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Testimony for the Assembly Committee on Judiciary
AB 648 Domestic Asset Protection Trusts (Legacy Trust)
January 30, 2024

Thank you Mister Chair and to the Committee members for the opportunity to share the goal of Assembly Bill 648 which is designed to provide a new level of opportunity for wealth preservation in the form referred to as a Legacy Trust.

Today's commonly utilized trusts provide significant asset protection because they contain certain provisions preventing creditors from reaching the beneficiaries' interest in the trust. However, current law also presents a challenge for the transferor, which this bill will address.

Current Wisconsin law requires that the settlor (the one who transfers their assets into the Trust) cannot also be a beneficiary under the terms of an Irrevocable Trust. The parties transferring the assets to the Trust must choose between the one who controls the Trust or being a beneficiary. They cannot be both and therein lies a conflict. We can probably identify many individuals who would prefer to retain control both as a Trustee and as a beneficiary.

I am one. Today I am married to Luanne following the passing of our respective spouses. We each brought our various assets into our marriage. We are in the process of creating a Trust but are suspending this process since we find the benefits of the Legacy Trust preferential to existing law. For others, this tool is also particularly valuable as an alternative to a prenuptial agreement.

A Legacy Trust will protect the estate's assets transferred into the Trust from various claims, subject to an 18-month lookback, which will protect legitimate creditor claims. The language of the Trust will protect creditors from pre-existing debts, judgments, or other claims as outlined in the language of this bill. The bill's language protects child support claims and does not provide protection for the transfer of assets in a fraudulent manner

Twenty other states have enacted legislation enabling these trusts, with bipartisan support in both red and blue states. Examples include Ohio, where it passed unanimously, and Hawaii, where it passed 71-1.

Legacy trusts are growing in popularity, and the longer Wisconsin waits to adopt this legislation, the more ground we will lose to other states in this emerging and competitive market. An estimated $2 billion in assets are currently held in legacy trusts in the state of Delaware alone. We have testimony from other states that illustrate how much money is being transferred into Legacy Trusts.

As an early adopter of this legislation in the upper Midwest, Wisconsin will stand to both benefit our citizens but also attract business from the regional and national trust market. We will also retain assets that might otherwise end up in other states with more favorable trust laws. Our state's financial services sector as well as our income tax base will benefit as a result.

Thank you to Senator Knodl for bringing this opportunity to our attention. We would be happy to take your questions,

WISCONSIN STATE SENATE
DAN KNODL
STATE SENATOR • 8TH DISTRICT

Assembly Bill 648
Public Testimony
Assembly Committee on Judiciary
January 30, 2024

Thank you, members of the committee, for hearing my testimony in favor of Assembly Bill 648.

We are here today to bring legacy trusts to Wisconsin. In some states, these are known as self-settled trusts or domestic asset protection trusts. In all cases, these trusts allow for the grantor to serve as the beneficiary of the trust.

This arrangement will modernize our wealth management laws to make Wisconsin competitive with other states in the trust market. If this bill passes, Wisconsin will join the growing list of both red and blue states that have adopted legacy trusts. The first state to do so was Alaska back in 1997. In drafting this legislation, we drew heavily from the experience of the states with the greatest success stories: Ohio, Delaware, South Dakota, and Nevada.

These states have decades of experience with these trusts. Along with my remarks, I have submitted testimony we have received from experts in states that have enacted this legislation. They can attest to the value of this arrangement for both the individual as well as the broader economy. In addition to the testimonies from other states, we are also submitting written testimony from Wisconsin-based trust attorney Eido Walny, who regretfully was unable to make it today.

Legacy trusts have a number of valuable applications. One of the most common uses is as an alternative to a prenuptial agreement. Legacy trusts can provide a way for the growing number of individuals remarrying late in life to retain control of their assets will pass them on to their adult children.

I would like to elaborate on a few details of this legislation. First, the bill includes a lookback period of eighteen months. This will prevent individuals from making fraudulent conveyances intended to defraud expected creditors. These trusts are only intended to serve legacy planning for unforeseen circumstances. Our legislation also ensures that assets in these trusts are not shielded against child support claims. It is also important to note that legacy trusts do not protect assets in cases of bankruptcy.

