

**COMMENTS ON ARTICLE NINE:  
FIRST DRAFT**

**Sec. 701.0902**

\*\*\*\*NOTE: What does “with respect to directed trust property” mean in this subsection? Would it be acceptable to replace this phrase with “having responsibility over” or “having power over” or “having control of” or something similar?

- ✓ • 701.0902(1); page 91, line 18. This means the directed trust power over which the directing party has power. Ok to change to “having power over”. In addition, the Committee believes that the language regarding “unless the trust instrument provides otherwise is superfluous because this could be added to any Code provision other than a mandatory provision per section 701.010592). We suggest this section be revised:  
*(1) A directing party having power over directed trust property shall:*

\*\*\*\*NOTE: The subject seems to be missing from this paragraph: the management, control, and voting powers of what. I assume the directed trust property?

- 701.0902(1)(b), page 92, top of page. Correct, we should add a reference to directed trust property in this subsection.  
✓ *(b) Direct the excluded trustee with respect to the management, control, and voting powers, including voting proxies, of the directed trust property.*
- 701.0902(2), page 92, line 8. No comment made by LRB, but similar to the change made above in subsection (1), change the reference to directed trust property or omit the reference to the trust instrument providing otherwise.  
*(2) An excluded trustee having no power over directed trust property shall have no duty to do the following with respect to the directed trust property:*

**Sec. 701.0903 (Upon reconsideration, the Committee believes there should be a section addressing the nonapplication of the prudent investor rule to life insurance contracts owned by trusts. However, the originally proposed statute, which was modeled after Florida law, will be revised to model a much simpler version adopted in Ohio.)**

- 701.0903, page 92, lines 16-17. Change the title of this section as follows:  
**701.0903 Article IX, Section 903 – Nonapplication of prudent investor rule to life insurance contracts owned by trusts**

The Study Group recommends section 701.0903 be rewritten as follows:

**701.0903 Article IX, Section 903 – Nonapplication of prudent investor rule to life insurance contracts owned by trusts**

*(1) Notwithstanding the provisions of section 881.01, if a principal purpose of a trust is to hold a life insurance contract or to purchase a life insurance contract from contributions made to the trust, a trustee has no duty to perform any of the following duties with respect to the acquisition, retention and ownership of a life insurance contract owned by the trust:*

- (a) Determine whether the life insurance contract is, or remains a proper investment.*
- (b) Investigate the financial strength or changes in the financial strength of the life insurance company maintaining the life insurance contract.*
- (c) Determine whether to exercise any policy option, right or privilege available under the life insurance contract.*
- (d) Diversify the life insurance contract relative to any other life insurance contracts or any other assets of the trust.*
- (e) Inquire about or investigate the health or financial condition of any insureds.*
- (f) Prevent the lapse of an underfunded life insurance contract if the trust does not receive contributions or hold other readily marketable trust assets to pay the life insurance contract premiums.*

*(3) The trustee is not liable to a beneficiary or to any other person for any loss arising from the absence of the duties specified in par. (1)(a)-(f) of this section.*

*(4) This section does not apply to any life insurance contract that is purchased from an affiliate of the trustee, or with respect to any life insurance contract from which the trustee or an affiliate receives a commission, unless the power to purchase the life insurance contract has been delegated to another person and that other person made the decision to purchase the life insurance contract from or through the trustee or an affiliate.*

*(5) This section applies to a life insurance contract acquired, retained, or owned by a trustee before, on or after the effective date of this section.*

## Kuczenski, Tracy

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**From:** victor.schultz@micorp.com  
**Sent:** Wednesday, August 22, 2012 11:54 AM  
**To:** Kuczenski, Tracy  
**Subject:** RE: LRB drafting update - articles 9 and 10, chapter 702

Fantastic - look forward to meeting you and Fern on Friday. I may park at our M&I building and walk over to your office.

---

Victor J. Schultz  
Vice President and Senior Counsel  
Marshall & Ilsley Trust Company N.A.  
111 East Kilbourn Avenue, Suite 200, Milwaukee, WI 53202  
Phone (414) 287-7019 / Fax (414) 287-7025 / Toll free 800-342-2265  
Visit M&I online at [www.miwealth.com](http://www.miwealth.com)  
M&I Wealth Management, a part of BMO Financial Group

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▼ "Kuczenski, Tracy" ---08/22/2012 09:15:14 AM---Hi Victor -

From: "Kuczenski, Tracy" <Tracy.Kuczenski@legis.wisconsin.gov>  
To: <victor.schultz@micorp.com>, "Knepp, Fern" <Fern.Knepp@legis.wisconsin.gov>  
Cc: <awiensch@foley.com>  
Date: 08/22/2012 09:15 AM  
Subject: RE: LRB drafting update - articles 9 and 10, chapter 702

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Hi Victor --

Fern and I would be available to meet with you on Friday at 2:00. We have several conference rooms and I can reserve one. Our offices are at 1 East Main Street (the building on the capitol square that houses Starbucks coffee), and we are on the 2<sup>nd</sup> floor just as you step off the elevator. Parking is available in the "Block 89" complex (our building is attached to three others with shared underground parking); let me know if you need more information about parking.

