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# Wisconsin Legislative Council

## ACT MEMO

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**Prepared by:** Amber Otis, Senior Staff Attorney

April 3, 2024

### 2023 Wisconsin Act 127 [2023 Senate Bill 759]

### Trust Administration, Powers of Appointment, Trust Decanting, and Digital Property

2023 Wisconsin Act 127 modifies various aspects of Wisconsin’s Trust Code, adopts two sets of laws relating to powers of appointment and trust decanting, respectively, based on recommendations by the Uniform Law Commission, and clarifies state law relating to digital property.

## TRUST ADMINISTRATION

The act modifies Wisconsin’s Trust Code, including as follows:

- Exempts from the trust code’s applicability certain qualifying tax-advantaged savings accounts for individuals with disabilities under federal tax laws, commonly referred to as the ABLÉ program.
- Defines the act of signing by providing that “sign” means doing either of the following acts with present intent to authenticate or adopt a record: executing or adopting a tangible symbol; or attaching to, or logically associating with, the record an electronic symbol, sound, or process.
- Creates the defined terms of “animal trust” and “animal protector” to apply in the context of trusts to care for an animal authorized under prior law and maintained by the act.
- Expands the definition of “beneficiary” to include identified charitable organizations that will or may receive distributions under a trust’s terms and further defines the terms “charitable interest,” “charitable organization,” “charitable purpose,” and “identified charitable organization.”
- Expands the concept of representation, such as by specifying certain types of interests that may represent and bind other types of interests, provided there is no conflict of interest.
- Clarifies that a trust’s terms may be established by court order or nonjudicial settlement agreement.
- Specifies that notice to any trustee is considered to be given to all persons serving as trustee, except notice must be given to corporate trustees or attorneys licensed in Wisconsin serving as a trustee.
- Expands the types of matters that may be addressed in a nonjudicial settlement agreement and requires that notice of any nonjudicial settlement agreement be given to the settlor, if living, the trustee, and other powerholders at least 30 days before the agreement’s proposed effective date.
- Allows a trust to be created by declaring an intent to create a trust that will later be funded by assets of the person who created the trust or by another person with legal authority to fund the trust.
- Provides that a trustee of a trust has an insurable interest in the life of an individual insured under a life insurance policy that is owned by the trustee of the trust acting in a fiduciary capacity or that designates the trust itself as the owner if certain conditions, specified in the act, are met on the date the policy is issued.
- Creates a payment claims procedure for debt of a deceased settlor, as well as more specific procedures for claims against a trust that was revocable by the settlor until the settlor’s death.

- Modifies aspects of a trustee's duty to inform and report, such as requiring a trustee to promptly furnish to the settlor a copy of the trust instrument upon request, but clarifying that the trustee has no duty to, but may, provide information about the trust's administration to the settlor, and that the trustee may limit its reports to a qualified beneficiary of a specific dollar amount or specific property to information relating to that dollar amount or property.

## **UNIFORM TRUST DECANTING ACT**

Act 127 expands Wisconsin's laws governing trust "decanting," a term used to describe the act of distributing assets from one trust to another trust. Whereas prior law allowed for decanting by a trustee in certain circumstances, Act 127 replaces those provisions by adopting the Uniform Trust Decanting Act, based on the recommended uniform legislation approved by the Uniform Law Commission.

Under the act, "decanting power" means the power of an authorized fiduciary to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust. For purposes of decanting power, an authorized fiduciary means any of the following: (1) a trustee, a directing party, or another fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more current beneficiaries; (2) a special fiduciary appointed by a court under specific authority created by the act; (3) a special-needs fiduciary, defined as a trustee or fiduciary with discretion to distribute part or all of the principal of a trust that has a beneficiary with a disability; or (4) a trust protector who has been granted a decanting power.

The act applies to a trust created before, on, or after the act's effective date, provided the trust has its principal place of administration in, or is governed by the laws of, this state. More specifically, the act applies to an express trust that is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest. However, the act does not apply to a trust held solely for charitable purposes. Subject to certain specific provisions, the act allows a trust instrument to restrict or prohibit the exercise of the decanting power.

Prior law generally allowed a trustee to appoint assets to a second trust with court approval or, upon compliance with a procedure for notice to specific persons, without court approval. The act similarly allows an authorized fiduciary to exercise the decanting power without court approval, provided certain notice requirements are met, but it expands the persons to whom notice must be provided to include certain powerholders of the second trust, as well as the attorney general in certain circumstances.

Under the act, the scope of the decanting power depends on the discretion afforded to the authorized fiduciary. Under the act, an authorized fiduciary with "limited" distributive discretion over the first trust's principal may exercise the decanting power over that principal, but the second trust must grant each beneficiary of the first trust a beneficial interest that is substantially similar to the beneficiary's beneficial interest in the first trust. In contrast, an authorized fiduciary with "expanded" distributive discretion is not subject to the same requirement, but is subject to certain limitations that apply more generally when exercising the decanting power over a first trust's principal, as specified in the act. The act also limits the use of the decanting power more generally to the extent its exercise would result in certain tax consequences.

