

**ARTICLE TWELVE COMMITTEE: NOTES ON CHAPTER 701**

- ✓ • 701.01 *x-ref @ 222 ✓* Definitions Delete ✓  
*(\*) 701.01 to 701.19 not done (\*)*
- ✓ • 701.02 *no x-ref* Purpose for which trust may be created ✓  
Delete
- ✓ • 701.03 *x-ref done* Passive trusts abolished Delete ✓
- ✓ • 701.04 *no x-ref* Purchase money trusts abolished Delete ✓
- ✓ • 701.05 *no x-ref* Title of Trustee Delete and recreate the ✓  
following as 710:

A settlor or transferor may effectively transfer property to a trust by placing legal title of the property in the name of the trustee, which shall be deemed to include any successor trustee regardless of whether a successor trustee is referenced in the transfer document. A transfer which places legal title in the name of the trust itself shall be deemed to place legal title in the name of the trustee.

- 701.06 *(\*) x-ref not done must address x-ref at 859.18(5) (\*)* Spendthrift provisions Delete ✓
- ✓ • 701.065 Debts of Decedents **Include in Article Six as Section 605** ✓  
*x-ref in 867.03(2) ✓*
- 701.07 Living Trusts *x-ref not done* Delete ✓  
*\* must address x-ref at 859.18(5) (\*)*
- ✓ • 701.08 Transfers to living trusts. **Include in Article Six as Section 606** ✓  
*x-ref in 853.32(3) ✓*
- ✓ • 701.09 Transfers to living trust **Change and move as follows** ✓  
*x-ref in 853.17(2) ✓*

Add the following to 853.34:

✓ (1) Testamentary Transfer to Trust of Another. A transfer or appointment by will shall not be held invalid because it is made to a trust created, or to be created, under the will of another person if the will of such other person was executed, or was last modified with respect to the terms of such trust, prior to the death of the person making the transfer or appointment and such other person's will is admitted to probate prior to, or within 2 years after, the death of the person making the transfer or appointment. *last sentence deleted*

✓ (2) Invalid Testamentary Transfer. If such a transfer or appointment by will is not accepted by the testamentary trustee of such other person or if no will of such other person which meets the conditions specified in sub.(1) is admitted to probate within the period therein limited, and if the will containing such transfer or appointment by will makes no alternative disposition of the assets, the will shall be construed as creating a trust upon the

*no changes to this provision*

*See 853.34(1) inserted*

terms contained in the documents constituting the will of such other person as of the date of death of the person making the transfer or appointment by will.

✓ Add the following to ch. 853: *What about 701.09(3) and (4) (5)? Repeat? (NOTE:)*

*Created  
as  
c. 853.34(3)*

Assets Transferred to Trusts Created by Will. If a trustee of a trust created by a testator's will is designated as the beneficiary of a transfer under another governing instrument as defined in s. 854.01(2) at the death of the testator or at the death of a third party, transfer of those assets to the trustee shall not cause the transferred assets to be included in property administered as part of the testator's estate. The transferred assets shall not be subject to taxes, debts or charges enforceable against the testator's estate to any greater extent than if the proceeds were payable to a beneficiary other than the testator's estate.

- ✓ • 701.10 Charitable trusts Delete ✓
- • 701.105 *not done yet [Fern]* Private Foundations **Include in Article Twelve**
- ✓ • 701.11 Honorary Trusts Delete ✓
- ✓ • 701.115 Future Interests in Revocable trusts Delete ✓
- ✓ • 701.12 Revocation, modification and termination of trusts with the consent of the settler Delete ✓  
*✓ x-ref in 445.125(1)(a) 2 ✓*
- ✓ • 701.13 Modification and Termination of trusts by court action Delete ✓
- ✓ • 701.14 Circuit Court procedure in trust proceeding
  - (1) Generally Delete 701.14(1) ✓
  - (2) Notice *Fern* **Section 205** Include 701.14(2) in Article 2 as ✓
  - (3) Attorney for Person in Military *Fern* **Section 306** Include 701.14(3) in Article 3 as ✓
  - ✓ (4) Venue Delete ✓
- 4 • 701.15 Representation of Others Delete ✓  
*x-ref in 701.14(2) → (changed) 701.15 to 701.0305 ✓*
- • 701.16 Testamentary Trustee Delete ✓  
*x-ref in 879.47 § 703.01(2)(a) § 650.04(4) 223.07(3) ✓*
- 701.17 Successor and added trustee Delete ✓
- 701.18 Resignation and removal of trustees Delete ✓
- 701.19 Powers of Trustees Delete ✓  
*x-ref in Del. 2919, 2312  
§ 39.23(5)(b)  
§ 62.145(b)*

✓ • 701.20 Principal and Income ✓  
*correcting under LRB - 4/31/01*

✓ We anticipate that all but 701.20(31) will be in Article 11.

• ~~701.20(31) is Section 1005 in Article 10.~~

Retain in Article 11 ✓

✓ • 701.21 Income Payments and Accumulations  
*m. 701.1101(35) has h/tee*

→ • 701.22 Distributions in kind by trustee [Fem]

Include in Article 12 or roll into Gardner's savings language.

✓ • 701.23 Removal of trusts  
*x-ref in 701.24(1) Not a prob. ...*

Delete ✓

• 701.24 Applicability of ~~ref~~ unresolved.  
*x-ref. still unresolved too. 6/25/2 -*

Revise and include in Article 12

→ [Fem] • 701.25 Applicability of general transfers at Death provisions

Include in Article 12

✓ • 701.26 Disclaimers of nonprobate transfers

Delete - but ask LRB if they want to retain the cross reference to disclaimers.



701.24  
↓

701.20 x-ref in 701.24(2)  
~~701.22 x-ref~~

701.21 as m. in 701.24(1)

701.22 in 701.24(1)

701.24 in 701.24(1)

701.23 in 701.24(1)

9:00-1:30

Whisper/Minhar Brewery  
in Monroeville

**Kuczenski, Tracy**

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**From:** victor.schultz@micorp.com  
**Sent:** Friday, June 29, 2012 2:30 PM  
**To:** Kuczenski, Tracy  
**Cc:** Knepp, Fern; Elizabeth A. Heiner  
**Subject:** RE: Chapter 701 - comments to LRB first draft  
**Attachments:** UTC article 4 - comments to First Draft by LRB - version without 418.docx; UTC article 2 - comments to First Draft by LRB.DOCX; UTC article 1 - comments on First Draft of UTC-1.DOCX; UTC article 3 - comments to first draft by LRB.docx

Here are our initial set of comments to article 1 (sections 1001-1004, article 2, article 3 and article 4 (excluding section 418)). Let me know if you would be available on July 5 or July 6 to discuss the format of the responses. In addition, Adam and I wanted to have another phone call with you to discuss the placement of the definitions that are currently part of section 701.20.

*(See attached file: UTC article 1 - comments on First Draft of UTC-1.DOCX)*

*(See attached file: UTC article 2 - comments to First Draft by LRB.DOCX)(See attached file: UTC article 3 - comments to first draft by LRB.docx)*

*(See attached file: UTC article 4 - comments to First Draft by LRB - version without 418.docx)*

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## COMMENTS ON ARTICLE ONE: FIRST DRAFT

### Sec. 701.0102

- 701.0102(7); page 3, line 11. In response to a question on whether the Wisconsin Trust Code covers corporate trust indentures, the Study Group wishes to modify this subsection to clarify that the Code does not cover trusts in connection with business transaction –  
*“(7) A trust in connection with a business transaction, including a trust created under a bond indenture or collateral trust agreement or in connection with a structured finance transaction, a common law trust under section 226.14 or a business trust.”*

### Sec. 701.0103

- 701.0103(1); page 4, line 2 - “Accounting period”. Add the definition from section 701.20, principal and income act. *“Accounting period” means a calendar year, unless a fiduciary selects another 12-month period, and includes a portion of a calendar year or other 12-month period that begins when an income interest begins or that ends when an income interest ends.*
- 701.0103(5); page 4, line 12 – “Conservator”. LRB drafting convention is to add the article “a” instead of “the” in front of nouns. This change is OK. The Study Group will follow LRB drafting conventions. Generally the Study Group wishes to follow UTC language when the change is grammatical only, but will defer to LRB drafting conventions.
- 701.0103(6); page 4, line 15 – “Directed Trust Property”. Ok to change to “a trust”. Yes, include “invested or managed”. **In line 15, insert “or” between ‘investment management’.** The intent is to cover both marketable securities, which are ‘invested’ and non-marketable securities like closely held business interests, real estate, personal notes, etc., which are ‘managed’.
- 701.0103(7); page 4, line 17 – “Directing Party”. Ok to change to “a trust instrument”, but not “the settlor”. The definition used is correct – a settlor cannot be a directing party; ‘or consent to’ was eliminated because the action to consent relates to a trust protector. The definition needs to be further amended to exclude a person who merely has a power as trust protector or pursuant to a general or limited power of appointment. Revise this section to read: *(7) “Directing party” means any person other than the settlor who, pursuant to a trust instrument or order of the court, is given a power to direct specified acts of an excluded trustee. A “directing party” does not include any person who only has a power as a trust protector or pursuant to a general or limited power of appointment.*
- 701.0103(8)(b); page 5, lines 6-10 – “Disabled individual”. This definition was revised by the Article 4 Study Group. [Note to LRB draftsman – our Study Group has decided to use the term “individual with a disability” rather than “disabled individual.” Please replace the term throughout the Wisconsin Trust Code.] Subsection 8 should be revised

to read: “(8) *Individual with a disability*” means an individual who meets one of the following tests: .... (b) *The individual has a mental or physical impairment of a type and severity that would cause the person to be considered disabled for purposes of the social security, supplemental social security or medical assistance programs, if the individual applied to be eligible for one of those programs based on disability, and if the person’s education, work record and engagement in substantial gainful activity were disregarded. The fact that a person is age 65 or older is not a bar to being considered disabled for purposes of this chapter.*”

- 701.0103(9); page 5, lines 11-12 – “Environmental law”. The definition of environmental law is part of the UTC. References to “environmental law” are included in sections 701, 815 and 1010. LRB proposed deleting this definition because the definition is not necessary under Wisconsin law. **The Study Group would like to retain this definition to be consistent with the UTC.** The Study Group will add a comment that the definition is intended to cover laws relating to the clean-up and remediation of contaminated property and laws relating to despoliation or damage to the environment.
- 701.0103(10); page 6, no line number – “Excluded trustee”. Ok to use “a trust instrument” and “that trustee”. We did intend to change the language provided in an earlier draft of article 1.
- 701.0103(11); page 6, line 1 – “Fiduciary”. Please add a definition of fiduciary from the principal and income act, 701.20. The Study Group notes that this definition relates to a person and not to an act or duty. The definition should reference a “special fiduciary”, which is referenced several places in the Act. We suggest the definition read:  
*“Fiduciary” as applied to a person means a personal representative, trustee, guardian, or conservator and includes a directing party, executor, special administrator, special fiduciary and any other person performing substantially the same function.* [Query: Should this same definition be used in Chapter 881, Prudent Investor Act? – Study Group says yes.]
- 701.0103(12); page 6, line 7 – “Incapacity”. Ok to change to “a trustee.” This definition is not part of the UTC. Incapacity may need to be determined of a beneficiary, interested person, trustee, or other fiduciary. When evaluating whether an individual is under incapacity, we intend that anyone may rely on a written report of an examining physician as part of the evidence to determine incapacity. We agree that the second sentence should be stricken and will add a note in our Study Group comments about how to determine incapacity.
- 701.0103(13); page 6, line 8 – “Income”. Add the definition from section 701.20, uniform principal and income act. *“Income” means money or property that a fiduciary receives as current return from a principal asset. Income includes a portion of the receipts from the sale, exchange or liquidation of a principal asset, to the extent provided in subsections [701.20(10)-(24)].*

