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April 30, 2004

Cathlene Hanaman  
Legislative Reference Bureau  
One East Main  
Suite 200  
Madison, WI 53703

Re: Additions to the Probate Trailer Bill

Dear Cathlene:

I enclose further proposed revisions to the Probate Trailer Bill. Specifically, I enclose a proposed revision to Wis. Stat. §853.18(1) and Wis. Stat. §861.21.

Please call me with any questions.

Sincerely,

Boardman, Suhr, Curry & Field LLP

By

A handwritten signature in black ink that reads "Elizabeth A. Heiner".

Elizabeth A. Heiner

EAH/jan  
enclosure

cc: Jason Westphal  
Howard Erlanger

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✓ April 23, 2004-revised  
PROPOSED REVISIONS TO § 853.18(1)

THE PROBLEM:

§ 853.18(1) states that "... no written designation in accordance with the terms of any insurance, annuity or endowment contract, ... and no written designation made under a contract, plan, system or trust providing for pension, retirement, deferred compensation, stock bonus, profit-sharing or death benefits, ... is subject to or defeated or impaired by any statute or rule of law governing the transfer of property by will, gift or intestacy..."

However, there are two other provisions that seem in tension with this provision:

§ 853.17(1) provides that a will *can* be used to change the beneficiary on a life insurance policy, if the contract or the company's bylaws authorizes such a change.

Also § 853.15, the equitable election statute, would appear to be a "statute governing the transfer of property by will." If this were so, then § 853.15 would not apply to a situation involving transfers under life insurance, pension plans, and the like. This issue was litigated (regarding a profit sharing plan), and the court held that the phrase "statute governing the transfer of property by will" in § 853.18(1) only refers to statutes establishing formalities for *the execution* of a valid will. In *Matter of Estate of Habelman*, 145 W (2d) 228, 426 NW (2d) 363 (Ct. App. 1988).

PROPOSED REVISION:

853.18 Designation of beneficiary, payee or owner. (1) Except as otherwise provided in ch. 766, s. 853.15, or s. 853.17(1) no written designation in accordance with the terms of any insurance, annuity or endowment contract, or in any agreement issued or entered into by an insurance company in connection therewith, supplemental thereto or in settlement thereof, and no written designation made under a contract, plan, system or trust providing for pension, retirement, deferred compensation, stock bonus, profit-sharing or death benefits, or an employment or commission contract, of any person to be a beneficiary, payee or owner of any right, title or interest thereunder upon the death of another, or any assignment of rights under any of the foregoing, is subject to or defeated or impaired by any statute or rule of law governing the transfer of property by will, gift or intestacy, even though that designation or assignment is revocable or the rights of that beneficiary, payee, owner or assignee are otherwise subject to defeasance.

*Committee Note:*

*Clarifies that s. 853.18 is not intended to contravene the provisions of s. 853.15 or s. 853.17(1). The amendment is consistent with the decision in *Matter of Estate of Habelman*, 145 W (2d) 228, 426 NW (2d) 363 (Ct. App. 1988), which held that the phrase "statute governing the transfer of property by will" in § 853.18(1) refers to statutes establishing formalities for the execution of a valid will.*

## PROPOSAL FOR A MODEST EXPANSION OF HOMESTEAD RIGHT

April 23, 2004

revised April 28, 2004

PROBLEM: Most states have much more generous homestead rights than those provided by Wisconsin under s. 861.21. Under the current statute, the surviving spouse has the right to buy out the decedent's interest in the home if it is not specifically transferred and either has a marital property component or passes by intestacy. But if it is deferred marital property, individual, or deferred individual property there is no buyout right. The exclusion of deferred marital property as a trigger seems to be an oversight; but if that is fixed, why not allow the buyout if the property is individual? The decedent is fully protected by the exclusion for an interest that is specifically transferred. But if there is no specific transfer, why not let the surviving spouse buy the house if s/he wants to?

### PROPOSED REVISION:

861.21 ASSIGNMENT OF HOME TO SURVIVING SPOUSE. ....

(2) ~~If marital~~ Decedent's property interest in home. Subject to subs. (4) and (5), if a married decedent has a ~~marital~~ property interest in a home, the decedent's entire interest in the home shall be assigned to the surviving spouse if the surviving spouse petitions the court requesting such a distribution and if a governing instrument does not provide a specific transfer of the decedent's interest in the home to someone other than the surviving spouse. The surviving spouse shall file the petition within 6 months after the decedent's death, unless the court extends the time for filing.

~~(3) If interest in home in intestate estate. Subject to subs. (4) and (5), if the intestate estate includes an interest in a home, the decedent's entire interest shall be assigned to the surviving spouse if the surviving spouse petitions the court requesting such a distribution. The surviving spouse shall file the petition within 6 months after the decedent's death, unless the court extends the time for filing.~~

(4) PAYMENT BY SURVIVING SPOUSE. The court shall assign the interest in the home to the surviving spouse under sub. (2) upon payment of the fair market value of the decedent's interest in the home that does not pass to the surviving spouse under intestacy or under ~~the a~~ governing instrument. Payment shall be made to the fiduciary holding title to the interest. The surviving spouse may use assets due him or her from the fiduciary to satisfy all or part of the payment in kind. Unless the court extends the time, the surviving spouse shall have one year from the decedent's death to pay the value of the assigned interest.

