

2011 HOUSE JUDICIARY

HB 1135

2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1135
January 11, 2011
12732

☐ Conference Committee

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will open the hearing on HB 1135.

Gail Hagerty, South Central District Court Judge: I was on the Commission for Uniform State Laws. HB 1135 amends the trust code with regard to interest that a trustee may insure. There was some case law in Virginia that indicated that a trustee couldn't insure certain interests, including the life of the settlor. Although, there is some feeling that that may not be very good law and it may not be the law in all of the states. There was an amendment drafted to clarify that the trustee of a trust would be able to insure the life of the settlor, and then if other people closely related to the trust. That's all this amendment does and I think the people who work in trust law are comfortable that it is something that will bring some clarity and avoid future disputes about this.

Chairman DeKrey: Thank you. Further testimony in support of HB 1135.

Malcolm Brown, member of Real Property and Probate section of the State Bar Association: Our section also supports this amendment. I was on the committee that worked on the Uniform Trust Code between the last two sessions. I visited with some of the other members and we felt that this was a little too restrictive with regard to stopping at stepchildren. I can think of instances where a couple got married, one of them had children from a previous marriage, the other one did not. The non-parent did not adopt the children, but wanted to leave them something in a trust or a will. This stops with stepchildren. The suggestion was in the last line, on line 23, that you might consider adding "issue of the stepchildren to the second degree" which would be step grandchildren. For instance, if a stepchild was the beneficiary of an insurable interest in a trust like this died, before the trustor, presumably then the insurance company would not pay. We just felt that there ought to be an opportunity to provide for step grandchildren, rather than just stop there. Otherwise, we support this bill.

Rep. Koppelman: The term, "issue of the stepchildren to the second degree" in the scenario you described, are they stepchildren if they aren't adopted.

Malcolm Brown: Stepchildren obviously are not adopted. If they are adopted, they are in fact legally children of the decedent.

Rep. Koppelman: So back to your original point that if two people who have been previously married, one with children and one does not, the person without the children doesn't adopt that new spouse's children, this change would not affect that, would it.

Malcolm Brown: It doesn't make the spouse's children, the decedent's children, but by going to the second degree, would permit the decedent/trustor to provide for them in case the stepchild dies before the trustor.

Chairman DeKrey: Thank you. Further testimony in support.

Marilyn Foss, General Counsel for the ND Bankers Association: I think that most people thought trusts did have insurable interests and could use them to purchase life insurance policies. That is what this is about, because many trust and estate arrangements are funded by life insurance. It was startling to learn of the decision on the East Coast. We think this is a change that is appropriate and puts in statute what we all thought was already there. We do support it.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition. We will close the hearing. What are the committee's wishes in regard to HB 1135?

Rep. Delmore: I move a Do Pass motion.

Rep. Kingsbury: Seconded.

12 YES 0 NO 2 ABSENT

DO PASS

CARRIER: Rep. Klemin

2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1135
January 25, 2011
13372

☐ Conference Committee

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will take a look at HB 1135. This bill was returned to us from the House floor, because IBL chairman had some questions about the bill interfering with legislation we passed last session. I talked to him today during session, and he said that there isn't a problem, so that we can send that bill back to the floor.

Rep. Klemin: I have an amendment (see attached).

Rep. Kretschmar: I move HB 1135 back to the committee for reconsideration.

Rep. Delmore: Second.

Chairman DeKrey: Voice vote, motion carried. We now have HB 1135 before us.

Rep. Klemin: I forwarded to each of you the email from Mary Hoberg, Insurance Dept., indicating that, in her view/interpretation, that no amendment to HB 1135 was needed as long as the bill is not changed from its form as introduced. I talked to Rep. Keiser about this; just to make it crystal clear that we're not trying to do anything in HB 1135 that's going to violate the provisions of 26.1-33.4, which has to do with life settlements. All the amendment does is to add a new subsection 3. That way if this issue does get debated over in the Senate or the Senate tries to amend HB 1135, then Mary Hoberg's opinion is that this isn't going to be continued. Just to make it clear that we're not trying to do anything on life settlements I had this amendment drafted and did discuss it with Rep. Keiser, and I would move the amendment.

Rep. Hogan: Second.