While over a third of our fellow states have passed this legislation, our neighboring states of Illinois, Iowa, and Minnesota have not. This presents Wisconsin with an opportunity to capture their business. Assets placed in Wisconsin-based legacy trusts will become part of our tax base, and the increased volume of business will benefit our financial services sector.

I would like to thank Representative O'Connor for leading this bill in the Assembly side. Thank you for your time, and I would be happy to answer any questions you may have.

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Jonathan G. Blattmachr
Alaska

I drafted the first self-settled trust legislation in the United States. It was adopted in Alaska in 1997. One newspaper article said it was the most important development in Estate Planning in a decade. My goal in seeking this legislation was two-fold. First, I wanted a jurisdiction in the United States that would permit an individual to be able to create a trust for himself or herself without subjecting the property to claims of the creditors of the person creating the trust provided the person was not attempting to defraud a known creditor. I wanted this because Federal tax law held that the property would permanently be included in the individual's gross estate for estate tax purposes if his or her creditors could attach the trust property. Second, although there were some jurisdictions outside of America that permitted that, I did not want assets to be placed outside of the United States. The estate planning business in Alaska for Alaskans and for families in other states has blossomed by this legislation. I have been advised that hundreds of jobs in Alaska have been created on account of this legislation.

Stephen J. Oshins
Nevada

You asked me how self-settled trusts have been beneficial for the State of Nevada. Nevada has now had this legislation for roughly 24 years. I can tell you it has been spectacular for the State of Nevada in that it has created a lot more trusts here, which in turn has created a whole lot of jobs for trust officers, estate planning attorneys and accountants, and related fields. It also keeps our residents (and their assets) here since many of them would otherwise leave the State of Nevada and go live in one of the 21 states that does allow these types of trusts.

I can tell you that I have personally referred roughly 4,000 trusts to my preferred trust company here in Nevada over roughly 22 years - and of those 4,000 trusts, my guess is that 60% to 80% of them (call it 3,000) are either regular self-settled asset protection trusts or a version of this trust that I call a "Hybrid" self-settled trust where it can be turned into such a trust.

Without hesitation, I can confirm that the authority to do self-settled trusts in Nevada has been great for my business, has been great for other professionals, has been great for the State of Nevada - and most importantly, we have helped a lot of people in the process.

Al W. King III
South Dakota

I have been in the trust industry for over 33 years. My trust career includes the establishment of a State chartered South Dakota Trust Company within a global money center bank as well as Co – Founding my own trust company 21 years ago, which has grown to $140 billion in assets under administration. My Co-founder and I have been actively involved in the development of South Dakota modern trust legislation since 1995. South Dakota has been a leader in the modern trust industry along with Alaska, Delaware, Nevada and Wyoming. The modern trusts laws have been very good for the State of South Dakota resulting in the creation of many job opportunities as well as additional business for the law firms, CPA firms, banks, investment firms and others.

Self-settled legislation has been present in the United States since 1997 with Alaska being the first state to pass such legislation. South Dakota followed suit in 2005, as have more than 17 other states since Alaska. During that time, countless individuals and families have been able to benefit from the structuring allowed for by such legislation, not only in the form of wealth protection, but mostly from its critical use in legacy planning. Many self-settled trusts are established as irrevocable dynasty trusts (i.e. excluded from the estate). The self-settled trust statute allows a trust grantor to be a permissible discretionary beneficiary of an irrevocable trust excluded from their estate. With the federal estate, gift and generation-skipping transfer tax exemptions at $13.61m per person in 2024, many families gain comfort knowing that they can efficiently gift away their assets to the next generations while also potentially being a permissible discretionary beneficiary in the remote case of hardship down the road. This powerful giving and legacy planning is often the critical component that allows lifetime giving to the next generation for families who may not otherwise feel comfortable doing so during their lifetime. In many cases, those families that do not have access to self-settled legislation, are left to legacy planning at death (i.e. once they are no longer with those in which they wish to provide for and guide). Additionally, while wealth preservation is also a critical component of self-settled planning, these trusts are generally not meant to avoid or remove existing creditors or obligations that are in place at the time they are established. Instead, self-settled trusts are typically meant to provide protection for an unforeseen unknown. As such, self-settled legislation would provide Wisconsin families powerful planning opportunities for their legacy, not only for today, but for generations to come.