Deleted: include

- 701.0103(13); page 6, line 8 – “Income beneficiary”. Add the definition from section 701.20, uniform principal and income act. *“Income beneficiary” means a person to whom net income of a trust is or may be payable.*
- 701.0103(13); page 6, line 8 – “Income interest”. Add the definition from section 701.20, uniform principal and income act. *“Income interest” means the right of an income beneficiary to receive all or part of net income, whether the terms of a trust require it to be distributed or authorize it to be distributed in the trustee’s discretion.*
- 701.0103(13); page 6, line 9 – “Interests of the beneficiaries”. This is a UTC definition. It is OK to change from “the trust” to “a trust”.
- 701.0103(14); page 6, line 10- the Study Group requests the LRB to confirm that the definition of Internal Revenue Code is consistent with the definition that may be used in other Wisconsin statute sections.
- 701.0103(16); page 6, line 15 – “Mandatory income interest”. Add the definition of “mandatory income interest” from section 701.20, uniform principal and income act. *“Mandatory income interest” means the right of an income beneficiary to receive net income that the terms of a trust require the fiduciary to distribute.*
- 701.0103(16); page 6, line 15 – “Net income”. Add the definition from section 701.20, uniform principal and income act. *“Net income” means the total receipts allocated to income during an accounting period, minus the disbursements made from income during the accounting period, plus or minus transfers under [subchapter 11] to or from income during the accounting period.*
- 701.0103(17); page 7, line 4 – “Power of appointment”? We do not object to a definition of power of appointment in the Wisconsin Trust Code. However, this term is covered in Wisconsin chapter 702. It is defined in the comments to the UTC as follows: “A power of appointment is authority [granted under the trust instrument] to designate the recipients of beneficial interests in property. A power is either general or nongeneral and is either presently exercisable or not presently exercisable. A general power of appointment is a power exercisable in favor of the holder of the power, the power holder’s creditors, the power holder’s estate or the creditors of the power holder’s estate. All other powers are nongeneral. A power is presently exercisable if the power holder can currently create an interest, present or future, in an object of the power. A power is not presently exercisable if exercisable only by the power holder’s will or if its exercise is not effective for a specified period of time or until the occurrence of some event.” We recommend the LRB cross reference the Chapter 702 definition of power of appointment in the Wisconsin Trust Code. In addition the Study Group would like to make the following changes to Chapter 702 to reflect the two generally recognized types of powers of appointment – general and special (also referred to as limited or nongeneral) – and to remove the definition of an unclassified power, which is no longer a term recognized when referring to powers of appointment.

702.01(5)

**Deleted:** (insert recommended changes by Mark Shiller and Randy Nelson.)  
**Formatted:** Font: Bold, Underline



beneficiary” be changed, but does recognize there is some confusion about how to apply powers of appointment to the definition. In its comments, the Study Group will reemphasize the UTC comments regarding powers of appointment and will insert some interpretive examples. The Study Group does recommend one change to the definition of “Qualified beneficiary.” In subsections (a), (b) and (c) there is a reference to trust income or principal. Since income and principal are now defined terms, we believe the word “trust” can be deleted from each subsection.

- 701.0103(20); page 8, line 4 – “Remainder beneficiary”. Add the definition from section 701.20, uniform principal and income act. *“Remainder beneficiary” means a person entitled to receive principal when an income interest ends.*
- 701.0103(20); page 8, line 6 – “Revocable”. You indicate that this definition is problematic because it uses the term “revocable” in the definition and because the phrase “to do so” is unclear. The Study Group notes the UTC uses the term “revocable” in its definition. The Study Group also notes that the UTC comments state that a settlor who becomes incapacitated does not convert a revocable trust into an irrevocable trust. A trust remains revocable until the settlor’s death or the power to revoke is released. We propose the definition continue to use the term “revocable” to be consistent with the UTC, but be revised to read: *“Revocable”, as applied to a trust, means a trust that can be revoked by the settlor without the consent of the trustee or a person holding an adverse interest, regardless of whether the settlor is incapacitated.*
- 701.0103(21); page 8, line 11 – “Settlor”. You suggest the second sentence is substantive rather than definitional and recommend it be moved to another section (perhaps article 4 dealing with the creation of trusts.) This language follows the UTC. The comments to the UTC state that determining the identity of the settlor is usually not an issue. The same person will sign the trust and fund the trust. Ascertaining the identity is more difficult when more than one person signs the trust instrument or funds the trust. The fact that a person is designated as the “settlor” by the terms of the trust is not determinative. Should more than one person fund the trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of who signs the trust instrument. Sometimes gifts are made to the trust’s creator by placing the gifted property directly into the trust. To recognize that such a donor is not intended to be treated as a settlor, the definition of “settlor” excludes a contributor to a trust that is revocable by another person or over which another person has a power of withdrawal. Thus a parent who contributes to a child’s revocable trust would not be treated as one of the trust’s settlors. The definition of settlor would treat the child as the sole settlor of the trust to the extent of the child’s proportionate contribution. Pursuant to UTC section 603(c), the child’s power of withdrawal over the trust would also result in the child being treated as the settlor with respect to the portion of the trust attributable to the parent’s contribution. Given these extensive comments in the UTC, we do not recommend this language be changed.
- 701.0103(23); page 8-9, line 17 – “State”. You changed the definition of “State” to add an Indian tribe or band rather than to follow the UTC definition that provides an Indian

tribes and band is included in the definition. We have discussed this definition with Indian law counsel and propose the following definition: *"State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, any territory or insular possession subject to the jurisdiction of the United States, and an Indian tribe, band or nation recognized by federal law or formally acknowledged by a state.*

- 701.0103(25), page 9, line 7 – “Trust for a disabled individual”. The Study Group for article four has rewritten the definition of a “trust for a disabled individual” as follows: *“Trust for an individual with a disability” means any trust that is established for the benefit of an individual with a disability of any age, if the assets of the trust would not be counted as resources of the individual with a disability for purposes of eligibility for medical assistance under subch. IV of ch. 49, if he or she applied for medical assistance and was otherwise eligible.”*
- 701.0103(26); page 9, line 11 – “Trust instrument”. Ok to change reference from “the settlor” to “a settlor”. The Study Group wanted to change the UTC to clarify the circumstances under which amendments could be made – the phrase “or as otherwise permitted by statute” is intended to refer back to ‘amendment’. After reconsideration, the Study Group suggests the definition be similar to the UTC definition and a Wisconsin Study Group comment be added that amendments include those made by the settlor, a nonjudicial settlement agreement, a court order or any other means allowed under the Wisconsin Trust Code. The recommended language would read: *“Trust instrument” means an instrument executed by the settlor or created by an order of the court that contains terms of the trust, including any amendments thereto.*
- 701.0103(27); pages 9-10, line 14 – “Trust protector”. Yes we intend to have a section dealing with trust protectors. The Study Group continues to work on this issue. As a placeholder proposal, we request that the definition read as follows: *“Trust Protector” includes advisers to the trust and means any person other than a settlor, trustee or directing party who is appointed under the trust instrument and who has powers under section 818.*

#### **Sec. 701.0105**

- 701.0105(2)(b); page 11, line 11 – ok to change “the trust instrument” to “a trust instrument.”
- 701.0105(2)(i); page 12, top of page – The LRB asks what rights are being referenced in this section. Article 10, subsections 10-13, refer to limitations on personal liability of trustee, trustee interest as general partner, protection of person dealing with trustee and certification of trusts. The Wisconsin Trust Code language follows the UTC. Comments to the UTC state that the intent of this provision is to clarify that a settlor is not free to limit the rights of third parties, such as purchasers of trust property, [with respect to the ability to make claims against the trustee or to rely on the authority of or information

provided by the trustee.] While the Study Group acknowledges that the reference to “rights” is not entirely clear, we would prefer to retain the UTC language.

- 701.0105(2)(m); page 12, line 7 – this is an addition to the UTC. The Study Group does not wish to allow the settlor or any other party to draft or contract away the right of Wisconsin courts to assume jurisdiction if certain trustee responsibilities are delegated (section 701.0807) or directed (section 701.0808) or if a trust protector chooses to direct the trustee (section 701.0818). The references to sections 701.0807(4) and 701.0808(6) are correct. There will be section 701.0818 on trust protectors and we suggest the code section be bracketed so that it can be finalized when section 701.0818 is finalized.

#### Sec. 701.0107

- 701.0107(1); pages 12-13, line 19 and top of page 13 – the Study Group initially changed the governing law provision, similar to the law in Florida, to require the settlor to have some connection with the state of Wisconsin in order to designate Wisconsin as the governing law in the trust instrument. Similarly, if a Wisconsin resident created a trust instrument and designated another state in which the resident had no connection, that designation would be invalid. LRB questioned the drafting of this provision. Specifically, LRB suggested we not use the word “nexus” and instead use the word “connection.” LRB also stated that the draft was not clear what the “connection” is supposed to link (the designated jurisdiction and what?) Finally, LRB questioned who determines if there is a sufficient connection, what standard applies to the determination and when the determination is made.

The original UTC provision states: “The meaning and effect of the terms of a trust are determined by (1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction’s law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or ....”

Comments to the UTC explain that this paragraph is intended to allow a settlor to select the law that will govern the meaning and effect of the trust. The jurisdiction selected need not have any connection to the trust. The settlor is free to select the governing law regardless of where the trust property may be physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor’s lifetime. The section does not attempt to specify strong public policy that would invalidate the designation because those public policies will vary by location and change over time.

Upon reconsideration, the Study Group recognizes the initially drafted provision may generate more uncertainty than is intended. The Study Group desires that a settlor be allowed flexibility to select the governing law. The Study Group wishes to remove the provision relating to public policy because of the uncertainty in defining “strong public policy.” The Study Group wishes to revise this section to follow the UTC without the reference to “strong public policy”. The Study Group believes a court has the right to override a statutory provision if it violates a “strong public policy”, regardless of whether

the statute specifically authorizes such actions. We request subsection (1) be rewritten as follows:

*(1) The law of the jurisdiction designated in the terms of a trust.*

- 701.0107(2); page 13, line 3 – LRB questions what is a “controlling designation” and asks if depends on the “nexus” test in (1). The “controlling designation” refers to the governing law that is specified in the trust instrument. The Study Group also notes the – LRB deleted the word “or” at the end of this section.

When originally drafting this subsection, the Study Group intended that the governing law be determined by a progression – first look at the trust instrument; second, if the trust instrument is silent, look at the domicile of the settlor; and third, if there is a conflict between jurisdictions, look at the law of the place where there is the most significant relationship to the matter at issue. Upon reconsideration, the Study Group decided to revert to the UTC language – first look to the terms of a trust, and second, look at the jurisdiction having the most significant relationship to the matter at issue. The Study Group request that subsection (2) be revised:

*(2) In the absence of a controlling designation in the terms of a trust, the law of the jurisdiction having the most significant relationship to the matter at issue.*

- 701.0107(3), page 13, line 4 – the changes to subsections (1) and (2) make subsection (3) unnecessary. We request that (3) be deleted.

#### **Section 701.0108**

- 701.0108(1), page 13, line 12 – LRB suggests defining the means for establishing a sufficient connection in order to determine the place of administration.

The Study Group notes the comments to the UTC, which state that this section prescribes the rules relating to a trust’s principal place of administration. Except as provided in UTC subsection (1), the UTC does not attempt to define the principal place of administration because of the difficult and variable situations that may be involved. Ordinarily a trust’s principal place of administration is the place where the trustee is located. Determining the principal place of administration becomes more difficult when the cotrustees are located in different states or when an institutional trustee has trust operations in multiple states. In these cases, other factors become relevant, including the place where trust records are kept, trust assets are held or the place where the institutional trust officer responsible for supervising the trust is located. A settlor expecting to name a trustee or cotrustees with significant contacts in more than one state may eliminate possible uncertainty about the location of the trust’s principal place of administration by specifying the jurisdiction in the terms of the trust. Under UTC subsection (1), a designation is controlling if (a) a trustee is a resident of or has its principal place of business in the designated jurisdiction, or (b) all or part of the administration occurs in the designated jurisdiction. Designating the principal place of administration should be distinguished from designating the law to determine the meaning and effect of the trust’s terms, as authorized by section 107. A settlor is free to designate one jurisdiction as the

principal place of administration and another to govern the meaning and effect of the trust's provisions.