Chairman DeKrey: Voice vote, motion carried. We now have HB 1135 before us as amended. What are the committee's wishes in regard to HB 1135.

Rep. Klemin: I move a Do Pass as amended.

Rep. Boehning: Seconded.

11 YES 0 NO 3 ABSENT DO PASS AS AMENDED CARRIER: Rep. Klemin

Date: 4/11/11
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1135

House JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Delmore Seconded By Rep. Kingsbury

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Guggisberg	✓	
Rep. Beadle	Ø		Rep. Hogan	✓	
Rep. Boehning	✓		Rep. Onstad	✓	
Rep. Brabandt	✓				
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Maragos	Ø				
Rep. Steiner	✓				

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Klemin

If the vote is on an amendment, briefly indicate intent:

Ø not present for the vote.

January 25, 2011

VR
1/26/11

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1135

Page 1, after line 23, insert:

"3. This section does not authorize any practice that is prohibited by chapter 26.1-33.4."

Renumber accordingly

Date: 1/25/11
Roll Call Vote # 4p

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1135

House JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 11.0164.01001 .02000

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Klemin Seconded By Rep. Boehning

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Guggisberg	✓	
Rep. Beadle	✓		Rep. Hogan	✓	
Rep. Boehning	✓		Rep. Onstad		
Rep. Brabandt	✓				
Rep. Kingsbury	✓				
Rep. Koppelman					
Rep. Kretschmar	✓				
Rep. Maragos					
Rep. Steiner	✓				

Total (Yes) 11 No 0

Absent 3

Floor Assignment Rep. Klemin

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1135: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO PASS**
(12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). HB 1135 was placed on the
Eleventh order on the calendar.

REPORT OF STANDING COMMITTEE

HB 1135: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (11 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). HB 1135 was placed on the Sixth order on the calendar.

Page 1, after line 23, insert:

"3. This section does not authorize any practice that is prohibited by chapter 26.1-33.4."

Renumber accordingly

2011 SENATE JUDICIARY

HB 1135

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

HB1135
2/15/11
Job #14559

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the insurable interest of a trustee.

Minutes:

There is attached written testimony

Senator Nething – Chairman

Representative Klemin – Introduces the bill – See written testimony.

Senator Nething – Asks him about the House amendment. He asks about the opinion of the Insurance Commissioner that this bill did not authorize a life settlement contract through the use of a trust.

Representative Klemin – Responds that is correct but in consideration of the issue they decided to make it clear that they are not doing anything that is prohibited under that section of the insurance code. He explains life settlement contracts.

Senator Nelson – Asks for a “real life for instance”, what can you do as a trustee of a trust.

Representative Klemin – Replies he can insure the life of the person that created the trust.

The proceeds must be for the benefit of the trust beneficiaries and delineates that those trust beneficiaries must have an insurable interest in the life of the insured. He goes on to explain the language and degrees in our insurable interest statute.

Senator Nelson – Asks what is new about this.

Representative Klemin – Replies there isn't anything new. He says they thought this was the case but it wasn't stated this way. He explains a court out in Virginia interpreting Maryland law that says you can't do this. The Uniform Law Commission reviewed the issue and decided it should be in the Uniform Trust Code.

Senator Sorvaag – Asks when this would be used.

Representative Klemin- Says life insurance is a common estate planning tool and is intended to provide funds to carry on whatever is intended.

Senator Sorvaag – He asks if the reason is so they pay the premiums with proceeds from the trust.

Representative Klemin – Replies it is an option.

Senator Nething – Says the applicability would come where someone has placed all of their property in a trust, they have no assets left to buy insurance themselves, now they can use the trust proceeds under this law to provide that insurance for whatever reason there may be, grandchildren, great-grandchildren, pay off taxes, pay off mortgage or whatever it might be.

The committee discusses different scenarios that may benefit from this.

Marilyn Foss – General Counsel for Bankers Association – In support of the bill, she says this is a law we already thought was there. She then explains reasons why you would set up trust and some of the different kinds of trusts there are.

Bill Neuman – Executive Director of the Bar Association – Supports this bill.

Oppose – 0
Neutral – 0

Close the hearing on 1135.

