fiduciary relationship is disclosed in the contract (for this purpose merely signing as "Trustee" would constitute disclosure), then the Trustee has NO personal liability. This same concept also applies where a fiduciary is a general partner in a general or limited partnership. The fiduciary is not personally liable as long as his fiduciary capacity was disclosed. My partner, Terry Tuthill, had one case where a trustee was threatened with several million dollars of personal liability that would not have existed had the UTC been in place.

Remedies. The UTC identifies the remedies for breach of trust, describes how money damages are to be determined, and specifies potential defenses.

Animal Trusts. The bill recognizes a trust created for the care of an animal as a lawful one. These pet trusts provide that there must be a designated human caretaker and that the trust cannot extend beyond the life of a current animal. Additionally, courts are empowered to cut back excessive sums set aside for favored pets to a reasonable amount required to maintain the animal. This will comfort clients who are fond of their pets and want to provide for their care after death.

The Uniform Laws Subcommittee of the CBA's Estates & Probate Section, including Professor John Langbein, one of the UTC's drafters, began its intensive study of the UTC nine years ago, in 1999. The subcommittee worked closely with family law practitioners and representatives of Connecticut financial institutions to ensure that the CUTC would meet their clients' needs. In addition, subcommittee members met with several Probate Court judges to revise the Connecticut UTC to preserve existing court oversight of testamentary trusts. A drafting committee then met to revise the UTC to incorporate the suggestions of all of these groups, with the assistance of the UTC reporter, Professor David English of the University of Missouri Law School.

The Rule Against Perpetuities is a topic much feared by law students as one of the most painfully boring areas of the law, but please allow me to provide a bit of background information nonetheless. Under current law, the length that a trust may continue is governed by what is known as the Uniform Statutory Rule Against Perpetuities (or, "the USRAP"). The USRAP provides (in a formulation that has given lawyers fits) that a trust must terminate no later than (a) twenty-one years after the death of all lives in being on the date the trust became irrevocable, or (b) ninety years after the trust becomes irrevocable. In other words, current law provides that a trust must end after a couple generations, or after 90 years.

In the decades that followed Connecticut's adoption of the then state-of-the-art USRAP, trusts that are effectively perpetual have become favored tax and business planning devices. They are currently permitted by approximately fourteen states, or over one-quarter of the Union, including our neighbor Rhode Island, nearby states such as New Jersey and Maine, and states known for their banking business such as Delaware, Florida and Illinois. However, Connecticut currently is not one of the states that permits these effectively perpetual trusts. Connecticut residents who wish to establish these types of trusts may still do so, but they must select a jurisdiction that does permit them, and choose an out-of-state trustee located in that jurisdiction. As a result, Connecticut residents are forced to move their trust business out of state, and are subjected to unnecessary costs and obstacles in managing their financial affairs. In addition, non-residents who might create trusts with Connecticut trustees are dissuaded from doing so because Connecticut does not allow such long-term trusts. Thus, Connecticut loses business in this fashion in two ways: it fails to retain its "native" trust business, and it fails to attract new "foreign" trust

business. The proposed Act would solve these problems by permitting a Connecticut trust to last 500 years (rather than the current 90 year limit).

If enacted, the proposed Act would merely add an option to the USRAP. By making a specific election, a person creating a Connecticut trust could provide that an "Alternative Rule against Perpetuities" (or "ARAP") would apply to the trust. The ARAP would permit the electing trust to last 500 years, but would otherwise be identical to the USRAP in all respects. That is, the ARAP would simply provide this longer duration as an option for trust settlors, but would leave untouched all other aspects of the USRAP, preserving the language of this Uniform Act as much as possible.

In order to choose this option, the election to have the ARAP govern a trust must be a qualified one. For example, to select the ARAP as governing law, non-residents would be required to name at least one trustee domiciled in Connecticut, and provide that the trust will be administered here under the laws of this state. In addition, the trust would have to contain certain provisions, such as an ability to sell the trust's assets, to ensure that capital is not frozen within the trust. No one could lock up his property for a millennium.

It is the position of the Estates and Probate Section of the CBA that passage of the proposed Act will modernize the state's trust law, bring it in line with current practice elsewhere, and greatly assist Connecticut institutions in attracting and retaining trust business within this State. It will not change the options currently available to Connecticut residents in planning their financial affairs, because they can after all simply go out-of-state and create an out-of-state trust in an appropriate jurisdiction. However, the Act will permit our residents to implement an extremely important part of their plans within Connecticut, applying Connecticut law and under the supervision of Connecticut courts.

Thank you again for this opportunity to comment on Raised Bill No. 508. On behalf of the Connecticut Bar Association, I respectfully request that the Judiciary Committee act favorably on Raised Bill No. 508, An Act Adopting the Connecticut Uniform Trust Code and Establishing an Alternative Rule Against Perpetuities.

I would be pleased to answer any questions you might have, either now or whenever you wish to contact me by telephone or e-mail.

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