(5) SEVERANCE OF HOME FROM SURROUNDING LAND. On petition of the surviving spouse or of any interested person that part of the land is not necessary for dwelling purposes and that it would be inappropriate to assign all of the surrounding land as the home under sub. (2), the court may set off for the home as much of the land as is necessary for a dwelling. In determining how much land should be set off, the court shall take into account the use and marketability of the parcels set off as the home and the remaining land.

*Committee Note:*

*Amends the statute to provide that, to the extent that the decedent's interest in the home has not passed to the surviving spouse under the decedent's estate plan, the surviving spouse may purchase that interest, as long as the interest to be purchased was not specifically transferred to a third party. Examples of a specific transfer include a specific devise of the decedent's interest to a third party in a will, identification of the decedent's interest in the home and the designation of a third party beneficiary to receive it under a trust, or holding the home in joint tenancy with a third party.*

*The prior statute limited this right to situations where part of the home was in intestacy and/or there was a marital property interest in the home. Sub. 2 was broadened to include any property interest no matter how transferred; as a result sub. 3 became redundant and was repealed. Because of drafting conventions, subs. 4 and 5 were not renumbered.*

*Amendments to subs. 4 and 5 clarify that these are not free standing provisions but are dependent on the spouse making a valid petition under sub 2.*



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April 2, 2004

Mr. Jason Westphal  
State Bar of Wisconsin  
P.O. Box 7158  
Madison, WI 53707

RE: LRB-0349/P1

Dear Jason:

I enclose a copy of Howie Erlanger's changes to the Probate Trailer Bill, LRB-0349/P1. It is my understanding that you will contact Mr. Grothman's office and have these changes submitted to the Legislative Reference Bureau. As we discussed, the prior drafter was Cathlene Hanaman.

Thank you for your assistance in this matter.

Sincerely,

Boardman, Suhr, Curry & Field LLP

By

A handwritten signature in black ink, appearing to read "Elizabeth A. Heiner".

Elizabeth A. Heiner

EAH/jan  
Enclosure  
cc: Howie Erlanger

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## Probate Code Trailer Bill – Additional Changes

Changes re Devolution of Disclaimed Property  
April 4, 2004

✓ 854.13 (7) Devolution in general. (a) Unless the transferor of the property or donee of the power has otherwise provided governing instrument provides otherwise either expressly or as construed from extrinsic evidence, the disclaimed property devolves as if the disclaimant had died before the decedent or before the effective date of the transfer under the governing instrument. If the disclaimant is an appointee under a power exercised by a governing instrument, the disclaimed property devolves as if the disclaimant had died before the effective date of the exercise of the power. If the disclaimant is a taker in default under a power created by a governing instrument, the disclaimed property devolves as if the disclaimant had predeceased the donee of the power. This paragraph is subject to subs. (8), (9) and (10).

*Committee Note: The reference to the “donee of the power” in the former provision meant that a person who had the power to appoint a donee could provide for an alternate disposition if that appointee were to disclaim. However, the language could have been misread to imply that the appointee, who was him or herself disclaiming, could direct the devolution of the property being disclaimed.*

*The revised language clarifies that the alternate disposition must be contained in the instrument of transfer exercising the power of appointment; the appointee cannot direct the devolution of any property he or she has disclaimed. The revised statute also provides that extrinsic evidence may be used to construe any provision in the governing instrument regarding disclaimer.*

### PROPOSED INTER VIVOS DISCLAIMER STATUTE

**700.27 (7) DEVOLUTION.** (a) Unless the transferor of the property or donee of the power provided otherwise in an *inter vivos* governing instrument inter vivos governing instrument provides otherwise either expressly or as construed from extrinsic evidence, the disclaimed property devolves as if the disclaimant had died before the effective date of the transfer under the *inter vivos* governing instrument. If the disclaimant is an appointee under a power exercised by an *inter vivos* governing instrument, the disclaimed property devolves as if the disclaimant had died before the effective date of the exercise of the power. If the disclaimant is a taker in default under a power created by an *inter vivos* governing instrument, the disclaimed property devolves as if the disclaimant had predeceased the donee of the power.

*Drafting note: The draft inter vivos disclaimer provision, which tracks 854.13[7], has been changed to reflect changes in 854.13[7].*

## Probate Code Trailer Bill – Additional Changes

s. 766.62

April 5, 2004

766.62 Classification of deferred employment benefits.

(2) A deferred employment benefit attributable to employment of a spouse occurring ~~while the spouse is married and~~ partly before and partly after the determination date is mixed property. The marital property component of that mixed property is the amount which results from multiplying the entire benefit by a fraction, the numerator of which is the period of employment giving rise to the benefit that occurred after the determination date and during marriage and the denominator of which is the total period of employment giving rise to the benefit.