Senator Olafson moves for a do pass

Senator Sorvaag seconds

Roll call vote
5 yes, 0 no, 1 absent

Senator Nelson will carry

Date: 2/15
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1135

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Olafson Seconded By Senator Sorvaag

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman	X		Carolyn Nelson	X	
Curtis Olafson - V. Chairman	X				
Stanley Lyson	X				
Margaret Sitte	A				
Ronald Sorvaag	X				

Total (Yes) 5 No 6

Absent 1

Floor Assignment Senator Nelson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1135, as engrossed: Judiciary Committee (Sen. Nething, Chairman) recommends **DO PASS** (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed HB 1135 was placed on the Fourteenth order on the calendar.

2011 TESTIMONY

HB 1135

Prepared for: Rep. Larry Klemin

Prepared by: Jessica Braun, Legislative Intern, House Judiciary

PROPOSED AMENDMENT TO HOUSE BILL 1135

Page 1, after line 23, insert:

"3. Nothing in this section authorizes a practice prohibited by chapter 26.1-33.4."

HOUSE BILL NO. 1135
TESTIMONY OF REP. LAWRENCE R. KLEMIN
SENATE JUDICIARY COMMITTEE
FEBRUARY 15, 2011

Mr. Chairman and members of the Senate Judiciary Committee. I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am here today to testify in support of House Bill 1135.

House Bill 1135 was introduced at the request of the North Dakota Commission on Uniform State Laws and amends the Uniform Trust Code that was enacted by the Legislature in 2007. The bill relates to the insurable interest of a trustee in a life insurance policy. Existing North Dakota law defines insurable interest and requires that a person who purchases life insurance on the life of another person must have an insurable interest in the person whose life is being insured.

This bill clarifies that a trustee of a trust has an insurable interest in the life of the person who created the trust, who is known as the settlor. The trustee can therefore purchase life insurance on that person. Life insurance trusts are a standard estate planning tool because proceeds of an irrevocable life insurance trust are not subject to estate taxes.

The insurable interest amendments to the Uniform Trust Code came about after a Virginia federal district court applying Maryland law held that a trust did not have an insurable interest in the life of an insured who was the person who created the trust. The Maryland Legislature then enacted a law clarifying the circumstances when a trust has an insurable interest in another's life. Several other states then also amended their laws. The Uniform Law Commission then studied the issue and approved these insurable interest amendments to the Uniform Trust Code in

2010 so that all states could consider and adopt uniform language.

The language in subsection 3 of the bill was added in the House to clarify that the insurable interest amendments to the Uniform Trust Code do not authorize anything prohibited by chapter 26.1-33.4. This chapter deals with life settlement contracts whereby people would invest in the life insurance proceeds on the life of another person, particularly chronically ill or terminally ill persons. The House obtained an opinion from the Insurance Commissioner that House Bill 1135 did not authorize a life settlement contract through the use of a trust, however we added subsection 3 just to make it clear in case the question ever arises.

Mr. Chairman and members of the committee, on behalf of the Uniform Law Commission, I encourage you to recommend "do pass" on House Bill 1135.

(2)

D R A F T
FOR APPROVAL

**INSURABLE INTEREST AMENDMENTS
TO THE UNIFORM TRUST CODE**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-NINETEENTH YEAR
CHICAGO, ILLINOIS
JULY 9 - JULY 16, 2010

**INSURABLE INTEREST AMENDMENTS
TO THE UNIFORM TRUST CODE**

WITH PREFATORY NOTE AND COMMENTS

Copyright ©2010
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

**DRAFTING COMMITTEE ON INSURABLE INTERESTS AMENDMENTS
TO THE UNIFORM TRUST CODE**

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in drafting this Act consists of the following individuals:

ROGER C. HENDERSON, 5861 N. Paseo Niquel, Tucson, AZ 85718, *Chair*
TURNER P. BERRY, 2700 PNC Plaza, Louisville, KY 40202
RICHARD C. HITE, 100 N. Broadway, Suite 950, Wichita, KS 67202
STANLEY C. KENT, 90 S. Cascade Ave., Suite 1210, Colorado Springs, CO 80903
NEAL OSSEN, 500 Mountain Rd., West Hartford, CT 06117
STEPHEN C. TAYLOR, 810 1st St. NE, Suite 701, Washington, DC 20002
SUZANNE BROWN WALSH, P.O. Box 271820, West Hartford, CT 06127
ROBERT H. JERRY, Frederic G. Levin College of Law, SW 2nd Ave. at SW 25th St.,
Gainesville, FL 32611, *Reporter*