In response to the LRB comment, the Study Group notes that it added subsections (7) and (8) in an effort to further define the means for establishing a connection to determine the principal place of administration. If the LRB believes these subsections would be better incorporated into subsection (1), the Study Group proposes the following revision to subsection (1):

*(1) The principal place of administration of a trust is determined by:*

*(a) The designation in the trust instrument, which is valid and controlling if: (i) A trustee's usual place of business is located in or a trustee is a resident of the jurisdiction designated in the trust instrument; or (ii) All or part of the administration of the trust occurs in the jurisdiction designated in the trust instrument; or (iii) The trust instrument designates the jurisdiction where the settlor is domiciled at the time the trust instrument is executed.*

*(b) If not validly designated in the trust instrument, the trustee's usual place of business or, if the trustee has no place of business, the trustee's residence.*

*(c) If a corporate trustee is designated as the trustee and the corporate trustee has offices in multiple states and performs administrative functions for a particular trust in multiple states, then the corporate trustee may designate the principal place of administration by providing notice to the qualified beneficiaries. The notice is valid and controlling as long as the corporate trustee has a connection to the jurisdiction designated in the notice, including an office where trustee services are performed and the actual performance of some administrative functions for that particular trust in that particular jurisdiction. The subsequent transfer of some of the administrative functions of the corporate trustee to another state or states does not transfer the principal place of administration as long as the corporate trustee continues to maintain an office and perform some administrative functions in the jurisdiction designated in the notice and the corporate trustee does not transfer the principal place of administration pursuant to subsection (4).*

*(d) In the case of cotrustees, (i) The usual place of business of the corporate trustee, if there is only one corporate trustee; or (ii) The usual place of business or the residence of any of the cotrustees as agreed to by all of the cotrustees with notice to the qualified beneficiaries.*

- 701.0108(2)(a), page 14, line 6 – The LRB questions what it means to administer a trust at a place appropriate to *its administration*. This language follows the UTC, which notes in its comments that a trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, *its administration* and the interests of the beneficiaries.

The Study Group initially revised this subsection with the intent that that the trustee be given the discretion to change the principal place of administration, but not impose a requirement to do so. Upon reconsideration, the Study Group decided to delete subsection (2) and revise subsection (3) to clarify a trustee has no affirmative duty to transfer the trust's principal place of administration. This is similar to the approach taken by Massachusetts in its recently adopted version of the UTC. The Study Group requests that subsection (2)(a) be deleted.

- 701.0108(2)(b), page 14, line 8 – LRB questioned the circumstances that would cause a trustee to shift the principal place of administration to or from Wisconsin. The Study Group requests subsection (2)(b) be deleted given the change discussed above.
- ✓ 701.0108(3), page 14, line 12 – LRB suggested that this subsection be rewritten to be “subject to the power of a court” rather than “without precluding the right of the court”. This is the UTC language and we would prefer to use this language. However, after reviewing this subsection, the Study Group would like to renumber subsection (3) as subsection (2) and, similar to the language adopted in Massachusetts, permit but not require the trustee to change the principal place of administration (subject to a court’s right to approve or disapprove, but not order, the transfer.) (This will also address the LRB comment to subsection (5) that the statute clearly state that a trustee has the power to transfer the principal place of administration.) The Study Group recommends subsection (3) be rewritten as subsection (2) as follows:  
 ✓ (2) *Without precluding the right of the court to approve or disapprove a transfer, the trustee may, but has no affirmative duty to, transfer a trust’s principal place of administration to another state or to a jurisdiction outside of the United States.*
- 701.0108(4)(b), page 15, line 7 – You ask if the Study Group wants to provide an option for including an electronic mail address. We support adding such an option and request the LRB renumber this subsection and draft an appropriate revision to provide an electronic email address.
- 701.0108(5), page 15, line 16 – LRB suggests that the statute clearly state that a trustee has the power to transfer the principal place of administration. We believe the language in revised subsection (2) establishes this power. This subsection (5) relates to a beneficiary’s ability to stop a change in the principal place of administration. While the UTC only requires notice (and then the trustee must seek court approval to proceed with the transfer – see UTC comments), our proposed revision would require the beneficiary to start a judicial proceeding in order to prevent a transfer of the principal place of administration. We request that this section be renumbered without any further revision.
- 701.0108(6), page 15, line 19 – LRB asked if a trust could transfer some or all of the trust property to a successor trustee in absence of a transfer of a trust’s principal place of administration. The answer is yes, but this subsection is intended to only cover those transfers that relate to a change in the principal place of administration. The UTC comments explain that in connection with a transfer of the principal place of administration, the trustee may transfer some or all of the trust property to a new trustee located outside of the state. The appointment of a new trustee may also be essential if the current trustee is ineligible to administer the trust in the new place. Subsection (6) clarifies that the appointment of the new trustee must comply with the provisions on appointment of successor trustees as provided in the terms of the trust or under section 704. Absent an order in succession in the terms of the trust, subsections 704(c) and 704(d) provide the procedures for appointment of successor trustees. The Study Group recommends that this subsection be renumbered, but not be changed.

- 701.0108(7), page 16, line 14 – LRB asked what a “trust office” is. With respect to a corporate trustee, the “trust office” is the office where corporate trustee services are being performed.
- 701.0108(8)(b), page 16, line 20 – LRB questioned the use of the preposition “on”. We agree that this preposition should be changed to “to”.
- 701.0108(9), page 16, line 21 – LRB made no comment, but subsection (9) will need to be renumbered since subsections (7) and (8) are incorporated into subsection (1). This subsection is not part of the UTC and was inserted by the Study Group to clarify that the principal place of administration controls the law on administrative matters. The Study Group’s Wisconsin Comment lists matters of administration that are controlled by the law of the principal place of administration.

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**Section 701.0109**

- 701.0109(1), page 17, line 7 – LRB asks what is meant by a “properly directed electronic message.” This language comes from the UTC. UTC does not further define this and states that the methods provided under the statute are intended to be illustrative and not exhaustive. The Study Group contemplates that this would cover e-mail and facsimile communications. The Study Group does not wish to change the UTC language.
- 701.0109(3), page 17, line 12 – LRB asks how a person accomplishes or demonstrates waiver. The language submitted to the LRB follows the UTC. Comments to the UTC state that this subsection allows waiver of notice by the person to be notified or sent the document. Notices or documents that can be waived include notice of proposed transfer of principal place of administration, trustee’s report, notice of proposed trust combination or division, temporary assumption of duties without accepting trusteeship and trustee’s resignation. As a further comment, the Wisconsin Study Group believes that waiver is generally accomplished by a person by sending notice of the waiver to the trustee. The Study Group does not want to change the UTC language in subsection (3).

**Section 701.0110**

- 701.0110(1), page 18, line 2 – LRB notes that drafting conventions do not permit mid-paragraph subdivision notations or the use of a semi-colon following a colon. Your proposed changes to comply with LRB drafting conventions are acceptable.

**Section 701.0111**

- 701.0111(1), page 19, line 4 – LRB drafting conventions require use of the singular form of nouns. This subsection tracks the UTC, with the exception of using the singular form, and the Study Group does not object to the changes to subsection (1).

- 701.0111(2), page 19, line 6 – LRB separated this provision from language the Study Group had incorporated in subsection (1). LRB commented that the meaning of this subsection is not clear. The intent of the Study Group was to confirm that an “interested person” could be represented by another as provided under the article on representation. To clarify this, the Study Group proposes: *(2) An interested person may be represented under this section as provided under subchapter III.*
- 701.0111(3), page 19, lines 7-9 – LRB made no comment to this subsection, but upon review the Study Group thought this section could be more clearly written to clarify that a nonjudicial settlement agreement has the same effect as court approval. Such a provision is consistent with the UTC comments that state that the intention of this section is to facilitate the making of nonjudicial settlement agreements by giving them the same effect as if approved by the court. The Study Group proposes this subsection be separated into two sentences: *(3) Except as otherwise provided in subsection (4), an interested person may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust. A binding nonjudicial settlement agreement shall have the effect of an order of the court and shall be considered part of the trust instrument.*
- 701.0111(4), page 19, line 12 – LRB asks if it would be helpful to define a nonjudicial settlement agreement and explain when such an agreement might be used. The Study Group does not believe a definition or explanation is necessary given the UTC comments on this section and because the UTC provides no definition or further explanation outside of its comments.

The Study Group reviewed subsection (4) and noted that the UTC language included a provision that stated an agreement is only valid to the extent it does not violate a material purpose of the trust. The “material purpose” requirement is consistent with section 65 of the Restatement of Trusts, Third, which includes comments that cite to a body of law that illustrates the material purpose restriction. The Study Group revisited the “material purpose” restriction and concluded it creates an element of uncertainty and may discourage the use of nonjudicial settlement agreements. For example, if a trust is created for the primary benefit of a surviving spouse, is that a material purpose that could not be changed to allow a discretionary distribution to a grandchild, even if the surviving spouse and all other beneficiaries consent to the distribution to the grandchild? The Study Group wishes to encourage use of nonjudicial settlement agreements to resolve disputes and to interpret the trust instrument. Accordingly the Study Group does not wish to make any changes to subsection (4).

- 701.0111(5), page 19, lines 13-14 – LRB makes no comment here, but the Study Group notes the list of matters to which a nonjudicial settlement agreement may pertain is intended to be illustrative. The Study Group asks LRB to comment on whether the heading should end with “include:”
- 701.0111(5)(k)-(m), page 20, lines 13-15 – LRB asked if the reference to trust protector is intended. The answer is yes. The Study Group reviewed the list of matters that could be resolved by nonjudicial settlement. The Study Group notes that the state of Virginia

recently adopted a change to its trust code that permits a “trust director” to be incorporated into a trust instrument by a nonjudicial settlement agreement. The Study Group concluded that subsections (k) and (L) could be further clarified and subsection (m) is not necessary because subsection (3) permits interested persons to enter into a binding nonjudicial settlement agreement “with respect to any matter involving a trust.” The Study Group recommends subsections (k)-(L) be revised and subsection (m) be deleted:

*(k) Appointment of a directing party or a trust protector.*

*(L) Direction to a directing party or to a trust protector to perform or refrain from performing a particular act or the grant to a directing party or trust protector of any necessary power.*

*[Delete (m).]*

- 701.0111(6), page 20, line 19 – LRB deleted the commas from this subsection and asked why the subsection used past tense (could have properly approved) instead of present tense. The originally submitted language followed the UTC. The Study Group wishes to follow the UTC language and to indicate that a court could approve any of the following issues by adding the conjunction “or”. (6) *Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided under the rules of subchapter III was adequate, or to determine whether the agreement contains terms and conditions the court could have properly approved.*

## COMMENTS ON ARTICLE ONE: FIRST DRAFT

### ✓ Sec. 701.0102

- 701.0102(7); page 3, line 11. In response to a question on whether the Wisconsin Trust Code covers corporate trust indentures, the Study Group wishes to modify this subsection to clarify that the Code does not cover trusts in connection with business transaction – *“(7) A trust in connection with a business transaction, including a trust created under a bond indenture or collateral trust agreement or in connection with a structured finance transaction, a common law trust under section 226.14 or a business trust.*