The act also addresses the use of decanting power with specific types of trusts. For example, the act imposes certain limitations on the use of the decanting power, as well as conditions that must be met, if the first trust contains a charitable interest. Also, in a trust that has a beneficiary with a disability, the act allows a special-needs fiduciary to exercise the decanting power over the first trust's principal if the second trust is a special-needs trust that benefits the beneficiary with a disability, and the special-needs fiduciary determines that exercising the decanting power furthers the first trust's purposes.

## **UNIFORM POWERS OF APPOINTMENT ACT**

Act 127 replaces Wisconsin's prior laws governing powers of appointment by adopting the Uniform Powers of Appointment Act, based generally on the recommended uniform legislation approved by the Uniform Law Commission.

The act creates a new definition for "power of appointment," that being "a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property." The act creates other defined terms that describe different types of powers and different methods for exercising that power.

Under the act, unless an instrument's terms manifest a contrary intent, a power of appointment is all of the following: (1) a "presently exercisable" power of appointment, generally meaning that it is exercisable by the powerholder at the relevant time; (2) an "exclusionary" power of appointment, meaning that it is exercisable in favor of one or more permissible appointees to the exclusion of other permissible appointees; and (3) a "general" power of appointment, meaning it is exercisable in favor of the powerholder, his or her estate, or a creditor of either the powerholder or his or her estate. However, a power is considered to be a "nongeneral" power of appointment if: (1) it is exercisable only at the powerholder's death; and (2) the permissible appointees are a defined and limited class that does not include the powerholder's estate or creditors of the powerholder or his or her estate.

The act specifies that a power of appointment is created only if the instrument creating the power is: (1) valid under applicable law; (2) governs the disposition of the appointive property, unless created by the exercise of another power of appointment; and (3) contains terms that manifest the donor's intent to create in a powerholder a power of appointment over the appointive property exercisable in favor of a permissible appointee. The act prohibits a power of appointment from being created in a deceased individual or in an unborn or unascertained powerholder, and further specifies that if a powerholder dies without exercising or releasing the power, the power lapses.

Under the act, certain requisites must be met to exercise a power of appointment. Specifically, the instrument exercising the power must be legally valid and contain terms manifesting intent to exercise the power and satisfying the requirements of exercise, if any, imposed by the donor. The act contains various provisions that apply if a powerholder's intent is unclear, and allows a powerholder of a general power of appointment to make any appointment that the powerholder could make in disposing of his or her own property, including in trust or by creating a new power of appointment, unless otherwise prohibited. If a power of appointment is vested in two or more persons, the joint powerholders may only exercise the power of appointment unanimously. However, if one or more of the joint powerholders die, become incapable of exercising the power of appointment, or renounce, release, or disclaim the power of appointment, then the power of appointment may be exercised unanimously by the other powerholders. The act further addresses disposition of unappointed property, a powerholder's ability to revoke or amend an exercise of power, and creditors' claims on appointive property.

The act allows a powerholder to disclaim all or part of a power of appointment, as provided under certain state laws that generally govern disclaimers, and specifies authority to, and a method for, a powerholder to release a power of appointment, as well as to revoke or amend a release. The act also addresses a powerholder's ability to contract to exercise, or not to exercise a power of appointment.

## **DIGITAL PROPERTY**

### **Disclosure Authorized by Consent Instrument**

State law governs the disclosure of a deceased person's digital property, defined as an electronic record in which a person has a right or interest (but not including underlying property or liability unless the property or liability is itself an electronic record). Specifically, state law specifies that a person's use of an online tool directing disclosure of digital property to a designated recipient overrides a contrary direction by the person in a will, trust, power of attorney, or any other governing instrument.

Act 127 expands the permissible tools for directing disclosure of digital property to allow for disclosure pursuant to a consent instrument, defined as a written notarized document in physical or electronic form evidencing the user's consent to the disclosure of the contents of electronic communications to a then-acting fiduciary. However, under the act, a person's use of an online tool directing disclosure overrides a contrary direction in a consent instrument in the same manner that the online tool overrides other governing instruments under state law.

### **Classification Under Marital Property Laws**

Under state law, all property of spouses is marital property, unless the property is classified as individual property under various statutory provisions. Act 127 classifies an account and the digital property held in an account as individual property of the holding spouse, regardless of the classification of property used to create, purchase, or otherwise acquire the account and digital property held in the account, unless the nonholding spouse proves that any of the following apply:

- The account or the digital property in the account was not originally created, purchased, or otherwise acquired exclusively for the personal, noneconomic purposes of the holding spouse.
- The account or the digital property in the account has at any time been used for purposes other than the personal, noneconomic purposes of the holding spouse.

However, the act classifies as marital property any property received in exchange for such an account or the digital property in the account in the event of a sale, exchange, or other disposition, as well as any income during the marriage attributable to the account or the digital property in the account.

**Effective date:** March 23, 2024

For a full history of the bill, visit the Legislature's [bill history page](#).

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