EX OFFICIO

ROBERT A. STEIN, University of Minnesota Law School, 229 19th Ave. South, Minneapolis,
MN 55455, *President*
BRIAN K. FLOWERS, 1350 Pennsylvania Ave., NW, Suite 4, Washington, DC 20004, *Division
Chair*

AMERICAN BAR ASSOCIATION ADVISOR

DAVID S. NEUFELD, 555 US Highway 1 South, Suite 230, Iselin, NJ 08830, *ABA Advisor*
DONALD O. JANSEN, 1301 McKinney St., Suite 5100, Houston, TX 77010-3095, *ABA Section
Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.nccusl.org

1 **INSURABLE INTERESTS AMENDMENTS TO THE UNIFORM TRUST CODE**

2
3 **[SECTION 113. INSURABLE INTEREST OF TRUSTEE.]**

4 (a) In this section, “settlor” means a person, including a person for which a fiduciary or
5 agent is acting, that executes the trust instrument.

6 (b) A trustee of a trust has an insurable interest in the life of an individual insured under a
7 life insurance policy owned by the trust or the trustee of the trust acting in a fiduciary capacity if,
8 on the date the policy is issued:

9 (1) the insured is:

10 (A) a settlor of the trust; or

11 (B) an individual in whom a settlor of the trust has, or would have had if
12 living at the time the policy was issued, an insurable interest; and

13 (2) the life insurance proceeds are primarily for the benefit of trust beneficiaries
14 that have[:

15 (A)] an insurable interest in the life of the insured [; or

16 (B) a substantial interest engendered by love and affection in the
17 continuation of the life of the insured and, if not already included under subparagraph (A), who
18 are:

19 (i) related within the third degree or closer, as measured by the
20 civil law system of determining degrees of relation, either by blood or law, to the insured; or

21 (ii) stepchildren of the insured].]

22 **Comment**

23
24 Every state requires, either as a matter of statutory or common law, that a purchaser of
25 life insurance on another individual have an insurable interest in the life of the insured. See
26 generally Robert H. Jerry, II & Douglas R. Richmond, Understanding Insurance Law, §§ 40, 43

(LexisNexis Publishing, 4 ed., 2007), at 273-77, 293-98. The definition of insurable interest became a matter of widespread concern among trust and estate planners after *Chawla ex rel Giesinger v. Transamerica Occidental Life Insurance Co.*, 2005 WL 405405 (E.D. Va. 2005), aff'd in part, vac'd in part, 440 F.3d 639 (4th Cir. 2006), where a Virginia federal district court applying Maryland law held that a trust did not have an insurable interest in the life of the insured who was the settlor and the creator of the trust. This portion of the district court's decision was subsequently vacated by the Fourth Circuit when holding that the district court's decision should be affirmed on other grounds, but the appellate decision did not question or criticize the district court's insurable interest analysis. The Maryland legislature subsequently enacted a statute in the state's insurance code clarifying the circumstances when a trust has an insurable interest in another's life, and several other states have enacted various forms of statutory clarification designed to address the "*Chawla* problem." During this process, the American College of Trust and Estate Counsel, among others, expressed the opinion that it would be best if a uniform approach could be fashioned in resolving the matter.

Consequently, the Uniform Law Commission, after studying the issue, decided to clarify the issue with respect to the Uniform Trust Code (UTC) and established a drafting committee for that purpose. The drafting committee, in addition to knowledgeable Conference members, consisted of representatives from the American Bar Association, the American College of Trust and Estate Counsel, and the American Council of Life Insurers, consumer advocates, and other interested parties. This proposed amendment resulted from their efforts and, if approved, would be inserted at the end of Article 1 of the UTC as Section 113. In keeping with the charge to the committee, the purpose of the amendment is to clarify when, for purposes of the Code, a trust has an insurable interest in an individual whose life is to be the subject of an insurance policy to fund the trust. Clarification of this area of law that was subjected to uncertainty by the *Chawla* decision will provide a reliable basis upon which trust and estate planning practitioners may draft trust instruments that involve the eventual payment of expected death benefits.