Self-settled trusts can also be a very important part of a client's legacy planning allowing them to preserve and protect important family values. Many people do not know the names of their great great grandparents or even the names of their great grandparents. Not knowing or remembering the great grandparents names may be important to some, but not knowing or remembering family values is very important to a vast majority of families. The New York Times reported that 75% of people would like their family values to stay with the family wealth i.e. inheritance. More than $70 trillion is due to pass from Baby Boomers to Millennials and Generation Z. 61% of Baby Boomer parents are not confident that their children are able to handle their inheritance. The self-settled trust provides an important solution allowing grantors to feel comfortable making lifetime gifts to irrevocable trusts thus allowing them to mentor their families by promoting both fiscal and social responsibility in the family.

The increases in the S & P 500 as well as real estate has put many baby boomers in a position to want to "give while living" versus waiting until death. The self-settled trust along with the high Federal estate, gift and generation skipping tax exemption allows them to accomplish this goal. As a permissible beneficiary of the trust, the grantor can access the trust for hardship distributions, if needed. This gives the grantor more comfort to gift to trusts irrevocably while they are alive in order to get the many non-tax benefits. One very important non-tax benefit is the ability of the self-settled trust to make distributions to charities. This is very important to many families.

Trust planning can provide for both intergenerational family needs and desires as well as encourage behaviors in future generations that are consistent with family values. The self-settled

trust terms, combined with the ability of senior family members to mentor junior family members, provide a roadmap to perpetuate family goals and instruct subsequent generations about the values the family holds in high regard, all allowing for both the protection and purpose for the family assets. Consequently, the self-settled trust allows inheritance to be a process not an event.

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Tony Evers
Governor

Peter W. Barca
Secretary of Revenue

Information Only Testimony on Assembly Bill 648
January 30, 2024
Peter Barca, Secretary of the Department of Revenue

Good morning, Chairman Tusler, ranking member Anderson and members of the Assembly Judiciary Committee. I would like to thank Representative O'Connor and Senator Knodl for sponsoring this piece of legislation. I appreciate the opportunity to provide written testimony for information only on Assembly Bill 648, creating domestic asset protection trusts.

This bill creates a new type of trust with greater asset-protection provisions, called a legacy trust. The protections being created go substantially beyond the existing protections provided in law for trusts, under Chapter 701, and include the creation of self-serving trusts. The bill also makes it difficult to substantiate claims of fraudulent conveyances, in the event the individual is attempting to hide assets. As drafted, the bill will assist individuals in avoiding DOR collections (and other creditors) on legacy trust assets and threatens to thwart the ability of the DOR to collect on public debt.

We outline our concerns below:

1. **The legacy trust allows individuals to create their own self-serving trusts to avoid taxes and all kinds of other debts.** Currently, individuals may create a trust for another individual, such as a disabled child, and that trust is protected from creditors. However, under existing law, individuals are NOT allowed to create a trust for themselves and avoid paying their bills and their taxes by hiding their assets in a trust.

2. **The bill increases the creditor burden of proof to prove the transferor's ill intent, making it difficult, if not impossible, for DOR to collect taxes from the individual creating the legacy trust.**

3. **The bill provides a VERY short time period for DOR to question and legally contest the transfer of property to a trust – only 6 months (if a transfer to a trust is public record) to 18 months from the date of the transfer to the trust.**

    a. The short time period is even shorter, because it starts running on the date that the person conveying real estate to a trust record that at the register of deeds – DOR and most creditors are not routinely reviewing and vetting such conveyances – DOR and most creditors lack the resources to do so.

    b. The 6-18 month deadline for lawsuits would have a substantial impact on our ability to successfully challenge fraudulent conveyances to avoid paying income tax assessments resulting from audits.

