



*Written Testimony before the Judiciary Committee
Submitted by the Department of Social Services
February 15, 2019*

H.B. 7104 (RAISED) - AN ACT CONCERNING ADOPTION OF THE CONNECTICUT UNIFORM TRUST CODE.

This bill would make numerous changes to Connecticut’s trust laws. The Department has identified various concerns with the proposed changes.

Generally, it is not clear why the Uniform Trust Code (the “Code”) is being offered for adoption. The stated purpose of the Code does not identify critical issues the Code seeks to address and it is not clear how the Code will accomplish the stated purpose. The proposed changes to the Code could potentially endanger estate plans, affect eligibility for public assistance, and interfere with special needs and pooled trusts established for disabled persons to qualify for public assistance. Connecticut has a long history of trust law, both common and statutory, governing the validity and enforcement of trusts. Additionally, the Probate Court has promulgated Rules of Procedure which govern the manner in which cases, including trust cases, are handled in the Probate Courts with the intent of promoting uniformity in the procedures used by all Probate Courts throughout the state. It is not clear how the Code will modernize trust law.

Examples of areas of concern include:

Section 3 (27) provides that “Terms of a Trust” means: “(A) The manifestations of the settlor’s intent regarding a trust’s provisions as: (i) Expressed in the trust instrument; or (ii) Established by other evidence that would be admissible in a judicial proceeding [.]” In Connecticut, it is well-established that “[t]he issue of intent as it relates to the interpretation of a trust instrument ... is to be determined by examination of the trust itself and not by extrinsic evidence of actual intent.” See Marzahl v. Colonial Bank & Trust Co., 170 Conn. 62, 64 (1976). The Code would overrule long-standing judicial precedent without any basis for doing so.

The Code interferes with special needs trusts and pooled trusts established to enable disabled individuals to qualify for public assistance such as Medicaid. For example, Sec. 3 (24) defines “settlor” and provides: “If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to such person’s contribution [.]” Medicaid law (42 USC 1396p (d)) provides that only the beneficiary, the beneficiary’s parent, the beneficiary’s grandparent, or a court may establish a special needs trust or pooled trust. Applying the Code’s definition of a settlor to a special needs trust, an individual who is not statutorily authorized to create a special needs trust would become a settlor of the trust by contributing assets to the trust, potentially invalidating the trust.

Revisions to the Code (§§ 31(f), 32(e), 35(b), and 41(h)) do not adequately address concerns regarding special needs and pooled trusts that DSS staff raised in a meeting with Connecticut Bar Association representatives. The revisions are confusing as written and do not clearly state that the provisions do not apply to special needs and pooled trusts established pursuant to 42 U.S.C. 1396 (d), which addresses only the requirements of a special needs or pooled trust for purposes of exclusion as a resource for purposes of determining Medicaid eligibility.

Specific issues include:

Sections 31(f) and 32(e) of the bill provide that, for special needs and pooled trusts, a nonjudicial settlement may permit modification or termination of a provision of an irrevocable trust established under 42 USC 1396p (d)(4)(A) or (C) if the settlement complies with 42 USC 1396p (d)(4)(A) or (C).

42 USC 1396p (d)(4) sets forth the criteria for a trust to qualify as a special needs or pooled trust for purposes of being excluded from the general Medicaid rules concerning self-settled trusts, i.e., who the settlor must be, the settlor must be under age 65, the settlor must be disabled, and the trust must contain a Medicaid payback provision. The statute does not address nonjudicial settlements so, therefore, a nonjudicial settlement cannot comply with the statute.

Section 35(b) appears to permit termination of a special needs or pooled trust prior to the beneficiary's death if a court determines that the value of the trust property is insufficient to justify the cost of administration. DSS and the Office of the Attorney General take the position that special needs and pooled trusts terminate only upon the beneficiary's death.

Section 41(a) indicates that unless the terms of the trust expressly provide that the trust is irrevocable, then it is revocable or can be amended. This is, however, inconsistent with general practice as special needs and pooled trusts are considered irrevocable even if the trust language is silent as to revocability.

The Department is concerned that this legislation may also include additional changes that will adversely affect numerous aspects of the Department and the state budget.

Overall, the bill contains many instances of confusing and unclear language.

Therefore, for the reasons noted above, the Department must oppose House Bill 7104. The Department has met with members of the Connecticut Bar Association (CBA) to address the Department's concerns regarding the bill and anticipates that the CBA will submit a revised bill making it clear that the bill does not apply to special needs and pooled trusts or to the Department's statutory authority to determine Medicaid eligibility.

Thank you for the opportunity to provide written remarks on House Bill 7104.