It should be noted that the entire amendment is placed in brackets to indicate that each state should consider whether it is needed or its adoption would be appropriate. In some states *Chawla* may not present serious problems under pre-existing insurable interest law because it may be clear that a trustee already has an appropriate insurable interest for estate planning purposes. In other states, *Chawla* would present problems but, as indicated above, the state may have already addressed the issue so that the amendment may not be needed. Currently there are at least ten states that have enacted legislation on the subject (Delaware, Florida, Illinois, Georgia, Maine, Maryland, Minnesota, South Dakota, Virginia, and Washington). In those states that do need to respond to *Chawla* (plus those that may want to revisit the matter) the amendment offers a reasonable solution that has the support of many in the estate planning field, as well as the life insurance industry.

With regard to language of the amendment, subsection (a) provides that the term "settlor" is limited to the person who *executes* the trust instrument. This is narrower than the UTC definition of "settlor," which, in addition to the person who executes the trust instrument, would include a person who merely contributes property to the trust. See UTC Section 103(15). As explained in the comment to Section 103(15), the broader definition serves a useful purpose in

1 connection with the UTC generally; however, none of those situations relates to the issue of
2 whose life should properly be the subject of a life insurance policy that is used to fund a trust.
3 Moreover, to use the broader definition would needlessly complicate the issue of whose life
4 should be the subject of insurance because it would be rare, if ever, that a life insurance policy
5 used to fund a trust for estate planning purposes would be on the life of someone other than the
6 settlor signing the trust or someone in whose life that settlor would have an insurable interest.
7 Because there are situations in which a trust instrument will be executed by a fiduciary or agent
8 for the creator of the trust, subsection (a) also makes clear that in such circumstances the
9 fiduciary or agent is deemed to be the equivalent of the settlor.

10
11 Subsection (b) carries forward the widely approved rule that the time at which insurable
12 interest in a life insurance policy is determined is the date the policy is issued, otherwise
13 understood as the inception of the policy. Thus, if on the date the policy is issued the trustee has
14 an insurable interest in the individual whose life is insured, the policy is not subject to being
15 declared void for lack of such an interest. Under the reasoning that an individual has an
16 unlimited insurable interest in his or her own life, subsection (b) provides that a trustee has an
17 insurable interest in the settlor's own life. If an individual, as settlor, has created a trust to hold a
18 life insurance policy on his or her own life, has funded that trust with the policy or with money to
19 pay its premiums, and has selected the trustee of the trust, it follows that the trustee should have
20 the same insurable interest that the settlor has in his or her own life. Similarly, recognizing that
21 an individual may purchase insurance on the life of anyone in whom that individual has an
22 insurable interest up to, generally speaking, the amount of that interest, subsection (b) provides
23 that the trustee has an insurable interest in an individual in whom the settlor has, or would have
24 had if living at the time the policy was issued, an insurable interest.

25
26 Moreover, paragraph (1) of subsection (b) addresses the *Chawla* issue by referring to the
27 jurisdiction's insurance code or other law regarding insurable interest as a separate, independent
28 source of law for determining whether a trustee has an insurable interest in the life of an
29 individual on whose life the trust has purchased insurance. This means that the trustee would be
30 entitled to apply for and purchase an insurance policy not only on the life a settlor but also on
31 any other individual in whom the settlor has an insurable interest, e.g., the spouse or children of
32 the settlor, in the enacting jurisdiction. Exactly whose lives may be insured depends on the law
33 of the enacting jurisdiction. In short, the amendment does not change the enacting jurisdiction's
34 pre-existing law of insurable interest.