Because of the potential for a substantial negative impact to revenue collections, and thus the state, DOR respectfully requests that the Legislature exclude state tax liability collections from the coverage of this statute.

Thanks again for your consideration. As always, I'm available for any questions.

WALNY LEGAL GROUP LLC

January 29, 2024

RE: Self-Settled Trust Legislation

Dear Chairman Tusler and Members of the Assembly Judiciary Committee:

My name is Eido Walny and I am the founder and managing partner of Walny Legal Group LLC, a boutique estate planning law firm based in Milwaukee but with a national clientele. I have previously served as the President of the Milwaukee Estate Planning Forum and on the national board of directors for the National Association of Estate Planners and Councils. I am the former editor-in-chief of the NAEPC Journal. I am also the national estate planning editor for Investopedia.com, a national financial literacy wiki website.

For the last several years, I have been working hard to bring self-settled trusts to the State of Wisconsin. These sorts of trusts have been around for over 25 years, dating back to 1997 when Alaska passed the first self-settled trust legislation. Since then, at least 21 other states have followed suit. It is now time for Wisconsin to join that group lest we be left behind by our neighboring and peer states.

You may be familiar with trusts. You may have a revocable trust yourself. Revocable trusts are wonderful instruments for succession and work far better than wills in most circumstances. You can set up very useful, pragmatic, irrevocable trusts for your children by way of your revocable trust – but you cannot set up such a trust for yourself. That makes no sense and it is time for that to change. A self-settled trust is an irrevocable trust where the settlor can name themself as a beneficiary. In that regard, it is like a common revocable trust, but with the benefits that come with the creation of an irrevocable trust.

There are two primary reasons I think self-settled trust legislation is very important:

First, 21 other states now have this legislation in place. For my Wisconsin clients who want to avail themselves of these sorts of laws, our peer states have graciously invited Wisconsin residents to move assets out of Wisconsin to these other states and/or hire in-state trustees in these peer states. That is costing Wisconsin dearly. Jobs and revenue are being lost to the states that have beat us to the punch on this legislation, including the midwestern states of Michigan, Ohio, Indiana, and Missouri.

We now have an opportunity to turn the tables and turn the tides. It is notable that our neighbors of Iowa, Illinois, and Minnesota do not have this legislation in place. Since we share significant borders with these states, we will now offer their residents an opportunity to avail themselves of Wisconsin's self-settled trusts by bringing assets in-state to Wisconsin and/or hiring in-state trustees here. In either case, we will benefit as a state from the influx of jobs and assets. Notwithstanding local and national competition, we will also be an attractive jurisdiction because neighboring residents will easily be able to meet with professionals (as opposed to, say, Alaska or Missouri) and our legislation is highly competitive compared to what is offered elsewhere. The benefit of having waited this long for the legislation is that we can see what others have done and do it as good or better.

Second, and perhaps most practically, is that self-settled trusts will offer individuals contemplating marriage a significant alternative to prenuptial planning. Currently, prenuptial planning requires both marrying individuals to agree to enter into a pre-marital contract. If one party refuses to enter into the contract, the other party has two options: A)

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do not get married; or B) go forward into the marriage with no pre-nup. These are both losing positions and should not be the only viable outcomes available.

Enter self-settled trusts as a new alternative option. Before entering into a marriage, one future spouse will now be able to put some of their own individual, pre-marital property into a trust. This trust would protect those assets from entering the marital domain, and thus would not be divisible in the event of a divorce. The trust would only encapsulate the individual, pre-marital assets of the settlor-spouse – meaning that post-marriage marital property would still be shared and thus be divisible in the event of divorce. This fact also does not preclude the need for a pre-nup. A pre-nup can cover far more marital matters (e.g. marital property and children) than a trust could, but the trust ends the current problem of all-or-nothing that negotiating future spouses face with traditional pre-nups.

By adding Wisconsin to the growing list of states offering self-settled trusts, we will bring the benefits of this legislation to a wider audience. Currently I am one of a small group of lawyers who know how to do these trusts in other jurisdictions. As a result, I can charge a premium for my services. With legislation, a much larger group of practitioners will enter the marketplace at various cost-points. Coupled with the idea that assets can stay put in Wisconsin rather than move to, say, Nevada, the reduced costs caused by increased competition will mean that far more people will be able to avail themselves to the benefits of the legislation.