### Sec. 701.0103

- 701.0103(1); page 4, line 2 - “Accounting period”. Add the definition from section 701.20, principal and income act. *“Accounting period” means a calendar year, unless a fiduciary selects another 12-month period, and includes a portion of a calendar year or other 12-month period that begins when an income interest begins or that ends when an income interest ends.*

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- ✓ • 701.0103(5); page 4, line 12 – “Conservator”. LRB drafting convention is to add the article “a” instead of “the” in front of nouns. This change is OK. The Study Group will follow LRB drafting conventions. Generally the Study Group wishes to follow UTC language when the change is grammatical only, but will defer to LRB drafting conventions.
- ✓ • 701.0103(6); page 4, line 15 – “Directed Trust Property”. Ok to change to “a trust”. Yes, include “invested or managed”. **In line 15, insert “or” between ‘investment management’.** The intent is to cover both marketable securities, which are ‘invested’ and non-marketable securities like closely held business interests, real estate, personal notes, etc., which are ‘managed’.
- ✓ • 701.0103(7); page 4, line 17 – “Directing Party”. Ok to change to “a trust instrument”, but not “the settlor”. The definition used is correct – a settlor cannot be a directing party; ‘or consent to’ was eliminated because the action to consent relates to a trust protector. The definition needs to be further amended to exclude a person who is merely has a power as trust protector or pursuant to a general or limited power of appointment. Revise this section to read: *(7) “Directing party” means any person other than the settlor who, pursuant to a trust instrument or order of the court, is given a power to direct specified acts of an excluded trustee. A “directing party” does not include any person who only has a power as a trust protector or pursuant to a general or limited power of appointment.*
- ✓ • 701.0103(8)(b); page 5, lines 6-10 – “Disabled individual”. This definition was revised by the Article 4 Study Group. Our Study Group has decided to use the term “individual with a disability” rather than “disabled individual.” Subsection 8 should be revised to read: *“(8) Individual with a disability” means an individual who meets one of the*

following tests: .... (b) *The individual has a mental or physical impairment of a type and severity that would cause the person to be considered disabled for purposes of the social security, supplemental social security or medical assistance programs, if the individual applied to be eligible for one of those programs based on disability, and if the person's education, work record and engagement in substantial gainful activity were disregarded. The fact that a person is age 65 or older is not a bar to being considered disabled for purposes of this chapter.*"

- ✓ • 701.0103(9); page 5, lines 11-12 – “Environmental law”. The definition of environmental law is part of the UTC. References to “environmental law” are included in sections 701, 815 and 1010. LRB proposed deleting this definition because the definition is not necessary under Wisconsin law. **The Study Group would like to retain this definition to be consistent with the UTC.** The Study Group will add a comment that the definition is intended to cover laws relating to the clean-up and remediation of contaminated property and laws relating to despoliation or damage to the environment.

- ✓ • 701.0103(10); page 6, no line number – “Excluded trustee”. Ok to use “a trust instrument” and “that trustee”. We did intend to change the language provided in an earlier draft of article 1.

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- ✓ • 701.0103(11); page 6, line 1 – “Fiduciary”. Please add a definition of fiduciary from the principal and income act, 701.20. The Study Group notes that this definition relates to a person and not to an act or duty. The definition should include a “special fiduciary”, which is referenced several places in the Act. We suggest the definition read:  
*“Fiduciary” as applied to a person means a personal representative, trustee, guardian, conservator or directing party and includes an executor, administrator, successor fiduciary, special administrator, special fiduciary or any other person performing substantially the same function as any of those.* [Query: Should this same definition be used in Chapter 881, Prudent Investor Act? – Study Group says yes.]

- ✓ • 701.0103(12); page 6, line 7 – “Incapacity”. Ok to change to “a trustee.” This definition is not part of the UTC. Incapacity may need to be determined of a beneficiary, interested person, trustee, or other fiduciary. When evaluating whether an individual is under incapacity, we intend that anyone may rely on a written report of an examining physician as part of the evidence to determine incapacity. We agree that the second sentence should be stricken and will add a note in our Study Group comments about how to determine incapacity.

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XI

- ✓ • 701.0103(13); page 6, line 8 – “Income”. Add the definition from section 701.20, uniform principal and income act. *“Income” means money or property that a fiduciary receives as current return from a principal asset. Income includes a portion of the receipts from the sale, exchange or liquidation of a principal asset, to the extent provided in subsections [701.20(10)-(24)].*

Keep in  
Subch. XI

• 701.0103(13); page 6, line 8 – “Income beneficiary”. Add the definition from section 701.20, uniform principal and income act. *“Income beneficiary” means a person to whom net income of a trust is or may be payable.*

• 701.0103(13); page 6, line 8 – “Income interest”. Add the definition from section 701.20, uniform principal and income act. *“Income interest” means the right of an income beneficiary to receive all or part of net income, whether the terms of a trust require it to be distributed or authorize it to be distributed in the trustee’s discretion.*

✓ • 701.0103(13); page 6, line 9 – “Interests of the beneficiaries”. This is a UTC definition. It is OK to change from “the trust” to “a trust”.

• 701.0103(14); page 6, line 10- the Study Group requests the LRB to confirm that the definition of Internal Revenue Code is consistent with the definition that may be used in other Wisconsin statute sections.

Keep in  
Subch. XI

• 701.0103(16); page 6, line 15 – “Mandatory income interest”. Add the definition of “mandatory income interest” from section 701.20, uniform principal and income act. *“Mandatory income interest” means the right of an income beneficiary to receive net income that the terms of a trust require the fiduciary to distribute.*

• 701.0103(16); page 6, line 15 – “Net income”. Add the definition from section 701.20, uniform principal and income act. *“Net income” means the total receipts allocated to income during an accounting period, minus the disbursements made from income during the accounting period, plus or minus transfers under [subchapter 11] to or from income during the accounting period.*

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definition of  
“general power”  
at 702.01(3)  
not “power” at  
702.01(4).

✓ • 701.0103(17); page 7, line 4 – “Power of appointment”? We do not object to a definition of power of appointment in the Wisconsin Trust Code. However, this term is covered in Wisconsin chapter 702. It is defined in the comments to the UTC as follows: “A power of appointment is authority [granted under the trust instrument] to designate the recipients of beneficial interests in property. A power is either general or nongeneral [also referred to as a limited or special power] and is either presently exercisable or not presently exercisable. A general power of appointment is a power exercisable in favor of the holder of the power, the power holder’s creditors, the power holder’s estate or the creditors of the power holder’s estate. All other powers are nongeneral. A power is presently exercisable if the power holder can currently create an interest, present or future, in an object of the power. A power is not presently exercisable if exercisable only by the power holder’s will or if its exercise is not effective for a specified period of time or until the occurrence of some event.” We recommend the LRB cross reference the Chapter 702 definition of power of appointment in the Wisconsin Trust Code. In addition the Study Group will recommend some changes to Chapter 702 (Mark Shiller and Randy Nelson will provide recommended language.)

✓ • 701.0103(17)(b); page 7, line 7 – “Power of withdrawal”. Ok to change to “a trust”. The language in this section tracks the UTC. We think ‘another person’ is distinguished from

the trustee or a person holding an adverse interest. The clause 'holding an adverse interest' is intended to modify 'a person'. We request that this definition continue to track the UTC definition.

- 701.0103(18); page 7, line 8 – “Principal”. Add the definition of “principal” from section 701.20, uniform principal and income act. [Note to LRB: this definition does not make sense from a UTC perspective – should we pull out this definition and other principal and income act definitions and add them to subchapter 11 or a different chapter altogether. If not, this definition needs to be changed. The State of Washington defined principal as “the assets of trust, from which income is derived.”] When referencing the definition, we recommend the definition only apply to trust property, as follows: “Principal, as applied to property held by a fiduciary, means property held for distribution to a remainder beneficiary when the trust terminates or property held in a trust in perpetuity.”

keep in  
subch. XI

- ✓ • 701.0103(19)(b); page 7, line 12 – “Qualified beneficiary”. In response to the question raised by LRB, yes, a presently exercisable power of appointment should be considered when determining whether a distributee or permissible distributee is a qualified beneficiary. The comments to the UTC state that the qualified beneficiaries who take upon termination of another beneficiary’s interest or of the trust can include takers in default of the exercise of a power of appointment. The term can also include the persons entitled to receive trust property pursuant to the exercise of a presently exercisable power of appointment. A qualified beneficiary does not include an appointee under the will of a living person because the exercise of a testamentary power of appointment is not effective until the testator’s death and probate of the will. A qualified beneficiary also does not include the potential objects of an unexercised inter vivos (presently exercisable) power. The Study Group does not recommend that the definition of “qualified beneficiary” be changed, but does recognize there is some confusion about how to apply powers of appointment to the definition. In its comments, the Study Group will reemphasize the UTC comments regarding powers of appointment and will insert some interpretive examples. The Study Group does recommend one change to the definition of “Qualified beneficiary.” In subsections (a), (b) and (c) there is a reference to trust income or principal. Since income and principal are now defined terms, we believe the word “trust” can be deleted from each subsection.

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- 701.0103(20); page 8, line 4 – “Remainder beneficiary”. Add the definition from section 701.20, uniform principal and income act. *“Remainder beneficiary” means a person entitled to receive principal when an income interest ends.*
- 701.0103(20); page 8, line 6 – “Revocable”. You indicate that this definition is problematic because it uses the term “revocable” in the definition and because the phrase “to do so” is unclear. The Study Group notes the UTC uses the term “revocable” in its definition. The Study Group also notes that the UTC comments state that a settlor who becomes incapacitated does not convert a revocable trust into an irrevocable trust. A trust remains revocable until the settlor’s death or the power to revoke is released. We propose the definition continue to use the term “revocable” to be consistent with the UTC, but be revised to read: *“Revocable”, as applied to a trust, means a trust that can*

*be revoked by the settlor without the consent of the trustee or a person holding an adverse interest, regardless of whether the settlor is incapacitated.*

- ✓ • 701.0103(21); page 8, line 11 – “Settlor”. You suggest the second sentence is substantive rather than definitional and recommend it be moved to another section (perhaps article 4 dealing with the creation of trusts.) This language follows the UTC. The comments to the UTC state that determining the identity of the settlor is usually not an issue. The same person will sign the trust and fund the trust. Ascertaining the identity is more difficult when more than one person signs the trust instrument of funds the trust. The fact that a person is designated as the “settlor” by the terms of the trust is not determinative. Should more than one person fund the trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of who signs the trust instrument. Sometimes gifts are made to the trust’s creator by placing the gifted property directly into the trust. To recognize that such a donor is not intended to be treated as a settlor, the definition of “settlor” excludes a contributor to a trust that is revocable by another person or over which another person has a power of withdrawal. Thus a parent who contributes to a child’s revocable trust would not be treated as one of the trust’s settlors. The definition of settlor would treat the child as the sole settlor of the trust to the extent of the child’s proportionate contribution. Pursuant to UTC section 603(c), the child’s power of withdrawal over the trust would also result in the child being treated as the settlor with respect to the portion of the trust attributable to the parent’s contribution. Given these extensive comments in the UTC, we do not recommend this language be changed.
- ✓ • 701.0103(23); page 8-9, line 17 – “State”. You changed the definition of “State” to add an Indian tribe or band rather than to follow the UTC definition that provides an Indian tribes and band is included in the definition. We have discussed this definition with Indian law counsel and propose the following definition: *“State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, any territory or insular possession subject to the jurisdiction of the United States, and an Indian tribe, band or nation recognized by federal law or formally acknowledged by a state.*
- ✓ • 701.0103(25), page 9, line 7 – “Trust for a disabled individual”. The Study Group for article four has rewritten the definition of a “trust for a disabled individual” as follows: *“Trust for an individual with a disability” means any trust that is established for the benefit of an individual with a disability of any age, if the assets of the trust would not be counted as resources of the individual with a disability for purposes of eligibility for medical assistance under subch. IV of ch. 49, if he or she applied for medical assistance and was otherwise eligible.”*
- ✓ • 701.0103(26); page 9, line 11 – “Trust instrument”. Ok to change reference from “the settlor” to “a settlor”. The Study Group wanted to change the UTC to clarify the circumstances under which amendments could be made – the phrase “or as otherwise permitted by statute” is intended to refer back to ‘amendment’. After reconsideration, the Study Group suggests the definition be similar to the UTC definition and a Wisconsin

Study Group comment be added that amendments include those made by the settlor, a nonjudicial settlement agreement, a court order or any other means allowed under the Wisconsin Trust Code. The recommended language would read: *“Trust instrument” means an instrument executed by the settlor or created by an order of the court that contains terms of the trust, including any amendments thereto.*

- ✓ • 701.0103(27); pages 9-10, line 14 – “Trust protector”. Yes we intend to have a section dealing with trust protectors. The Study Group continues to work on this issue. As a placeholder proposal, we request that the definition read as follows: *“Trust Protector” includes advisers to the trust and means any person other than a settlor, trustee or directing party who is appointed under the trust instrument and who has powers under section 818.*

**Sec. 701.0105**

- 701.