35
36 Paragraph (2) of subsection (b) addresses a somewhat different issue, although it also
37 references the insurable interest law of the enacting jurisdiction. It is designed to ensure that
38 irrevocable life insurance trusts (ILITs) are created to serve *bona fide* estate planning purposes
39 by restricting who may be a beneficiary of insurance proceeds from a policy owned by an ILIT.
40 It establishes the requirement that the proceeds of a life insurance policy used to fund the trust be
41 payable primarily to certain types of trust beneficiaries. As to the latter, paragraph (2) contains
42 bracketed language designed to provide states with a choice with regard to who those
43 beneficiaries might be.
44

1 One choice may be exercised by deleting all the brackets, and all the language contained
2 within the brackets, in paragraph (2) of subsection (b). By doing so, the class of beneficiaries for
3 whom the insurance proceeds must primarily benefit is limited to those who, in the enacting
4 state, have an insurable interest in the life of the settlor. Depending on the law of the
5 jurisdiction, this could mean that only those individuals traditionally recognized as having an
6 insurable interest, such as spouses and their children, would qualify, or it could mean that
7 additional family members, such as siblings, grandchildren, grandparents, and perhaps others,
8 have an insurable interest in the life of the settlor. In some other jurisdictions, the law may not
9 be clear on this point. In these jurisdictions, estate planners generally may be concerned that
10 strictly tying the class of beneficiaries to the state's insurable interest law might unduly restrict
11 their ability to provide appropriate legal services to their clients. To help alleviate this concern,
12 an alternative is offered to clarify the law in these jurisdictions. To exercise this choice, the
13 enacting jurisdiction need only remove the brackets while retaining the language contained
14 therein, thereby adopting the language as part of the amendment.
15

16 Removing the brackets and retaining the bracketed language in paragraph (2) of
17 subsection (b) clarifies and broadens to a limited extent the class of individuals for whom the
18 insurance must primarily benefit. By including anyone who is related to the settlor or other
19 insured by blood or law within the third degree, the amendment makes clear that not only parents
20 and their children would fall in the required beneficiary category, but also that siblings,
21 grandparents, grandchildren, great-grandparents, great-grandchildren, aunts, uncles, nephews,
22 and nieces would also qualify. Lineal consanguinity, to use the more technical term for relation
23 by blood, is the relationship between individuals when one directly descends from the other.
24 Each generation in this direct line constitutes a degree. Collateral consanguinity refers to the
25 relationship between individuals who descend from a common ancestor but not from each other.
26 The civil law method of calculating degree of collateral consanguinity, which is used in most
27 states, counts the number of generations from one individual, e.g., the insured, up to the common
28 ancestor and then down to the other individual. See 1 RESTATEMENT (THIRD) OF PROPERTY
29 (Wills and Other Donative Transfers) § 2.4 cmt. *k* (1999).
30

31 The following table identifies the relatives of an insured within three degrees of lineal
32 and collateral consanguinity using the civil law method, with each row representing a generation.
33

			Great-Grandparents (3)
		Grandparents (2)	
	Parents (1)	Aunts and Uncles (3)	
INSURED	Sisters and Brothers (2)		
Children (1)	Nieces and Nephews (3)		
Grandchildren (2)			
Great-Grandchildren (3)			

2

3 The reference in subparagraph (B)(i) to relation by “law”—if that term is interpreted to
4 have the same legal meaning as the term “affinity”—may extend the category of beneficiaries that
5 must be primarily benefited to in-laws. If that is the case, degrees of relationship by law or
6 affinity should be computed in the same manner as degrees of relationship by consanguinity.
7 See *State v. Hooper*, 140 Kan. 481, 37 P.2d 52 (1934) (explaining, for example, that a husband
8 has the same relation, by affinity, to his wife’s blood relatives as she has to them by
9 consanguinity, and vice versa). This would mean that a son- or daughter-in-law of the insured
10 would be related in the first degree and a brother- or sister-in-law of the insured would be related
11 in the second degree. A father- or mother-in-law would be related to the insured in the first
12 degree, whereas an aunt- or uncle-in-law would be related to the insured in the third degree. See
13 *State v. Allen*, 304 N.W.2d 203, at 207 (Iowa 1981) (listing authorities on how to compute
14 degrees of relation).
15

1 At the very least, the term "law" should be interpreted to include the relation between
2 spouses and the relation between an adoptive parent and a adopted child, if they were not already
3 included under subparagraph (A). Additionally, in case there is any doubt as to whether an
4 adopted grandchild, i.e., a child adopted by an insured's child, is sufficiently related to the
5 insured, as a biological grandchild might be, to have an insurable interest under subparagraph
6 (A), the reference in (B)(i) may ensure that the adopted grandchild falls within the required
7 category of beneficiaries. This is because the adopted grandchild arguably would, at the very
8 least, be related by affinity to the insured in the second degree, just as a biological child of the
9 insured's child would be. In other words, the adopted grandchild would be treated in the same
10 manner as a biological grandchild.