*Committee Note: Clarifies that the "pro-rata by time" rule for classification of deferred employment benefit plans that straddle the determination date applies irrespective of whether the spouses were married during the period of pre-determination date employment. The reference to "spouse" is consistent with use of the term elsewhere in Chapter 766 and does not imply that the spouses were married during the period of pre-determination date employment.*

9/30/03

DRAFTER'S NOTE FROM THE LEGISLATIVE REFERENCE BUREAU  
LRB-0349/p1dn CMH&MJL:jld:pg April 28, 2003

1. In addition to the questions in this d-note, I also added embedded notes to the bill for your review.

Very helpful; Thanks. This is a good way to identify issues. ✓

2. I deleted the treatment of s. 40.75 from the bill; s. 40.18 made it redundant. OK?

Yes. Thanks ✓

3. Section 853.32 (2) (b) 4. does not seem to fit with the "even if" introduction clause. Would it work better as s. 853.32 (2) (bm)? It could begin "Another document under par. (a) is valid if..."

good point. Seems that it would be better as 2 (am), however. ✓

4. I was not here for the initial bill, so I need to ask why we are repealing s. 854.06 (1) (b) since the term "revocable provision" appears in s. 854.06 (2). Same question as to why we are repealing s. 854.14 (1) when the term "disposition of property" appears in s. 854.14 (6).

854.15(1)(e), which defines "revocable," has been moved to 854.01(3) as a general definition  
Re 854.14(1), see attached.

5. Under created s. 854.115, I am confused by the use of "transfer" and "distribution" — the usage does not seem consistent to me. I changed a few; please see if you agree with my changes. ✓

Reads well now, so changes must have been for the better. The "distribution" satisfies a "transfer", so it's not obvious which term is best to use.

6. I removed ss. 851.21 (1) (b), 853.03 (intro.), and 853.05 (1) (intro.) from the bill, okay?

Yes. ✓

7. In ss. 856.05 (5) and 856.17, I am not sure what the difference is between "lost" and "missing." Are both terms necessary, or would "missing" be enough?

*Good change for 856.05(5)  
Elaboration at 856.17 seems to be important.*

8. I did not change the initial applicability date for s. 40.02 (8) (a) 2. although you had marked it as "prospective"—indicating that it should first apply to deaths occurring on the effective date of the bill. I thought the amended provision might require a longer lead time. Which date would you like?

*at this point, it doesn't seem like it needs a longer lead time. Let us know if you have additional concerns.*

9. With the retroactive initial applicability dates, what if the probate process has concluded or is partially completed in ways inconsistent with the bill?

*We have removed any explicit mention of retroactivity and simply made some provisions explicitly prospective w/r deaths after the effective date, while being silent on the other provisions. Please see notes at section 162.*

Cathlene Hanaman  
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E-mail: cathlene.hanaman@legis.state.wi.us

Madelon J. Lief  
Senior Legislative Attorney  
Phone: (608) 267-7380

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**AMENDMENT:**

**854.14 Beneficiary who kills decedent. (1) DEFINITION.** ~~In this section, "disposition of property" means a transfer, including by appointment, of property or any other benefit to a beneficiary designated in a governing instrument or under a statute.~~

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**COMMITTEE NOTE:**

The definition of "disposition of property" is repealed, to clarify that the court's equitable power to order "another disposition of the property" under s. (6)(a) is not limited to beneficiaries designated in a governing instrument or statute. For example, the court may decide that transfer to the children of the slayer is appropriate, even if they are not mentioned in the plan or under the statute.



≈ May 2003

(drafting notes dated  
April 28)

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

*Handwritten:*  
May 2003  
~~Outgoing~~

1 AN ACT *to repeal* 854.03 (3), 854.03 (4), 854.03 (7), 854.06 (1) (b), 854.14 (1),  
2 854.21 (1) (a) 1., 2. and 3., 861.04 (2), 861.31 (1c), 861.33 (1) (c), 861.35 (1c),  
3 863.16 and 863.19; *to renumber* 701.115 (1), 766.62 (4), 853.32 (1), 854.17 and  
4 861.04 (1); *to renumber and amend* 701.24, 705.04 (2), 766.31 (3), 852.01 (1)  
5 (a) 2., 853.11 (2), 853.32 (2) (b), 854.01, 854.06 (4) (a), 854.08 (5), 854.15 (1) (e),  
6 854.20 (1), 854.20 (2), 854.20 (3), 854.20 (4), 854.21 (1) (a) (intro.) and 861.01  
7 (3); *to amend* 40.02 (8) (a) 2., 700.11 (1), 701.115 (2), 701.115 (3), 701.20 (5) (d),  
8 701.24 (title), 702.03 (1), 705.27, 766.61 (7), 766.62 (5) (intro.), 767.266 (1) (b),  
9 851.21 (1) (b), 851.31, 851.50, 852.01 (1) (b), 852.12, 853.03 (2) (intro.), 853.03  
10 (2) (a), 853.03 (2) (b), 853.03 (2) (c), 853.11 (3), 853.11 (6) (c), 853.11 (6) (d),  
11 853.32 (2) (a), 854.03 (2) (b), 854.03 (5) (d), 854.03 (6), 854.04 (1) (a), 854.04 (5)  
12 (intro.), 854.05 (5), 854.06 (4) (b), 854.07 (3), 854.08 (6) (a) 1., 854.08 (6) (a) 2.,  
13 854.13 (7) (a), 854.13 (8), 854.13 (9), 854.13 (10), 854.14 (5) (a), 854.14 (5) (b),  
14 854.14 (5) (c), 854.18 (1) (a) (intro.), 854.18 (3), 854.20 (5), 854.21 (1) (b), 856.05  
15 (5), 856.15 (1), 856.17, 857.03 (2) (intro.), subchapter II (title) of chapter 861

