



STATE OF CONNECTICUT

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Honorable Members of the Judiciary Committee

From: Judge James J. Lawlor
Probate Court Administrator

Re: RB 508 An Act Adopting the Connecticut Uniform Trust Code and
Establishing an Alternate Rule Against Perpetuities

Date: March 3, 2008

Although the policies and procedures established by this bill would better define the law of trusts in Connecticut, we have significant concerns about certain sections of the bill.

Our first area of concern relates to the bill's treatment of unborn and unascertained beneficiaries. The definition of "person" under section 3(15) includes no reference to unborn or unascertained beneficiaries. It is true that section 19 provides for the application of the concept of virtual representation (section 16 – 18) to such beneficiaries. However, that concept has limitations and may not apply. Section 20 states that the court may appoint a guardian ad litem to represent the interests of unborn or persons if it determines that their interests would not be adequately protected under virtual representation. It further provides that the guardian ad litem may so act whether or not there is a judicial proceeding pending. However, a number of questions are raised. Does the trustee have a duty to determine whether virtual representation would adequately protect the interests of unborn and unascertained beneficiaries? If so, does the trustee have an obligation to seek the appointment of a guardian ad

litem if virtual representation would not be adequate? And if there is no judicial proceeding pending, how would such an appointment be obtained? We believe that further refinements are required in this area.

Section 5(c) would allow a settlor to provide in the trust instrument that a trustee need not provide a beneficiary with information about the trust. The default rule under section 67 is that a trustee must provide qualified beneficiaries with information related to the administration of the trust upon request. However, section 5(c) would permit a settlor to override that rule. We believe that this presents significant due process issues, since a person who lacks relevant information concerning his or her interests cannot, as a practical matter, avail themselves of the judicial process or other appropriate remedies to protect those interests. In the context of a judicial proceeding, this provision also raises a question as to whether it would prohibit courts from disclosing to the beneficiary the information that the trustee is excused from providing under the terms of the instrument. Such a result would, we believe, result in a serious due process deprivation.

Section 5(c) attempts to resolve some of the issues by providing that the information would be provided instead to a "beneficiary surrogate." This provision raises additional questions. Is a beneficiary surrogate a fiduciary, owing fiduciary duties to the beneficiary? What information, if any, would the beneficiary surrogate be required to provide to the beneficiary? Is a beneficiary surrogate liable to a beneficiary for breach of duty? Who would appoint a successor in the event of a vacancy? Could a court remove a beneficiary surrogate who is not doing the job? Curiously, section 5(c) contemplates that a beneficiary who isn't entitled to information still has a right to pursue a trustee for breach of trust. How would this work if the beneficiary doesn't know what the trustee has been doing?

While section 67 of the bill embodies important provisions designed to protect the interests of beneficiaries, they can, by the terms of section 5(c), be overridden by a settlor. We believe that the requirements of section 67 should be mandatory. Further, we believe that notice under section 67(b) should be required to all qualified beneficiaries, not merely current beneficiaries. The section provides for a qualified beneficiary to request information, but how can a beneficiary know to ask if he or she is unaware of the trust in the first instance?

Section 14 provides that the Probate Courts have exclusive jurisdiction with respect to the accounts of trustees of testamentary trusts. In the event of a contested proceeding, however, the bill would establish transfer procedures that would both enable and encourage judge and /or forum shopping.

Section 14(b) would provide for transfer to a special assignment probate judge. Such a transfer would be very much in line with the concept of the special assignment judge, which is intended, to a considerable extent, to deal with

unusually complex, difficult or time consuming cases. However, this section would, if all parties agree, make such a transfer mandatory, depriving the sitting judge of any discretion in the matter. Further, if such a motion is made by a party, but not agreed to by all, the court would be required to transfer the matter to the Superior Court.

We believe that such a provision would be contrary to fundamental judicial principles. It would provide a party with the absolute right, for whatever reason, to require that the matter be transferred to another judge. If all other parties agree to the transfer, it would be to a special assignment probate judge. If the other parties do not agree, the transfer would still be required, but to the Superior Court. The parties, collectively or singly, should not have the right to require that the matter be heard by another judge without good and sufficient reason. To afford that unbridled right to a single party is even more troublesome.

The bill seeks to pursue a laudable goal, insofar as it attempts to codify and clarify the law of trusts in this state. Nonetheless, we believe that there are a number of sections of the bill that require further refinement, and we would urge the Committee not to approve the bill without these necessary changes.