11
12 Stepchildren, who may not otherwise have an insurable interest in the life of the settlor or
13 other insured under subparagraph (A) or who may not be included under subparagraph (B)(i),
14 depending on the interpretation given to the term "law," are specifically included in
15 subparagraph (B)(ii) to ensure that they occupy the same status as any other child of the settlor,
16 biological or adopted.

17
18 The reason for the modifying language "if not already included under subparagraph (A)"
19 found in subparagraph (B) of paragraph (2) of subsection (b) is to make it clear that there is no
20 negative implication with regard to anyone related within the third degree to the insured and who
21 would be included by virtue of the adopting jurisdiction's insurable interest law referred to in
22 subparagraph (A). In other words, some of the people, but not all, included under subparagraph
23 (A) will be related to the person whose life is insured within the third degree and the modifying
24 language is designed to make it clear that subparagraph (B)(i) merely adds any others so related.
25 The same reasoning applies to stepchildren. The adopting jurisdiction may already include them
26 under its insurable interest law referred to in subparagraph (A). If not, however, subparagraph
27 (B)(ii) makes sure they are included in the category of people for whom the insurance policy
28 proceeds must primarily benefit.

29
30 Although estate planners expressed concern were a jurisdiction to delete subparagraph
31 (B) because they felt doing so would unduly limit their ability to serve their clients' needs, there
32 was a general consensus that including those identified in subparagraph (B) should suffice for the
33 great majority of estate plans. Thus, estate planners strongly support the adoption of the
34 language in subparagraph (B).

35
36 It should also be noted that, regardless of the decision relating to the choices presented by
37 the bracketed language in paragraph (b)(2), the test concerning whether the beneficiaries
38 designated in paragraph (2) are the primary beneficiaries of the policy proceeds takes place at the
39 inception of the life insurance policy, i.e., when the policy is issued. The fact that there may be
40 contingent trust beneficiaries or that the proceeds would be payable to different beneficiaries
41 based on subsequent events or conditions is not relevant to the determination. One need only
42 identify those trust beneficiaries that would receive the policy proceeds were the insured life to
43 expire immediately after the policy is issued and the trust were to terminate at the same time.
44 Among these beneficiaries, the proceeds must be payable primarily to those specified in

1 paragraph (2) of subsection (b). If that is so, the condition is satisfied and may not be challenged
2 thereafter or on the basis that subsequent events might change who would receive the proceeds.
3

4 As for the term "primarily," it will often be the case that one is able to calculate that more
5 than fifty percent of the policy proceeds will be payable to the required class of beneficiaries
6 under paragraph (2), but this may not always be the situation. For example, if the purpose of the
7 trust is to provide a lifetime benefit to a spouse or funds for children to obtain an education, the
8 amount may be indeterminate. This, however, does not mean that the policy proceeds are not
9 primarily for the benefit of these individuals if upon the inception of the policy they are the
10 people who will immediately and mainly benefit from the trust, even though there are others not
11 designated in paragraph (2) who may also benefit concurrently or benefit subsequently upon the
12 satisfaction of some condition in the future. In short, the term is intended to be applied in a
13 common sense manner rather than in a hyper-technical manner that would require that a precise
14 dollar amount be payable to certain beneficiaries.
15

16 Finally, the amendment is drafted as it would appear in the UTC were it to be part of the
17 Code when the latter is enacted or as it would appear as an amendment to a previously enacted
18 version of the Code. In either case, since Section 1106 of the UTC, as originally drafted, already
19 deals with the applicability of the UTC to trusts existing at the time of enactment, there may be
20 no need to address that issue in this amendment. However, if an issue should arise regarding
21 which trusts *and* life insurance policies are subject to the amendment, the following language
22 may be helpful in resolving that issue:
23

24 This section applies to any trust existing before, on, or after the effective date of this
25 section, regardless of the effective date of the governing instrument under which the trust
26 was created, but only as to a life insurance policy that is in force and for which an insured
27 is alive on or after the effective date of this section.