1 [precedes 861.018], 861.02 (title), 861.02 (4), 861.02 (6), 861.02 (7) (b), 861.05  
2 (1) (c), 861.05 (2) (title), 861.06 (title), 861.06 (2) (title), 861.06 (2) (b) (intro.),  
3 861.06 (2) (b) 4. a., 861.07 (2) (intro.), 861.10 (1), 861.10 (2), 861.11 (2) (a)  
4 (intro.), 861.11 (2) (b), 861.11 (5) (b), 861.17 (3), 861.21 (1) (a), 861.21 (4), 861.31  
5 (1m), 861.31 (2), 861.31 (4) (intro.), 861.31 (4) (a), 861.33 (title), 861.33 (1) (a)  
6 (intro.), 861.33 (1) (b), 861.33 (2), 861.33 (3), 861.33 (4), 861.35 (title), 861.35  
7 (1m) (intro.), 861.35 (1m) (a), 861.35 (1m) (b), 861.35 (1m) (c), 861.35 (2), 861.35  
8 (3) (a), 861.35 (4) (intro.), 861.35 (4) (a), 863.15 and 865.07 (1) (d); **to repeal and**  
9 **recreate** 701.19 (10), 853.04 (3), 854.17 (title), 856.16 and 861.02 (8); **to create**  
10 40.18, 701.115 (1) (a), 701.24 (2), 705.04 (2) (a), 705.04 (2) (d), 705.04 (2) (e),  
11 705.04 (2) (f), 766.31 (3) (a) and (b), 766.62 (4) (b), 766.62 (4) (c), 851.055 (1m),  
12 852.01 (1) (a) 2. b., 853.11 (2m), 853.32 (1) (bm), 853.32 (2) (b) 4., 854.01 (1),  
13 854.03 (5) (g), 854.03 (5) (h), 854.03 (5) (i), 854.03 (5) (j), 854.06 (4) (am), 854.08  
14 (5) (a), 854.08 (5) (d), 854.115, 854.12, 854.13 (2) (gm), 854.14 (3m), 854.17 (2),  
15 861.01 (4), 861.01 (5), 861.05 (1) (e) and 861.05 (2m) of the statutes; and **to**  
16 **affect** 1997 Wisconsin Act 188, section 233 (1); **relating to:** miscellaneous  
17 modifications to the Wisconsin Probate Code.

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### ***Analysis by the Legislative Reference Bureau***

This bill primarily corrects technical errors and clarifies various provisions in 1997 Wisconsin Act 188, which modernized the Wisconsin Probate Code. This bill also continues the process of extending various interpretative rules from probate to nonprobate assets and of allowing extrinsic evidence to be used when interpreting the intent of the transferor. This bill also creates additional protections for a decedent spouse who is murdered by the surviving spouse.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1 SECTION 1. 40.02 (8) (a) 2. of the statutes is amended to read:

2 40.02 (8) (a) 2. In the absence of a written designation of beneficiary, or if all  
3 beneficiaries so designated die before filing with the department an application for  
4 any death benefit payable, the person determined in the following sequence: group  
5 1, widow or widower; group 2, ~~children if at least one child survives the participant,~~  
6 ~~employee or annuitant, in which event the share of any deceased child shall be~~  
7 ~~payable to the surviving spouse of the child or to the surviving children of the child~~  
8 ~~if there is no spouse, or otherwise to the other eligible children in this group; group~~  
9 3, grandchild; group 4, parent; group 5, brother and sister issue, as defined in s.

10 851.13. in equal shares to the children of the designated person, as described in s.

11 854.04 (1). No payment may be made to a person included in any group 2 if there is  
12 a living person in any preceding group 1.

*Good to get rid of jargon, but the new  
\*\*\*\*NOTE: I changed "per stirpes" to increase the readability of the statute. Do you  
want to start removing any other jargon from the statutes?  
Language is NOT the definition of per stirpes.*

13 SECTION 2. 40.18 of the statutes is created to read:

14 **40.18 Applicability of other statutes. (1) MARITAL PROPERTY RIGHTS.**  
15 Chapter 766 applies to ownership rights and remedies of a spouse in benefits  
16 provided under this chapter.

17 **(2) TRANSFERS AT DEATH.** Chapter 854 applies to transfers at death under this  
18 chapter.

19 **(3) DEFERRED MARITAL PROPERTY ELECTION.** Sections 861.018 to 861.10 apply to  
20 the election rights of a surviving spouse in benefits provided under this chapter.