**Sec. 701.0107**

- 701.

**Section 701.0108**

- 701.

**Section 701.0109**

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**Section 701.0110**

- 701.

**Section 701.0111**

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## UNIFORM TRUST CODE COMMITTEE

### SUBCHAPTER II: RESPONSES TO QUESTIONS/COMMENTS IN LRB DRAFT

#### **Page 21, Line 2: Subchapter II**

The title of subchapter II “Judicial Proceedings” should be inserted.

#### **Page 21, Line 6: §701.0201(1)**

The term “interested person” is undefined in the Uniform Trust Code. For example, the Drafting Committee comment to UTC § 111 regarding nonjudicial settlement agreements notes that “[b]ecause of the great variety of matters to which a nonjudicial settlement agreement may be applied, this section does not attempt to precisely define the “interested persons” whose consent is required to obtain a binding settlement...” It would be impossible to come up with a definition that is applicable in all situations and the term “interested person” is best left undefined.

*Wisconsin Drafting Committee Comment:* The term “interested person” is intentionally undefined in the Wisconsin Trust Code. Because of the great variety of situations in which the term “interested person” may apply (i.e., binding effect of nonjudicial settlement agreements, consent to trust modification, etc.), the Wisconsin Trust Code does not attempt to precisely define the term “interested person”.

#### **Page 21, Lines 7-8: §701.0201(2)**

We recommend making the following revision to §701.0201(2) (deletions from LRB draft struck through and additions to LRB draft underlined):

“(2) Unless ordered by the court upon petition of a settlor, trustee or qualified beneficiary, a trust is not subject to continuing judicial supervision ~~unless~~ ordered by the court.”

*Wisconsin Drafting Committee Comment:* The Wisconsin Trust Code follows the position of the majority of the states that continuing judicial supervision of trusts, testamentary or nontestamentary, is not required. However, this section does not prevent a settlor, trustee or qualified beneficiary from requesting the court to order continuing judicial supervision.

#### **Page 21, Line 10: §701.0201(3)**

LRB revision is OK. The addition of the words “may be used to do any of the following” is acceptable.

**Page 21, Lines 15-16: §701.0201(3)(d)**

We recommend making the following revision to §§701.0201(3)(d) and (e) (deletions from LRB draft struck through and additions to LRB draft underlined):

- “(d) Review or approve a trustee’s fees.
- (e) Review and or approve interim or final accounts.”

**Page 22, Line 2-3: §701.0201(3)(k)**

We recommend revising §701.0201(3)(k) as follows (deletions from LRB draft struck through and additions to LRB draft underlined):

- “(k) Determine Resolve any question arising in the administration or ~~distribution of a~~ any trust, including questions of construction of trust instruments.”

**Page 22, Line 4: §701.0201(3)(L)**

We recommend leaving the language as originally drafted. With respect to the LRB comment regarding the meaning of “administration” of a trust, we believe such term is broad enough to encompass resolving questions of construction and other matters involving trustees and beneficiaries. The title of section 201, “Role of Court in Administration of Trust” is the original UTC language and we recommend leaving it as is. A note to the LRB - with respect to the capitalization of the letter (L) in the subsection, was this intentional to distinguish it from the number (1)? The other subsections use lower case letters. - Yes

**Page 22, Lines 6-7: §701.0202**

We recommend revising the title of Article II, Section 202 as follows (deletions from LRB draft struck through and additions to LRB draft underlined):

“Personal jurisdiction ~~over trustee and beneficiary.~~”

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**Page 22, Lines 16-18 and Page 23, Lines 1-2: §701.0202(3)**

With respect to the LRB comment regarding how a delegation may occur, we recommend leaving the “or otherwise” language as originally drafted. In addition to a delegation under the Uniform Prudent Investor Act, a delegation could occur pursuant to the terms of the trust instrument or under common law, for example. We do, however, recommend making a specific reference to §701.0807 (see below).

With respect to the second LRB comment, we recommend revising §701.0202(3) to use the defined term “principal place of administration” as follows (deletions from LRB draft struck through and additions to LRB draft underlined):

“(3) Notwithstanding any contractual provision or other agreement between the trustee and the agent to the contrary, by accepting the delegation of a trust function, pursuant to s. 701.0807, s. 881.01(10) or otherwise, from the trustee of a trust administered having a principal place of administration in this state pursuant to s. 701.0807, s. 881.01(10) or otherwise, the agent submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.”

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**Page 23, Lines 9-11: §701.0203(1)**

LRB revision is OK. The last sentence of §701.0203(1) will now read as follows (deletions from LRB draft struck through and additions to LRB draft underlined):

“Except as otherwise provided in this chapter, and as applicable, the probate procedure described in ch. 879 governing circuit courts shall apply to such proceedings.”

**Page 23, Lines 15-17 and Page 24, Lines 1-2: §701.0204(1)**

With respect to the first LRB comment, venue can be in either the county in which the trust’s principal place of administration is or will be located or if it is a testamentary trust, in the county in which the decedent’s estate is being administered if the estate is not yet closed. We recommend the minor revisions noted below. With respect to the second LRB comment, we recommend revising §701.0204(1) to include consistent references to “county of this state” as follows (deletions from LRB draft struck through and additions to LRB draft underlined):

— “may either be”

“(1) Except as provided in sub. (2), venue for a judicial proceeding involving a trust may either be is in the county of this state in which the trust’s principal place of administration is or will be located or and, if the trust is a testamentary trust and the decedent’s estate is not yet closed, in the county of this state in which the decedent’s estate is being administered.”

**Page 24, Lines 6-9: §701.0204(2)(b) through (d)**

Consistent with the prior comment, we recommend revising §701.0204(2)(b) through (d) to include consistent references to “county of this state” as follows (deletions from LRB draft struck through and additions to LRB draft underlined):

- “(b) A county of this state in which any trust property is located.
- (c) A county of this state in which the holder of trust property maintains an office.
- (d) If the trust is a testamentary trust and the decedent’s estate is not yet closed, in the county of this state in which the decedent’s estate is being administered.”

**Page 24, Lines 10-12: §701.0204(3)**

We recommend leaving the language of section 701.0204(3) as originally drafted, as the word “further” means that the rules governing venue under §§801.50 through 801.62 apply in addition to the rules included in subchapter II.

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to 801.50

## SUBCHAPTER III

### RESPONSES TO QUESTIONS IN LRB DRAFT

#### **Page 25, Line 4: 701.0301(1)**

Add the word “shall” as follows: “.... person under this subchapter shall serve ....”

#### **Page 25, Line 13: 701.0301(3)**

(3) is the exact UTC language. The reason for the difference is that the scope of what a representative may do on behalf of someone other than the settlor is broader than what a representative may do on behalf of the settlor.

#### **Page 25, Line 15: 701.0301(4)**

It is correct to use subchapter, which is the equivalent of article in the UTC.

It is appropriate to limit the provisions of subchapter III to subchapter III because all they do is determine who may represent another.

#### **Page 26 Top of Page (Unnumbered): 701.0301(5)**

The references to section should be changed to subchapter so that they apply to all of subchapter III.

#### **Page 26, Line 7: 701.0302**

The submitted language is directly from the UTC. Your change is consistent with the concept behind the UTC language. Your change raises another issue. Assume a holder of a general testamentary power of appointment represents three people in connection with an action involving a trust but has a conflict of interest with respect to one of them. I think the right result would be that the holder can represent and bind the people with respect to whom he does not have a conflict of interest but cannot represent and bind the person with respect to whom he has a conflict of interest. This concept is change from the UTC and your language. I propose the following (deletions from your draft struck through and additions to your draft underlined):

“To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and any a person represented with respect to the particular question or dispute, the holder may represent and bind a the person whose interests, as a permissible appointee, taker in default, or otherwise, are subject to the power.”

#### **Page 27, Lines 22-24: 701.0303**

I recommend revising (8) as follows (deletions from your draft struck through and additions to your draft underlined):

“(8) If there is no one permitted to act under subs. (1) to (6), ~~or~~ if all of the people entitled to act under those subsections have declined to act, or if the trustees determine that the otherwise available representation might be inadequate, the trustees may appoint a representative to act.”

This addition is taken from Section 701.0305(1), which specifics when a court may appoint a representative to act. It makes sense for the same standard to apply.

**Page 28 Top of Page (Unnumbered): 701.0302 and 701.0303**

The intent is that these provisions only apply to chapter 701. For example, a conservator may represent and bind the estate the conservator controls with respect to a trust modification proceeding under s. 701.0409 but may not represent and bind the estate the conservator controls with respect to a real estate transaction on the basis of 701.0303. We do not think that it is necessary to specify this explicitly here because of s. 701.0102, which provides that this chapter only applies to trusts.

**Page 28, Line 17: 701.0305**

The change to subchapter is correct.

I recommend revising Section 701.0305 to address the expanded scope of representatives under 701.0303 as follows (deletions from your draft struck through and additions to your draft underlined):

“If the court determines that an interest is not represented under this subchapter, or that the otherwise available representation might be inadequate, the court may appoint a representative or guardian ad litem to receive notice, give consent, and otherwise represent, bind, and act on behalf of ~~a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown~~ the person who is not represented or whose representation may be inadequate. A representative or guardian ad litem may be appointed to represent several persons or interests.”

UTC Article IV  
New language

All references to "Pdf" means LRB file 11-2788P1

Note by Doug Barnes of the Article IV subcommittee to LRB drafter: Subsequent to our most recent meeting, members of the Article IV subcommittee agreed to return to the softer and more politically correct phrase "individual with a disability" and eliminate the term currently in use (but fading from use by governmental agencies) "disabled individual". On June 19, 2012 I did a "search and replace" in MS Word and replaced all occurrences of the phrase "disabled individual" with the more PC term regardless of the section of 701 where the term appears (such as 701.0501, .0502, .0503, .0505, and .0704). In the interest of time, however, I did NOT amend all of the comments of the Article IV subcommittee that appear in such section so there may be situations where our comments appear inconsistent with the terms in what will be the final statute.

Section **701.0405**

✓ Pdf page 32, line 3:

\*\*\*\*NOTE: This subsection uses the phrase "governing instrument". Is a governing instrument different from a "trust instrument"? If so, how? If not, can I substitute "trust instrument" for "governing instrument"?

**Subcommittee Response:** The subcommittee concurs with the LRB to use the term "trust instrument" for consistency. We note the term is defined in **701.0103(26)**, the scope includes trusts under Will under **701.0102** so no further elaboration is required in **701.0405**.