Finally, I would be remiss not to touch on the financial benefits to the State itself. I participated in the budget process with Governor Evers last year and was struck by the number of groups and individuals who promised financial returns to Wisconsin, but only if they got funding up front. Funding and revenue is a precious resource. It is hard to find new places to generate revenue, but self-settled trusts offer that very benefit to Wisconsin. These trusts require your authorization through legislation but require not a penny of funding from any government entity. Once this authorization is granted, assets and jobs flowing out of the state to one of the other 21 jurisdictions who offer this legislation will virtually stop. Assets and jobs will instead flow into the state from places like Chicago and Minneapolis. States like Delaware, Alaska and South Dakota generate hundreds of millions of dollars in revenue annually by way of their trust industries. Even a neighboring state like Ohio, a relative newcomer to the self-settled trust field, estimates that it generates roughly $20-30 million in fresh annual income tax revenue as a result of the new trusts created in Ohio. This legislation will have a tangible economic benefit to Wisconsin and keep our assets here while growing any number of jobs, both white-collar and otherwise.

It has been over a quarter-century since these laws first came on the books in other states. Wisconsin is losing out in numerous ways to the states who have gotten ahead of us on self-settled trusts. The legislation I have worked so hard on will change that and make us competitive with some of the best trust jurisdictions in the country. That fact will benefit every resident of the State of Wisconsin and the state itself.

I'm sorry I could not join you in person since I am acting as a court-ordered mediator and thus unavailable. But I would be more than happy to answer any questions or concerns that the Committee may have of me. Please just call or email and I will promptly return your inquiry.

I thank you for your consideration and look forward to working with you on this legislation.

Sincerely,

Eido M. Walny
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REAL PROPERTY, PROBATE & TRUST LAW SECTION

Date: January 30, 2024
To: Assembly Committee on Judiciary
Re: AB 648/SB 667– Domestic Asset Protection Trusts

The Real Property, Probate and Trust (RPPT) Section of the State Bar of Wisconsin continues to study and review AB 648/SB 667 dealing with domestic asset protection trusts. Members of RPPT support the ongoing review of Wisconsin's trust laws to both determine beneficial trends in the various states that would be prudent to follow and to provide Wisconsin residents with estate and trust planning strategies that allow appropriate benefits. RPPT has been generally supportive on the concept of a domestic asset protection trusts, but believe that the language AB 648/SB 667 as currently drafted and its application need significant further study and review before we can recommend the legislature adopt it.

Over the past decade, RPPT attorneys with extensive trust law knowledge established a study committee of broad expertise to review various trust changes that would modernize and update our state's laws. The product of that working group was the adoption of the Uniform Trust Code in 2014 and now an additional legislative effort that is pending that would update Chapter 701 further and additionally adopt the Uniform Powers of Appointment Act and the Uniform Trust Decanting Act. That legislation (AB 803) unanimously passed out of committee and is awaiting approval by the State Assembly. Additional study committees have already started work to review supplementary trust laws including the Uniform Directed Trust Act, Uniform Principal and Income Act and finally a review of Domestic Asset Protection Trusts (DAPT). All these new review projects need to be in alignment so that all this language and trust application can work in collaboration to get a policy and approach that works for everyone.

The DAPT Committee working on the bill recognizes that while it is important, this new trust concept is a significant departure from centuries old trust principles. AB 648/SB 667 requires additional deliberation and if passed as drafted would create several unintended issues. In reviewing the current bill a few of the items that our committee has concerns with include:

1.) Definitions – These all need reviewed and compared from Chapter 701, AB 803/SB 759 and from the DAPT legislation (AB 648/SB 667).
2.) Portability - Rules regarding out of state DAPTs and determination of which provisions may not be (federal) constitutionally "portable" into or out of Wisconsin.
3.) Creditor Claims Language – When assets within a DAPT are attachable or not is very important to their effectiveness, but also strikes a certain balance. The creditor claims statutes included in the revisions to Chapter 701 are not aligned with DAPTs, whether during or after a trust creator's lifetime.
4.) Spendthrift Provisions – This language does not align with both Chapter 701 and AB 803
5.) Spousal Support Issues/Post-Nuptial Agreements/Child Support – The present bill presents the opportunities for abuse by those seeking to avoid spousal and child support and additional dislocations are likely given our marital property system and the sourcing of the draft legislation from a non-marital property system. As to the latter, the Bar has had a long-standing practice of referring such matters to the academic and professional participants in Marital Property Law in Wisconsin.