21 SECTION 3. 700.11 (1) of the statutes is amended to read:

22 700.11 (1) If a statute or governing instrument, as defined in s. 854.01 (2),  
23 specifies that property is to be distributed to, or a future interest is to be created in,

X

✓  
10/31/03  
DRAFT

## PROPOSED INTER VIVOS DISCLAIMER STATUTE

**700.27 DISCLAIMER OF TRANSFERS DURING LIFE.** (1) DEFINITIONS. In this section:

(a) "Beneficiary under an *inter vivos* governing instrument" includes any person who receives or might receive property under the terms or legal effect of an *inter vivos* governing instrument.

(b) "Extrinsic evidence" means evidence that would be inadmissible under the common law parol evidence rule or a similar doctrine because the evidence is not contained in the governing instrument to which it relates.

(c) 1. "*Inter vivos* governing instrument" means a gratuitous deed; *inter vivos* trust instrument; insurance policy; contract; *inter vivos* instrument that creates or exercises a power of appointment; or any other dispositive, appointive or nominative instrument that gratuitously transfers property, other than a governing instrument as defined in s. 854.01.

2. "*Inter vivos* governing instrument" includes an *inter vivos* gift that is not subject to a written instrument.

(d) "Power" has the meaning designated in s. 702.01(4).

(2) RIGHT TO DISCLAIM. (a) *In general.* A person who is a recipient of property or beneficiary under an *inter vivos* governing instrument, donee of a power created by an *inter vivos* governing instrument, appointee under a power exercised by an *inter vivos* governing instrument, taker in default under a power created by an *inter vivos* governing instrument or person succeeding to a disclaimed property created by an *inter vivos* governing instrument may disclaim any property, including contingent or future interests or the right to receive discretionary distributions, by delivering a written instrument of disclaimer under this section.

(b) *Partial Disclaimer.* Property transferred under an *inter vivos* governing instrument may be disclaimed in whole or in part, except that a partial disclaimer of property passing by an *inter vivos* governing instrument or by the exercise of a power may not be made if partial disclaimer is expressly prohibited by the *inter vivos* governing instrument or by the instrument exercising the power.

(c) *Spendthrift provision.* The right to disclaim exists notwithstanding any limitation on the interest of the disclaimant in the nature of a spendthrift provision or similar restriction.

(d) *Disclaimer by a guardian or conservator.* A guardian of the estate or a conservator appointed under ch. 880 may disclaim on behalf of his or her ward, with court approval, if the

ward is entitled to disclaim under this section.

(e) *Disclaimer by an agent under power of attorney.* An agent under a power of attorney may disclaim on behalf of the person who granted the power of attorney if all of the following apply:

1. The person who granted the power of attorney is entitled to disclaim under this section.

2. The power of attorney specifically grants the power to disclaim.

(f) *Disclaimer by trustee.* The trustee of a trust named as a recipient of property under an *inter vivos* governing instrument may disclaim that property on behalf of the trust if the governing instrument authorizes disclaimer by the trustee. If the governing instrument does not authorize disclaimer by the trustee, the trustee's power to disclaim is subject to the approval of the court.

(g) *After death.* A person's right to disclaim survives the person's death and may be exercised by the person's personal representative or special administrator upon receiving approval from the court having jurisdiction of the person's estate after hearing upon notice to all persons interested in the disclaimed property, if the personal representative or special administrator has not taken any action which would bar the right to disclaim.

(h) *Disclaimer of transfers at death.* A person who is a recipient of property under a governing instrument as defined in s. 854.01 may disclaim such property as provided in s. 854.13.

(3) INSTRUMENT OF DISCLAIMER. The instrument of disclaimer must meet the provisions of s. 854.13(3) except that delivery of the disclaimer must be within the time and in the manner as provided under subs. (4) and (5) below.

(4) TIME FOR EFFECTIVE DISCLAIMER. (a) *Present Interest.* An instrument disclaiming a present interest shall be executed and delivered not later than 9 months after the effective date of the transfer under the *inter vivos* governing instrument. For cause shown, the period may be extended by a court of competent jurisdiction, either within or after the 9-month period, for such additional time as the court considers just.

(b) *Future interest.* An instrument disclaiming a future interest shall be executed and delivered not later than 9 months after the event that determines that the taker of the property is finally ascertained and his or her interest indefeasibly fixed. For cause shown, the period may be extended by a court of competent jurisdiction, either within or after the 9-month period, for such additional time as the court considers just.

(c) *Future right to income or profits.* Notwithstanding pars. (a) and (b), an instrument disclaiming the future right to receive mandatory distributions of income or profits from any

source may be executed and delivered at any time.

(d) *Persons under 21.* Notwithstanding pars (a) and (b), a person under 21 years of age may disclaim at any time not later than 9 months after the date on which the person attains 21 years of age.

(e) *Interests arising by disclaimer.* Notwithstanding pars. (a) and (b), a person whose interest in property arises by disclaimer or by default of exercise of a power created by an *inter vivos* governing instrument may disclaim at any time not later than 9 months after the day on which the prior instrument of disclaimer is delivered or the date upon which the donee's power lapses.

(5) DELIVERY AND FILING OF DISCLAIMER. (a) *Delivery.* In addition to any requirements imposed by the *inter vivos* governing instrument, the instrument of disclaimer is effective only if, within the time specified under sub. (4), it is delivered to and received by any of the following:

1. The transferor of the property disclaimed;
2. The transferor's legal representative; or
3. The holder of the legal title to the property.