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Section **701.0405**

✓ Pdf page 32, line 4:

\*\*\*\*NOTE: Are the words "among others" necessary in this subsection? They seem to minimize the significance of or even eliminate the need for the other more specific persons designated to enforce a trust. Can this broader "among others" category of persons be assumed to be covered by "such other person the court determines to have sufficient interest"?

**Subcommittee Response:** Because the Wisconsin statute expanded the list of persons beyond the original UTC, we agree to eliminate the phrase "among others".

---

Section **701.0406**

✓ Pdf page 32, line 9:

\*\*\*\*NOTE: Are there standards for determining when/whether fraud, duress, or undue influence has occurred? Or for determining what portion of a trust would be upheld in the face of fraud, duress, or undue influence?

**Subcommittee Response:** This language tracks the UTC. The UTC comments state that this provision is an application of the Restatement of Trusts, which provide that a trust can be set aside or reformed on the same grounds as those which apply to a transfer of property not in trust, among which include undue influence, duress, fraud and mistake. This section addresses undue influence, duress and fraud, while section 701.0415 addresses mistake. Similar to a will, the invalidity of a trust on grounds of undue influence, duress or fraud may be in whole or in part. Standards for fraud, duress, or undue influence are

based on common law (see section 701.0106.) The portion of the trust invalidated would be determined by a court of equity or an agreement of all interested persons based on the facts and circumstances. The Study Group recommends no change to this section.

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✓ Section **701.0407**

Pdf page 32, line 12:

\*\*\*NOTE: Is it your intent by using the word “statute” in this section that no other law (case law, ordinance, rule) may require a trust to be evidenced by a trust instrument?

**Subcommittee Response:** The term “statute” is used by NCCUSL and the subcommittee wishes to use the original UTC language. Comments to the UTC state that absent some specific statutory provision, such as requiring that transfers of real property be in writing, a trust need not be evidenced by a writing. States with statutes of frauds or other provisions requiring the creation of certain trusts in writing may wish to specifically cite such provisions. [Note to LRB – are you aware of any such specific statutory cites?] No

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✓ Section **701.0408**

Pdf page 33, line 5:

\*\*\*NOTE: What does “a person having an interest in the welfare of the animal” mean? Must the person suffer a financial loss if the animal is not cared for? Or have some sort of demonstrated attachment to or history with the animal? Or may the person simply love animals? If the latter, how will the court distinguish between two persons who express a passionate interest in animals generally but may have no actual emotional attachment to or history with the specific animal?

**Subcommittee Response:** Based on the comments to the UTC, a person having an interest in the welfare of an animal is a person who has exhibited an interest in the animal’s welfare.

This section tracks the UTC, is new to Wisconsin law and the Study Group wishes to retain the original UTC language. The comments to the original UTC state that the intent of this section is to validate trusts for the care of an animal. At common law such a trust was unenforceable because there was no person authorized to enforce the trustee’s obligations. Subsection (2) specifically addresses enforcement of the trust. The comment continues (with emphasis added for clarity to LRB)

a person with an interest *in the welfare of the animal* has standing to petition for an appointment. The person appointed by the court to enforce the trust should also be a person *who has exhibited an interest in the animal’s welfare*. The concept of granting standing to a person with a demonstrated interest in the animal’s welfare is derived from the Uniform Guardianship and Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected person to file petitions on behalf of the ward or protected person.

The determination of “a person having an interest in the welfare of the animal” will be made by the court. Multiple people may request the court to take action and the court has the authority to choose a person to enforce the trust.

---

Section **701.0409**

Pdf page 33, line 17:

\*\*\*\*NOTE: Is it your intent by using the word “statute” in this section that no other law (case law, ordinance, rule) may apply to a noncharitable trust without an ascertainable beneficiary?

**Subcommittee Response:** Because the common law requires an ascertainable beneficiary, any variation would have to be by statute (not common law). Additionally, the term “statute” is used in the original UTC.

---

✓ Section **701.0409**

Pdf page 34, lines 2-3:

\*\*\*\*NOTE: Wisconsin law authorizes the creation of cemetery authorities (see s. 157.061 (2)). Would it be appropriate to add to or substitute the word authority for company and corporation in the sentence that begins “Any cemetery company, association, or corporation...”?

**Subcommittee Response:** The subcommittee agrees to remove company, association or corporation, and use “Authority under 157.061(2)”. Accordingly the second sentence in subsection 701.0409(2) would read: *Any cemetery authority under section 157.061(2) may receive property in trust for any of the purposes specified in this subsection and apply income from the trust to the purpose stated in the trust instrument.*

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✓ Section **701.0409**

Pdf page 34, line 5:

\*\*\*\*NOTE: The term “creating instrument” seems odd to me; is “trust instrument” an appropriate alternative?

**Subcommittee Response:** We agree with the LRB to use the term “trust instrument”. See above.

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Section **701.0409**

✓ Pdf page 34, line 7:

\*\*\*\*NOTE: Why does this subsection refer to a “person appointed” and not a “trustee appointed”?

**Subcommittee Response:** First, the language used is taken directly from the original UTC text and the subcommittee saw no reason to make a change. Second, although the comments to the original UTC do not provide any additional insight on the matter, the members of the subcommittee all foresee the possibility that a “person appointed” could be a protector or someone other than a trustee.

---

✓ Section **701.0410**

Pdf page 35, line 15:

\*\*\*\*NOTE: I substituted the defined term, “trust for a disabled individual,” for “trust for an individual with a disability.” Okay?

**Subcommittee Response:** No, we have decided to replace the term “disabled individual” with “individual with a disability”. Please change all of the references in subsection 701.0410(3) accordingly (four references.)

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✓ Section **701.0410**

Pdf page 35, line 21:

\*\*\*\*NOTE: A Note to the drafter: in the next draft, s. 701.20 (4g) (current law) will need to be renumbered, not repealed.

**Subcommittee Response:** No comment appears needed by this subcommittee, and we leave numbering up to LRB. This cite will correspond the appropriate section in subchapter 11.

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✓ Section **701.0412**

Pdf page 37, line 15:

\*\*\*\*NOTE: What are “the dispositive terms of the trust”? Is this a term of art? Do dispositive terms govern distributions from the trust? If so, could the word “distribution” appear here instead? See also s. 701.1013 (4).

**Subcommittee Response:** This term is in the UTC and is understood by practitioners. The Study Group notes that the UTC comments state that subsection 412(a) allows a court to modify the dispositive provisions of the trust as well as its administrative terms. For example, modification of the dispositive provisions to increase support of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due to poor health or serious injury.

Accordingly no change to section 701.1013(4) is necessary.

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✓ Section **701.0413**

Pdf page 39, line 5:

\*\*\*\*NOTE: This subsection (3) indicates that “The purpose of this subsection is to broaden the power of the courts” and “in any situation not expressly covered the court shall liberally apply the cy pres doctrine.” I believe the word “subsection” is not appropriate, as there are no situations expressed or covered in this sub. (3). Should it, instead read “The purpose of this section [701.0413] is to broaden the power of the courts...”? If so, might I suggest that this purpose statement be moved to sub. (1) of this section?

**Subcommittee Response:** This language comes right out of current 701.10, but we agree with LRB that the new statute should refer to “section” not “subsection”. We also agree with moving it to and making it sub. (1).

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Section **701.0414**

Pdf page 41, note following line 3 refers to page 39 line 21, page 40 lines 3-4, 5, 11, and 16:

\*\*\*\*NOTE: I modified this section to establish a specific subsection for definitions and, per LRB drafting conventions, to establish formulae for calculating the “revised applicable figure.” Please review this section carefully to ensure it accomplishes your intent.

p. 39, ln. 18  
**Subcommittee Response:** In section 701.0414(1)(c), we intend that the base year be the year that the Act becomes effective – hopefully 2013 or 2014 at the latest. The section should also provide for rounding to the nearest \$1,000. We need to insert the rounding requirement in subsection 701.0414(3)(b).

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This ends the committee meeting of May 2, 2012 and begins decanting section that Phil Halley will review separately.

## UNIFORM TRUST CODE

### SUBCHAPTER V: RESPONSES TO LRB QUESTIONS/SUGGESTED REVISIONS

#### Sec. 701.0501

- ✓ • 701.0501(1)(a); pages 53; line 5. “To the extent” makes clear that different pools of creditors may reach the beneficiary’s interest depending on the limitations on alienation. For example, the interest may be exempt from only some creditors if voluntary alienation is allowed under the trust instrument. We would leave the language as drafted without “Except as provided in par. (b).”  
w/Note
- ✓ • 701.0501(1)(a); page 53; line 8. The language is the UTC language and should not be changed. The difference between the two provisions is intentional.
- ✓ • 701.0501(2); page 53; line 13. We agree with the proposed change, substituting “if” for “to the extent.”
- 701.0501(1)(b); page 53, line 11. This subsection and various other subsections in this subchapter refer to a “trust for a disabled individual.” Please change all such references to a “trust for an individual with a disability.”

#### Sec. 701.0502

- 701.0502(1)(a); page 54; lines 3-4. We have followed the UTC approach in 701.0502(1)(a) which includes the definition in (a). Allowing either voluntary or involuntary alienation is a change in Wisconsin law and it is important to make clear that either approach is valid.
- ✓ • 701.0502(2); page 54; line 8. The only inconsistency between sub (1) and sub (2) would be an argument that sub (2) allows a settlor’s beneficial interest to be protected, so we agree to rephrase sub (2) as follows: “*Subject to subsection 701.0502(1), a term of a trust providing that the interest of a beneficiary is held subject to a “spendthrift trust,” or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary’s interest.*”
- ✓ • 701.0502(2); page 54; line 9. The UTC uses “held subject to a spendthrift trust” and should not be changed. Words of similar import would include “held subject to a spendthrift provision” or “held subject to a spendthrift clause or spendthrift protection.”
- 701.0502(3); page 54; line 14. A beneficiary may receive an interest in trust when the preceding interest terminates in favor of the beneficiary or is distributed to the beneficiary.

Sec. 701.0503

- ✓ • 701.0503(1); page 55; lines 3-4. “Creating instrument” is taken from current Wis. Stat. 701.06(5) and is left undefined. We have agreed to change the reference to “trust instrument.”
- 701.0503(1)(b); page 55; line 10. “Discretionary trust” is taken from current 701.06(5) and is not defined under current law, although it is a commonly understood concept. Rather than relying on a definition of a discretionary trust, we propose to rewrite subsection 701.0503(1)(b), page 55; lines 10-13 as follows: “(b) *If the beneficiary may receive income or principal under the trust, order the trustee to satisfy part or all of the claim out of part or all of any future payments of income or principal which are made pursuant to the exercise of the trustee’s discretion in favor of such beneficiary.*”
- 701.0503(2); page 55; lines 14-15. We will change “creating instrument” to “trust instrument.” A beneficiary can be legally obligated to pay for his or her own support if the beneficiary does not meet certain income or asset tests. This phrase is taken from current 701.06(5).
- 701.0503(2)(b) 1 and 2; page 56; lines 4-11. To be consistent with subsection 701.0503(1)(b), we propose to rewrite subsection 701.0503(2)(b) 1 and 2; page 56; lines 4-11, as follows: “(b)1. *Except as provided in subsection 2, if the beneficiary may receive income or principal under the trust, order the trustee to satisfy part or all of the liability out of part or all of any future payments of income or principal which are made pursuant to the exercise of the trustee’s discretion in favor of such beneficiary.*  
(b)2. *In the case of a beneficiary who may receive income or principal of the trust and who is a settlor or a spouse or minor child of the settlor, order the trustee to satisfy part or all of the liability without regard to whether the trustee has then exercised or may thereafter exercise the trustee’s discretion in favor of the beneficiary.*”
- ✓ • 701.0503(4); page 56; line 15. We agree with the proposed change.
- 701.0503(5); page 56; lines 16-17. We agree with the proposed change. The current language comes from current 701.06(8).