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As with all trusts, there are pros and cons that need to be appropriately weighed and discussed as part of the estate planning process. DAPTs are still a relatively new trust concept (first state adopted DAPT in 1997) and have only been partially tested to date in courts around the United States. This legislation could have very meaningful implications both positive and negative on trust creators, trust companies and even potentially on the financial services industry that provides credit and capital to attract individuals and businesses to the state. Our Trust Committee is more than willing to review these issues and provide further recommendations. But again, this is a complicated area of trust law and that should include the multiple professionals and perspectives.

With respect to the economic impact of the proposed DAPT language, the assumption presented to the legislature is that there would be a significant inflow of assets to Wisconsin trusts. The DAPT experience in other states would suggest otherwise. Larger trust institutions, for instance, which would be the primary drivers of large-scale asset placements, continue to advocate for DAPTs in Delaware and South Dakota even as DAPT statutes are present. That would suggest that the primary use of Wisconsin DAPTs would be within the state itself – and therefore not creating a net inflow of capital for investment in the state.

We have appreciated the authors' openness to dialogue and RPPT is open to ongoing dialogue, but will withhold making a final judgment on the legislation until we are able to further evaluate any proposed amendments.

If you have any questions, please contact Cale Battles, Government Relations Coordinator at the State Bar of Wisconsin, at cbattles@wisbar.org or (608) 695-5686.

The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.

The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.

Dear Committee Chairperson,

My name is Robert Keebler and I am a nationally recognized CPA and estate planner based in Green Bay and have taught estate planning, tax and legal education in 46 states (my curriculum vitae is attached). I am submitting my written support of self-settled trusts in the State of Wisconsin. This legislation will bring Wisconsin into compliance with at least 21 other states who offer self-settled trusts in their states.

The issue of self-settled trusts is not political. This is an issue that has been passed in red states, blue states, and purple states. In fact, both Alabama and Hawaii, two polar opposites politically, both have passed this legislation nearly unanimously. And for good reason: The economic benefits to the State of Wisconsin would be tremendous. In fact, we estimate that the economic benefit of these trusts to the State would be measured in the hundreds of millions of dollars in new revenue. This would come from several sources, including assets from neighboring states that are brought into our state, new jobs created, and new infrastructure. All of this can be done without any expenditure whatsoever by the state. This is truly a rare opportunity for all of us.

You need not trust my own experience to see the economic impact of self-settled trusts on the jurisdictions that have them. Alaska had the first self-settled trust legislation in 1997. Alaska now has a $640 billion trust industry. Delaware, a state known for friendly business statutes, now has a trust industry that contributes roughly $1 billion to the Delaware economy on an annual basis. I myself recently spoke in South Dakota and saw firsthand the economic impact the South Dakota trust industry has had in places like Sioux Falls. It is undeniable.

Today, Wisconsin lacks the legislative authorization to create these trusts. That means that our residents are either not benefiting from them or are moving their own assets out of the state to places like Alaska, Delaware, Nevada and South Dakota. We are not net neutral by not having legislation because we are actually losing ground and losing assets to the jurisdictions that have the legislation.

There are others who can speak more to the legal benefits of this legislation, but as a CPA, I can tell you that this is a tremendous opportunity for the State of Wisconsin. Rarely do you have an opportunity to generate revenue, grow business, and better the lives of Wisconsinites at no cost. I would strongly urge you to pass this legislation.

Thank you for your consideration,

R S Keebler CPA/PFS, MST

Robert S. Keebler, CPA/PFS, MST, AEP (Distinguished)