(b) *Delivery to trustee.* If the trustee of any trust to which the interest or power relates does not receive the instrument of disclaimer under par. (a), a copy shall also be delivered to the trustee. Failure to deliver a copy of the instrument of disclaimer to the trustee within the time specified under sub. (4) does not affect the validity of any disclaimer.

(c) *Recording.* If real property or an interest in real property is disclaimed, a copy of the instrument of disclaimer may be recorded in the office of the register of deeds of the county in which the real estate is situated.

(6) PROPERTY NOT VESTED. The property disclaimed under this section shall be considered not to have been vested in, created in or transferred to the disclaimant.

(7) DEVOLUTION. (a) Unless the transferor of the property or donee of the power <sup>provided otherwise in an</sup> ~~provided otherwise in an~~ *inter vivos* governing instrument, either expressly or as construed from extrinsic evidence, the disclaimed property devolves as if the disclaimant had died before the effective date of the transfer under the *inter vivos* governing instrument. If the disclaimant is an appointee under a power exercised by an *inter vivos* governing instrument, the disclaimed property devolves as if the disclaimant had died before the effective date of the exercise of the power. If the disclaimant is a taker in default under a power created by an *inter vivos* governing instrument, the disclaimed property devolves as if the disclaimant had predeceased the donee of the power.

(b) A disclaimer relates back for all purposes to the effective date of the transfer under the *inter vivos* governing instrument. If the disclaimant is an appointee under a power exercised under an *inter vivos* governing instrument, the disclaimer relates back to the effective date of the

exercise of the power. If the disclaimant is a taker in default under a power created by an *inter vivos* governing instrument, the disclaimer relates back to the last possible date for exercise of the power. A disclaimer of the future right to receive mandatory distributions of income or profits relates to the period stated in the disclaimer.

(c) *Devolution of disclaimed future interest.* Unless the transferor of the future interest or donee of the power under which the future interest was created provided otherwise in an *inter vivos* governing instrument, either expressly or as construed from extrinsic evidence, a future interest limited to take effect in possession or enjoyment after the termination of the interest that is disclaimed takes effect as if the disclaimant had died before the effective date of the *inter vivos* governing instrument or, if the disclaimant is an appointee under a power exercised by an *inter vivos* governing instrument, as if the disclaimant had died before the effective date of the exercise of the power.

(8) BAR. Actions that bar disclaimer and the effect upon successors in interest are as provided in s. 854.13(11).

(9) NONEXCLUSIVENESS OF REMEDY. (a) This section does not affect the right of a person to waive, release, disclaim or renounce property under any other statute, the common law, or as provided in the creating instrument.

(b) A disclaimer that is not effective under this section may be effective under s. 854.13(12).

(10) CONSTRUCTION OF EFFECTIVE DATE. In this section, the effective date of an irrevocable transfer under an *inter vivos* governing instrument is the date on which the donor executed the instrument or made the transfer. The effective date of a revocable transfer under an *inter vivos* governing instrument is the date on which the person with the power to revoke the transfer no longer has that power or the power to transfer the legal or equitable ownership of the property that is the subject of the transfer.

#### Coordinating Changes:

**700.11 Interests in "heirs" and the like.** If a statute, *inter vivos* governing instrument, as defined in s. 700.27(1)(c) or governing instrument, as defined in s. 854.01, specifies that property is to be distributed to, or a future interest is to be created in, a designated individual's "heirs", "heirs at law", "next of kin", "relatives" or "family" or a term that has a similar meaning, or if a class gift in favor of "descendants", "issue" or "heirs of the body" does not specify the manner in which the property is to be distributed among the class members, the property is distributed according to s. 854.22.

**701.26(4)** The recipient of any interest in a trust may disclaim all or part of the interest transferred under an *inter vivos* governing instrument as provided in s. 700.27 and may disclaim all or part of the interest transferred under a governing instrument as provided in s. 854.13.

From  
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**702.03 Manifestation of intent to exercise powers.** Unless a contrary intention is found, if a governing instrument, as defined in s. 854.01(2) or an *inter vivos* governing instrument as defined in s. 700.27(1)(c)...

**702.08 Disclaimer of powers.** The donee of any power may disclaim all or part of the power as provided under ss. 700.27 or 854.13.

**854.13. Disclaimer of transfers at death.** [Change the title]

**854.13(2)(i).** Disclaimer of inter vivos transfers. A person who is a recipient of property under an *inter vivos* governing instrument as defined in s. 700.27(1)(c) may disclaim such property as provided in s. 700.27.

**854.13(12)(b)** Any disclaimer that meets the requirements of section 2518 of the Internal Revenue Code, or the requirements of any other federal law relating to disclaimers, constitutes an effective disclaimer under ~~this section~~ the law of this state.

1 a designated individual's "heirs", "heirs at law", "next of kin", "relatives," or  
 2 "family," or a term that has a similar meaning, or if a class gift in favor of  
 3 "descendants", "issue," or "heirs of the body" does not specify the manner in which  
 4 the property is to be distributed among the class members, the property is  
 5 distributed according to s. 854.22.