Sec. 701.0504

- ✓ • 701.0504(1); page 56; line 20. No. “This chapter” refers to Article V and should be changed to “subchapter.” ✓
- ✓ • 701.0504(2); page 57; line 4. No. “This chapter” refers to Article V and should be changed to “subchapter.”
- ✓ • 701.0504 (2); page 57; line 5. We agree to substitute “such an interest in property or an enforceable right” for “such an interest or right.”

- ✓ • 701.0504(3); page 57; line 11. We agree with the proposed change.
- ✓ • 701.0504(4); page 57; line 17. We propose to rewrite subsection 701.0504(4)(b) as follows: “(b) *The right of a beneficiary described in par. (a) may not be exercised by a creditor.*”

Sec. 701.0505

- ✓ 2 0 • 701.0505(1)(a)2; page 58; line 8. The reference to judgment creditors of the settlor is intentional. Upon further review, we propose to rewrite subsection 701.0505(1)(a)2; page 58; lines 7-15, as follows: “2. *With respect to an irrevocable trust that is not a trust for a disabled individual, upon application of a judgment creditor of the settlor, the court may, if the trust instrument requires or authorizes the trustee to make payments of income or principal to or for the settlor, order the trustee to satisfy part or all of the judgment out of part or all of the payments of income or principal as they are due, presently or in the future, or which are payable in the trustee’s discretion. If a trust has more than one settlor, the amount the judgment creditor of a particular settlor may reach may not exceed the settlor’s interest in the trust.*”
- ✓ • 701.0505(1)(b); page 59; lines 1-2. The language is the same as current 701.06(8). We would prefer to reword (b) as follows: “(b) *Assets of a trust exempt from claims of creditors under other statutes shall not be subject to subsection 701.0505(1)(a).*” We prefer not to provide cross references to other statutes providing exemptions from creditors as some exemptions may be provided for outside of our statutes.
- 701.0505(2); page 59; line 3. This is the UTC language, and we prefer to follow the UTC approach for consistency. These are situations in which the beneficiary is treated as the settlor of a revocable trust for purposes of creditor access to the trust funds.
- 701.0505(2)(a); page 59; line 5. This is the UTC language and should not be changed. Creditors have access to assets placed in a revocable trust by a settlor. This section provides that a holder of a withdrawal power will be treated like the settlor while the withdrawal power is exercisable (i.e., creditors can reach those assets) but only to the extent of property subject to the power. Not all of the trust assets may be subject to the withdrawal power. We question if there should be a semi-colon followed by “and” after (a). Answer given
- ✓ • 701.0505(2)(b)2.; page 59; line 10. “To the extent” is used by the UTC and in current 701.06(6)(b)2. It is not an “either/or” statement. “To the extent” is more accurate than “provided” because it is only the excess property over the greater of the amounts in (a) and (b) that is subject to claims. Please change this back from “provided” to “to the extent”.
- ✓ • 701.0505(2)(b)2.a.; page 59; lines 13-14. We agree with the proposed change.

- ✓ • 701.0505(2)(c); page 60; line 6. We agree with the proposed change. Current 701.06(6)(c) uses “or” and we tracked that section, but agree “and” makes more sense.
- New 701.0505(2)(e); page 60. We propose to add new subsection 701.0505(2)(e) taken from Arizona’s UTC to address lifetime planning techniques which allow the original settlor of a trust to become a beneficiary of the trust or a new trust after an intervening event such as the life estate of another beneficiary or the exercise of a power of appointment. Subsection 701.0505(2)(e) would read as follows: “(e). *For the purposes of this section, amounts and property contributed to the following trusts are not deemed to have been contributed by the settlor, and a person who would otherwise be treated as a settlor or deemed settlor of the following trusts shall not be treated as a settlor.* *considered*
  1. *An irrevocable inter vivos marital trust that is treated as qualified terminable interest property under section 2523(f) of the Internal Revenue Code if after the death of the settlor’s spouse the settlor is a beneficiary of the trust or an irrevocable trust that receives property from the trust.*
  2. *An irrevocable inter vivos marital trust that is treated as a general power of appointment trust under section 2523(e) of the Internal Revenue Code if after the death of the settlor’s spouse the settlor is a beneficiary of the trust or an irrevocable trust that receives property from the trust.*
  3. *An irrevocable inter vivos trust for the settlor’s spouse if after the death of the settlor’s spouse the settlor is a beneficiary of the trust or an irrevocable trust that receives property from the trust.*
  4. *An irrevocable trust for the benefit of a person, the settlor of which is the person’s spouse, regardless of whether or when the person was the settlor of an irrevocable trust for the benefit of that spouse.*
  5. *An irrevocable trust for the benefit of a person to the extent that the property of the trust was subject to a general power of appointment in another person.*
  6. *For the purposes of this subsection, a person is a beneficiary whether so named under the initial trust instrument or through the exercise by that person’s spouse or by another person of a limited or general power of appointment.”*
- 701.0505(2)(e), page 61, line 1. Current 701.0505(2)(e) would be renumbered 701.0505(2)(f).

Sec. 701.0507

- 701.0507; page 61; lines 19-21. This is the UTC language and should not be changed. This section deals only with personal creditors of a trustee who holds only legal title to property. Subsection 701.0504(3) deals with claims against a beneficiary who is acting as trustee.

Current Sec. 701.065

- The UTC committee has decided that LRB should add current subsection 701.065 of the Wisconsin Statutes to Subchapter V. We presume this would be added as a new subsection, 701.0508.

## UNIFORM TRUST CODE COMMITTEE

### SUBCHAPTER VI: RESPONSES TO QUESTIONS/COMMENTS IN LRB DRAFT

Note: Page 62, line 13 makes reference to the effective date of this subsection. This should refer to the effective date of the Chapter or Act.

✓ Page 62, Line 15, 701.0602(2)

The verb "fund" is appropriate. Also, this is the UTC language and should not be changed.

✓ Page 63, Line 16, 701.0602(5)

Powers of distribution are powers granted by the trust instrument to direct distributions of trust property.

✓ Page 65, Line 5, 701.0604(3)

The phrase refers to the trust being invalid, not the beneficiary. This is the UTC language and should not be changed.

Page 65, Line 7, 701.0604(4)

701.0813(2)(c) requires notice to the Qualified Beneficiaries of the existence of the trust and the right to request documentation, but intentionally does not require that notice be given to anyone else. The general rule in 701.0604(1)(a) intentionally creates a one year bar that applies to everyone without any notice requirement beyond 701.0813(2)(c).

This subsection imposes a one year statute of limitations on actions to contest the validity of a revocable trust, which can be accelerated to four months if notice is sent to any person that wants to contest the revocable trust. The Committee does not want to impose a duty on the trustee to send the notice; the notice is intended to be used in the discretion of the trustee. The Committee has decided that it would better accomplish our objective of clarity by deleting 701.0604(4) and by instead adding the following to Page 64, Line 17, 701.0604(1)(b) at the end:

"A trustee is not liable to any person for not taking the actions described in the preceding sentence."

The Committee wishes to add current Wisconsin statute section 701.08 as new subsection in subchapter 6, presumably as section 701.0605.

## COMMENTS ON ARTICLE SEVEN: FIRST DRAFT

### Sec. 701.0701

✓ \*\*\*\*NOTE: What is a reasonable time? Who decides?

- 701.0701(2); Page 66, line 5. “Reasonable time” is used in the UTC. The comment to the UTC provides: “What will constitute a reasonable time depends on the facts and circumstances of the particular case. A major consideration is possible harm that might occur if a vacancy in a trusteeship is not filled in a timely manner.” The Comments do not address who decides. The subcommittee recommends retaining the original UTC language.

✓ \*NOTE: I added “of the trust” following “distributee or a permissible distributee.” Okay?

- 701.0701(3)(a), page 66, line 12. OK to add “of the trust” following “distributee or a permissible distributee.”

### Sec. 701.0702

✓ \*\*\*\*NOTE: Section 220.09 refers to a “national bank”, not a national banking association. Is there a difference between these two entities? If not, I think the draft should use the term “national bank” to be consistent with s. 220.09. If there is a difference between these two entities, perhaps there is another more appropriate section to refer to?

- 701.0702(3), Page 67, line 2. We agree that the reference should be to a national bank.

### Sec. 701.0703

✓ \*\*\*\*NOTE: What if there are only two cotrustees?

- 701.0703(1), Page 67, line 5. **If there are only two co-trustees, they must both agree** – that is the only way that you will reach majority consensus. The UTC states that “Co-trustees who are unable to reach a unanimous decision may act by majority decision.” The Wisconsin Study Group thought that our change was more straightforward.

\*\*\*\*NOTE: This subsection assumes that there will be multiple cotrustees. Will that always be the case? Also, this subsection refers to all remaining cotrustees, but sub. (4) refers to “a majority of the remaining cotrustees.” Is there a reason for this difference?

- 701.0703(2), page 67, line 7.
  - The drafter asks whether there will always be multiple co-trustees. Section 704 provides that a vacancy in a co-trusteeship need be filled only if there is no trustee remaining in office.

- ✓
  - The subcommittee is Ok with changing (2) to “a majority of the remaining cotrustees.”

\*\*\*\*NOTE: I added a cross-reference to s. 701.0704, dealing with vacancy. Okay?

- ✓
  - Agree that the reference to 704 is OK.

\*\*\*\*NOTE: Why would a majority of the remaining trustees be sufficient to act for the trust under this subsection when sub. (3) requires the participation of a (each) cotrustee?

- ✓
  - 701.0703(4), page 67, line 16. The language of (2) and (4) follow the UTC. The subcommittee recommends retaining the original UTC language.

\*\*\*\*NOTE: Why does this subsection refer to the power of a “trustee” to delegate, rather than of a “cotrustee”?

\*\*\*\*NOTE: Because the last sentence of this subsection refers to “a delegation previously made,” I changed the tense of the irrevocable delegation from “was irrevocable” to “is irrevocable.” Okay?

- ✓
  - 701.0703(5), page 68, line 3.
    - The drafter asks why this subsection refers to trustee rather than co-trustee. We used the UTC language. Trustee by definition includes a co-trustee. The subcommittee recommends retaining the original UTC language.
    - In 701.0703(5), page 68, line 2, please change “trust terms” to “terms of the trust.”
    - The change in tense is OK.

✓ \*\*\*\*NOTE: Why does this subsection refer to a “trustee” rather than a “cotrustee”?

- 701.0703(6), page 68, line 5. The subcommittee recommends retaining the original UTC language.

✓ \*\*\*\*NOTE: Why does this subsection refer to a “trustee” rather than a “cotrustee”?

- 701.0703(7), page 68, line 6. The subcommittee recommends retaining the original UTC language.

✓ \*\*\*\*NOTE: Why does this subsection refer to a “trustee” rather than a “cotrustee”?

- 701.0703(8), page 68, line 11. The subcommittee recommends retaining the original UTC language.

**Section 701.0704**

✓ \*\*\*\*NOTE: What if the trust instrument requires a vacancy to be filled?

- 701.0704(2), page 69, line 4. This is only a default provision. If the trust instrument requires a vacancy to be filled, it trumps this section. Section 701.0105(1) says that chapter 701 governs except as otherwise provided in the terms of the trust. Section 701.0105(2) says that the terms of a trust prevail over any provision of the chapter. [There are exceptions to this, but filling a vacancy in the trusteeship is not one of the exceptions.] Further, the UTC Comment provides that this section applies only if the terms of the trust fail to specify a procedure for filling vacancies. The subcommittee recommends retaining the original UTC language.

✓ \*\*\*\*NOTE: This paragraph originally read “beneficiaries other than a disabled individual who is a beneficiary of a trust for a disabled individual or his or her spouse.” It was not clear whether “his or her spouse” referred to the spouse of the disabled individual or back to the original “person appointed by unanimous agreement of the qualified beneficiaries.” I modified the structure of this paragraph to make connections between the terms beneficiary, disabled individual, and spouse. Please review the paragraph carefully and confirm both that I interpreted the provision correctly and that it accomplishes your intent.