*INSERT Re 700.27 and related provisions*

6 SECTION 4. 701.115 (1) of the statutes is renumbered 701.115 (1) (b).

7 SECTION 5. 701.115 (1) (a) of the statutes is created to read:

8 701.115 (1) (a) In par. (b), "revocable trust" means a trust that the grantor, at  
 9 the time of death, was alone empowered to change <sup>or</sup> ~~or~~ revoke by law or under the  
 10 instrument creating the trust, regardless of whether the grantor then had the  
 11 capacity to exercise the power.

*} Keep orig.*

12 SECTION 6. 701.115 (2) of the statutes is amended to read:

13 701.115 (2) Survivorship under sub. (1) (b) is governed by s. 854.03.

14 SECTION 7. 701.115 (3) of the statutes is amended to read:

15 701.115 (3) The rights of the issue of a predeceasing beneficiary under sub. (1)  
 16 (b) are governed by s. 854.06.

17 SECTION 8. 701.19 (10) of the statutes is repealed and recreated to read:

18 701.19 (10) RESTRICTION ON EXERCISE OF POWERS. (a) Except as provided in par.  
 19 (c), a person may not exercise any of the following powers conferred upon him or her  
 20 in his or her capacity as trustee:

21 1. The power to make discretionary distributions of trust principal or income  
 22 if the distributions are to himself or herself or for the discharge of his or her legal  
 23 obligations.

24 2. The power to make discretionary allocations of receipts or expenses as  
 25 between principal and income if the allocations are in his or her favor.

1 (b) If a power under par. (a) is conferred upon more than one person as trustee,  
2 a person who is not disqualified to act under par. (a) may exercise the power for the  
3 benefit of the person who is disqualified to act, unless the creating instrument  
4 expressly provides otherwise. A special trustee appointed by a court may exercise  
5 a power under par. (a) for the benefit of the disqualified person if no other trustee is  
6 qualified to exercise the power.

7 (c) Paragraph (a) does not apply if any of the following applies:

8 1. The person is also the settlor of the trust, and the trust may be revoked or  
9 amended by the settlor.

10 2. The terms of the creating instrument specifically limit the scope of the power  
11 to expenditures and distributions of income or principal on the basis of an  
12 ascertainable standard relating to the person's health, maintenance, support, or  
13 education such that the person would not be subject to tax under section 2041 or 2514  
14 of the Internal Revenue Code as a result of having or exercising the power.

15 3. The person is the spouse, widow, or widower of the settlor of the trust, and  
16 a marital deduction has been allowed for federal gift or estate tax purposes with  
17 respect to the trust property that is subject to the power.

18 4. ~~The creating instrument specifically confers the powers that par. (a)~~  
19 ~~prohibits:~~ *The creating instrument negates the application of par. (a) with respect to the power or*

\*\*\*\*NOTE: I changed this subdivision because I don't think the instrument has to  
say "s. 701.19 (10) (a) does not apply." The instrument could simply confer the powers,  
couldn't it?

*indicates that <sup>PROVISIONS</sup> statutes such as this one do  
those in par (a) do not apply.*

SECTION 9. 701.20 (5) (d) of the statutes is amended to read:

*See insert*

20 701.20 (5) (d) A legatee, including a trustee, of a specific amount of money not  
21 determined by a pecuniary formula shall not be paid any part of the income of the  
22 estate but shall receive interest on any unpaid portion of the legacy for the period  
23

(p 5 of LRB draft)

Insert re NOTE, line 19, LRB0349/P1.

We like your idea re line 18. However, the problem that the statute addresses is that drafters grant broad powers to the trustees without realizing that the powers can trigger tax. The result is that everything will turn on what is meant by "specifically." The broad powers are specifically mentioned, and that's the problem.

Bottom line - unless you can see a way out, we don't think we can use your suggestion. The language in the proposal is modeled off of statutes in other states, which doesn't mean it can't be improved, of course.

Separate point - with the huge increases in death tax exemptions (and gift tax exemptions), the chance that 2041 or 2514 will matter gets smaller all the time. But estate planners want the restrictions, and the change here at least modifies what is a very rigid rule.

(p. 5 of LRB draft)

Insert re Section 8, LRB 0349/P1

We propose adding a paragraph (d),  
stating that:

(d) Applicability of this section is  
governed by s. 701.24(2). ✓

## SECTION 9

1 commencing one year after decedent's death at the legal rate set forth in s. 138.04.  
2 For purposes of this paragraph, the deferred marital property elective share amount  
3 elected by a surviving spouse under s. 861.02 (1) is a bequest of a specific amount of  
4 money not determined by a pecuniary formula.

5 SECTION 10. 701.24 (title) of the statutes is amended to read:

6 **701.24 (title) Applicability of ss. 701.01 to 701.23.**

7 SECTION 11. 701.24 of the statutes is renumbered 701.24 (1) and amended to  
8 read:

9 701.24 (1) Except as otherwise provided in sub. (2) and s. 701.19 (9) (a) and (10),  
10 ss. 701.01 to 701.23 are applicable to a trust existing on July 1, 1971, as well as a trust  
11 created after such date, and shall govern trustees acting under such trusts. If  
12 application of any provision of ss. 701.01 to 701.23 to a trust in existence on August  
13 1, 1971, is unconstitutional, it shall not affect application of the provision to a trust  
14 created after that date.

15 SECTION 12. 701.24 (2) of the statutes is created to read:

16 701.24 (2) Section 701.19 (10) is applicable to a trust existing on the effective  
17 date of this subsection .... [revisor inserts date], as well as a trust created after that  
18 date, and shall govern trustees acting under such trusts. If application of any  
19 provision of s. 701.19 (10) to a trust in existence on the effective date of this  
20 subsection .... [revisor inserts date], is unconstitutional, it shall not affect application  
21 of the provision to a trust created after that date.

22 SECTION 13. 702.03 (1) of the statutes is amended to read:

23 702.03 (1) Unless <sup>the person who executed the governing instrument had a</sup> a contrary intention ~~is found~~, if a governing instrument, as  
24 defined in s. 854.01 (2), creating a power of appointment expressly requires that the  
25 power be exercised by any type of reference to the power or its source, ~~it is presumed~~

1 ~~that~~ the donor's intention in requiring the reference ~~was is~~ presumed to be to prevent  
2 an inadvertent exercise of the power. ~~Extrinsic~~ ~~The court may use~~ Extrinsic evidence  
3 <sup>may be used</sup> ~~may be used~~ to show contrary intent. *Please see explanation at Section 65.*

4 SECTION 14. 705.04 (2) of the statutes is ~~renumbered~~ <sup>renumbered</sup> 705.04 (2) (intro.) and  
5 amended to read:

6 705.04 (2) (intro.) If the account is a P.O.D. account, on the death of the original  
7 payee or the survivor of 2 or more original payees, ~~any sums remaining on deposit~~  
8 ~~belong to the P.O.D. beneficiaries if surviving, or to the survivor of them if one or more~~  
9 ~~die before the original payee. Payment may be made to a minor P.O.D. beneficiary,~~  
10 ~~however, only in accordance with a procedure approved in ch. 880. all of the following~~  
11 apply:

12 (b) If there are 2 or more P.O.D. beneficiaries and they all survive, they shall  
13 be are entitled to payment of the sums on deposit in accordance with ~~such~~ any written  
14 instructions ~~as may have been~~ that the owner filed with the financial institution, ~~and~~  
15 or, if none the owner left no written instructions, to payment in equal shares. ~~There~~

16 (c) If 2 or more persons succeed to ownership of the account, there is no further  
17 right of survivorship in the event of the death of one of 2 or more P.O.D. beneficiaries  
18 after their entitlement to payment has matured unless the terms of the account  
19 expressly provide for survivorship or for the account's continuance as a joint account.

20 SECTION 15. 705.04 (2) (a) of the statutes is created to read:

21 705.04 (2) (a) If there is one P.O.D. beneficiary and he or she survives, he or she  
22 is entitled to payment of all sums remaining on deposit.

23 SECTION 16. 705.04 (2) (d) of the statutes is created to read:

24 705.04 (2) (d) If any P.O.D. beneficiary predeceases the original payee or the  
25 survivor of 2 or more original payees, any written instructions that the owner filed

1 with the financial institution determine the rights of the P.O.D. beneficiaries. If the  
2 owner left no applicable written instructions, the amount to which the predeceased  
3 P.O.D. beneficiary would have been entitled passes to any of his or her issue who  
4 would take under s. 854.06 (3). *Please see insert: ~*

5 SECTION 17. 705.04 (2) (e) of the statutes is created to read:

6 705.04 (2) (e) If no P.O.D. beneficiary or predeceased P.O.D. beneficiary's issue  
7 who would take under s. 854.06 (3) survives the death of all owners, the account  
8 belongs to the estate of the deceased sole owner or the estate of the last to die of  
9 multiple owners.

10 SECTION 18. 705.04 (2) (f) of the statutes is created to read:

11 705.04 (2) (f) Payment may be made to a minor P.O.D. beneficiary only in  
12 accordance with a procedure approved under ch. 880.

13 SECTION 19. 705.27 of the statutes is amended to read:

14 **705.27 Ownership on death of owner.** On death of a sole owner or the last  
15 to die of multiple owners, ownership of securities registered in beneficiary form  
16 passes to the beneficiary or beneficiaries who survive all owners and to any  
17 predeceased beneficiary's issue who would take under s. 854.06 (3). On proof of death  
18 of all owners and compliance with any applicable requirements of the registering  
19 entity, a security registered in beneficiary form may be reregistered in the name of  
20 ~~the beneficiary or beneficiaries who survive the death of all owners~~ successors to the  
21 ownership interest. Until division of the security after the death of all owners,  
22 ~~multiple beneficiaries surviving the death of all owners~~ successors to the ownership  
23 interest hold their interests as tenants in common. If no beneficiary or predeceased  
24 beneficiary's issue who would take under s. 854.06 (3) survives the death of all

*Please see  
inserts re  
§ 705.06.  
and 705.21(12)*