- 701.0704(3)(b), page 69, line 10. Please change (b) from

“By a person appointed by unanimous agreement of the qualified beneficiaries, other than a person who is a disabled individual and a beneficiary of a trust for a disabled individual or the spouse of the disabled individual.”

to:

“By a person appointed by unanimous agreement of the qualified beneficiaries, other than a person who is both an individual with a disability and a beneficiary of a trust for an individual with a disability or his or her spouse.”

✓ \*\*\*\*NOTE: The term “special fiduciary” is used in several places in the bill, and in each place the powers seem to be a bit different. Is this a term of art? Or should this term or the fiduciary’s powers or limitations be defined?

- 701.0704(4), page 69, line 14. The term “special fiduciary” is used in the UTC. The subcommittee recommends retaining the original UTC language.

**Section 701.0705**

✓ \*\*\*\*NOTE: Are these the only circumstances upon which a trustee may resign? If so, is it okay to say “a trustee may resign only...”?

- 701.0705(1), page 70, line 3. These aren't the only circumstances upon which a trustee may resign - a trustee may also resign in any manner provided in the trust instrument. The word "only" is not in the UTC. The subcommittee recommends retaining the original UTC language.

#### ✓ Section 701.0706

\*\*\*\*NOTE: I inverted this paragraph. Okay?

- 701.0706(2)(c), page 70, line 19. Inversion is OK.

#### Section 701.0708

✓ \*\*\*\*NOTE: This subsection provides that the trustee "shall be allowed reasonable compensation for the other services. . ." It is not clear whether the word shall is used in a mandatory, rather than a discretionary, sense. That is, is it your intent that a trustee who provides additional services is entitled to be paid an additional amount? If so, I think the use of the word "allowed" (rather than a word like entitled) weakens such an argument.

701.0708(3), page 72, line 5. Please change "shall be allowed reasonable compensation" to "may receive reasonable compensation."

#### Section 701.0709

✓ \*\*\*\*NOTE: Is there a reason that this subsection does not say "a trustee shall be reimbursed out of the trust property. . ."? I think "shall be reimbursed" is clearer than "is entitled to be," in part because "is entitled to be" implies that there is another alternative for reimbursing a trustee. Is that the case?

- 701.0709(1), page 72, line 9. The UTC uses the language "is entitled to be reimbursed" rather than the drafter's suggested "shall be reimbursed." The "entitled" language makes more sense than "shall" given 701.0709(1)(b) – where a trustee is entitled to reimbursement for unauthorized expenses to prevent unjust enrichment. The UTC Comments explain that a court may deny reimbursement for unauthorized expenses on appropriate grounds and lists the grounds. The subcommittee recommends retaining the original UTC language.

✓ \*\*\*\*NOTE: If the expenses were not properly incurred, why should they be reimbursed? Or was the reason that they were not properly incurred the prevention of unjust enrichment of the trust? If the latter, I would suggest restructuring the sentence so that that meaning is clear.

- 701.0709(1)(b), page 72, line 12. This is the UTC language. The UTC Comments provide that a trustee is entitled to reimbursement for unauthorized expenses only if the expenses benefit the trust. The purpose of reimbursing a trustee for unauthorized expenditures is to prevent unjust enrichment of the trust. However, a court can deny

reimbursement on grounds as outlined in the Comments. The subcommittee recommends retaining the original UTC language.

✓ **Addition: Please add the following as 701.0710**

**SECTION 701.0710. TITLE OF TRUST PROPERTY.**

*is considered*

A settlor or transferor may effectively transfer property to a trust by placing legal title of the property in the name of the trustee, which ~~shall be deemed~~ to include any successor trustee regardless of whether a successor trustee is referenced in the transfer document. A transfer which places legal title in the name of the trust itself shall be deemed to place legal title in the name of the trustee.

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## UNIFORM TRUST CODE COMMITTEE

### SUBCHAPTER VIII: RESPONSES TO QUESTIONS/COMMENTS IN LRB DRAFT

✓ Page 73, Line 1

The title of Subchapter VIII is "Duties and Powers of Trustee".

Page 75, Line 2, 701.0802(5)

✓ This is the UTC language and should not be changed. It does allow a trustee to be paid from multiple sources. The intent is to allow a corporate trustee (or its affiliated organization) to retain mutual fund fee revenue in addition to the normal trustee fee collected by the trustee. The mutual fund (investment company) services are provided to the mutual fund in general and the corporate trustee may receive fees based on the amount that is invested in a particular trust.

Page 75, Line 7, 701.0802(6)

✓ This is the UTC language and should not be changed. "Enterprise" is a term of art and relates to all business enterprises, so it includes LLCs, partnerships, sole proprietorships, and associations.

Page 75, Line 15, 701.0802(7)(c)

✓ The elimination of the brackets is correct. This subparagraph should be further modified to read: *"A transaction between a trust and another trust, a decedent's estate, a guardianship, a conservatorship, or a custodianship of which the trustee is a fiduciary or in which a beneficiary has an interest."*

✓ Page 75, Line 17, 701.0802(7)(d)

This is a term used in the UTC. No definition is needed.

✓ Page 76, Line 3, 701.0802(8)

Yes, "special fiduciary" is a term of art. No definition is needed.

✓ Page 77, Line 7, 701.0807(1)

Yes, a prudent trustee is different from a prudent person. This is the UTC language and should not be changed.

Page 77, Line 22, 701.0807(5)

The first interpretation is correct. Modify this to read: *"This section shall not apply to the delegation of investment and management functions. The delegation of investment and management functions is governed by subsection 881.01(10)."*

Page 78, Line 16, 701.0808(3)

Consistent with Virginia's recent changes to its version of the UTC, replace (3) entirely with the following:

*"(3) An excluded trustee shall not have any duty to:*

*(a) Provide advice to, consult with, monitor or evaluate the directing party's conduct.*

*(b) Provide information to the directing party, except for reasonable information related to the directing party's power that is requested by the directing party.*

*(c) Inform or warn any beneficiary, third party or the directing party that the excluded trustee disagrees with any of the directing party's actions or directions.*

*(d) Prevent the directing party from giving any direction or taking any action.*

*(e) Compel the directing party to redress a breach of its fiduciary duty."*

Page 79, Line 2, 701.0808(4)

Consistent with Virginia's recent changes to its version of the UTC, replace (4) entirely with the following:

*"(4) The administrative actions of an excluded trustee related to matters within the scope of the directing party's power, including confirming that the directing party's directions have been carried out and recording and reporting actions taken pursuant to the directing party's direction, shall not be considered to constitute either monitoring the directing party's actions or participating in the actions of the directing party."*

Page 79, Line 15, 701.0808(7)

Delete the first sentence

In the second sentence, delete "considered".

Yes, the deletion of old (5) and (9) is correct.

✓ The reference to 701.0818 is correct. That section is not yet completed. As a result the subsection will read: "*A trust protector is not a directing party and is subject to the provisions of s. 701.0818.*"

✓ Page 80, Line 21, 701.0812

Change heading by deleting "and liabilities".

✓ Page 81, above Line 1, 701.0812(1)

No, do not add "Subject to sub. (2)". These are separate rules. We intend to add a study group comment to further clarify this.

✓ Page 81, Lines 2 and 3, 701.0812(2)

✓ We decided to move the second part of this subsection to a new subsection 701.1002(3). After the second word of Line 2 insert a period, and on Lines 2 and 3 delete "and shall not be liable for the acts and omissions of a former trustee or other fiduciary of the trust." This subsection will then read: "*(2) A successor trustee shall not have a duty to examine the accounts of a former trustee.*"

Page 81, Line 10, 701.0813(1)

✓ No change. A distributee receives mandatory distributions and a permissible distributee receives discretionary distributions. One is not a subset of the other. It is necessary to refer to both.

✓ Page 84, Line 2, 701.0814(3)

Yes, "special fiduciary" is a term of art. No definition is needed.

✓ Page 84, Line 7, 701.0814(4)(a)

Delete "of 1986, as in effect on the effective date of this paragraph .... [LRB inserts date], or as later amended" and insert a comma after "Code".

Page 84, Line 12, 701.0814(4)(c)

Put a period after "Code" and delete the rest of that sentence.

Page 84, Line 16, 701.0815(1)

No, do not add "Subject to sub. (2)". Go back to the UTC language and do not change this.

Page 85, Line 7, 701.0815(2)

No, go back to the UTC language which says:

*"The exercise of a power is subject to the fiduciary duties prescribed by this chapter."*

Page 85, Line 16, 701.0816(4)

This is a term used in the UTC. No definition is needed.

Page 86, Line 2, 701.0816(6)

No, go back to the UTC language which says:

*"(6) With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital."*

Page 86, Line 4, 701.0816(7)

Ok, but add "other" to (c) before "security".

Page 86, Line 12, 701.0816(7)(d)

This is a term used in the UTC. No definition is needed.

Page 86, Line 17, 701.0816(8)

Common wall used by two adjacent structures.

Page 87, Line 8, 701.0816(12)

"Collection" means to take possession of the property. No change is needed.

✓ Page 87, Line 18, 701.0816(13)(b)

This is the UTC language, so add back "otherwise" before "remedy".

✓ Page 88, above Line 1, 701.0816(13)(d)

Yes, no change is needed.

\* ✓ Page 88, Line 15, 701.0816(18)

No, go back to the UTC language which says:

○ *"(18) Make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans."*

✓ Page 89, Line 4, 701.0816(21)

"Legal disability" means a minor or a person declared incompetent by a court. It is different from a "disabled person". No change is needed.

✓ Page 89, Line 16, 701.0816(21)(d)

These are distinguishable. This is the UTC language and should not be changed.

## Knepp, Fern

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**From:** victor.schultz@micorp.com  
**Sent:** Tuesday, August 21, 2012 11:30 AM  
**To:** Kuczenski, Tracy; Knepp, Fern  
**Cc:** Elizabeth A. Heiner; awiensch@foley.com; Halley, Philip J. PJH (5426)  
**Subject:** RE: LRB drafting update - articles 9 and 10, chapter 702  
**Attachments:** UTC article 9 - comments on First Draft by LRB.DOCX; 2012-08-16 -- Proposed Changes to Chapter 702.pdf; UTC article 10 - comments to LRB draft (August 12, 2012).DOCX

Hi Tracy and Fern - here are our comments on the final two articles of the UTC that were included in draft #1 of the bill. Please incorporate these comments in draft #2. (Note to Phil Halley - you will note some minor differences in the attached memo compared to what you sent me. I added some clarifying comments.)

*(See attached file: UTC article 9 - comments on First Draft by LRB.DOCX)(See attached file: UTC article 10 - comments to LRB draft (August 12, 2012).DOCX)*

In light of the changes we recommended to the power of appointment definitions, one of our committee members read through chapter 702 and had some other recommended changes. Here is what he suggests. Please advise if these are changes we can incorporate into the Trust Code bill. If we can incorporate these changes, the committee is also discussing one substantive change to section 702.17, rights of creditors of donee.  
*(See attached file: 2012-08-16 -- Proposed Changes to Chapter 702.pdf)*

The committee continues to work on two statute sections - section 418 on decanting and section 818 on trust protectors. By Monday, 8/27, I will send you some sample language for each section. While the final language may change, we want you to incorporate this into draft #2 so that draft #2 represents a full draft of the bill.

We are working on separate comments to drafts of the revisions to chapter 881 and the principal and income act (current statute section 701.20). We expect to have final comments on chapter 881 by mid-September and have some initial comments on the principal and income act around that same time.

Please let us know when draft #2 might be available. We are hoping that we might have something for review prior to our next committee meeting (9/13/12).

---

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