See you Friday!

Tracy

Tracy K. Kuczenski  
*Legislative Attorney*  
Wisconsin Legislative Reference Bureau  
[tracy.kuczenski@legis.wisconsin.gov](mailto:tracy.kuczenski@legis.wisconsin.gov)  
(608) 266-9867  
**From:** victor.schultz@micorp.com [<mailto:victor.schultz@micorp.com>]  
**Sent:** Tuesday, August 21, 2012 6:17 PM  
**To:** Kuczenski, Tracy; Knepp, Fern  
**Cc:** awiensch@foley.com  
**Subject:** RE: LRB drafting update - articles 9 and 10, chapter 702

I am planning a trip to Madison on Friday. Would you be able to meet with me if I stopped by your offices Friday afternoon? I would propose 2PM or later for a meeting time. I was interested in discussing the following topics with you. If we can meet, where should I meet you?

- ✓1. LRB drafting conventions on the use of the word "shall".
- ✓2. LRB drafting convention and direction to committee on use of "unless the trust instrument provides otherwise".
- ✓3. How do the separate Acts get rolled into one legislative bill? *↳ search - default phrase, raise "or"*
- ✓4. Process and timing of preparing a new draft of bill - LRB drafts person prepares draft, sends it to editing, sends it to the legislator for distribution?
- ✓5. Drafting changes to chapter 702 - is this a separate Act; does it require legislator approval?
6. Review timing for completion of redrafts - 701; 881; 701.20
7. Process for introduction of bill once drafts are completed
8. Discuss any other drafting issues that you would like to raise

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Victor J. Schultz  
Vice President and Senior Counsel  
Marshall & Ilsley Trust Company N.A.  
111 East Kilbourn Avenue, Suite 200, Milwaukee, WI 53202  
Phone (414) 287-7019 / Fax (414) 287-7025 / Toll free 800-342-2265  
Visit M&I online at [www.miwealth.com](http://www.miwealth.com)  
M&I Wealth Management, a part of BMO Financial Group

*Fiduciary power vs.  
Fiduciary duty vs.  
trustee duty vs.  
Fiduciary powers elevated to power.  
trustee duty?*

*418 Decanting -  
re-written, not responding to my  
questions*

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✓ Victor Schultz---08/21/2012 11:30:18 AM---Hi Tracy and Fern - here are our comments on the final two articles of the UTC that were included in

From: Victor Schultz/MICorporation  
To: "Kuczenski, Tracy" <Tracy.Kuczenski@legis.wisconsin.gov>, "Knepp, Fern" <Fern.Knepp@legis.wisconsin.gov>  
Cc: "Elizabeth A. Heiner" <lheiner@BoardmanClark.com>, "awiensch@foley.com" <awiensch@foley.com>, "Halley, Philip J. PJH (5426)" <PHALLEY@whdlaw.com>  
Date: 08/21/2012 11:30 AM  
Subject: RE: LRB drafting update - articles 9 and 10, chapter 702

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.)  
[attachment "UTC article 9 - comments on First Draft by LRB.DOCX" deleted by Victor Schultz/MICorporation]  
[attachment "UTC article 10 - comments to LRB draft (August 12, 2012).DOCX" deleted by Victor Schultz/MICorporation]

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.  
[attachment "2012-08-16 -- Proposed Changes to Chapter 702.pdf" deleted by Victor Schultz/MICorporation]

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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Victor J. Schultz  
Vice President and Senior Counsel  
Marshall & Ilsley Trust Company N.A.  
111 East Kilbourn Avenue, Suite 200, Milwaukee, WI 53202  
Phone (414) 287-7019 / Fax (414) 287-7025 / Toll free 800-342-2265  
Visit M&I online at [www.miwealth.com](http://www.miwealth.com)  
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Changes to 702.01(5) & (6) from ca. 1 instruction  
702.17

## CHAPTER 702 POWERS OF APPOINTMENT

- 702.01 Definitions.
- 702.03 Manifestation of intent to exercise powers of appointment.
- 702.05 Exercise of powers of appointment.
- 702.07 Powers of appointment to be construed as exclusive.
- 702.08 Disclaimer of powers of appointment.
- 702.09 Release of powers of appointment.
- 702.11 Irrevocability of creation, exercise and release of powers of appointment.
- 702.13 Recording instruments relating to powers of appointment.
- 702.15 Disposition when special power of appointment is unexercised.
- 702.17 Rights of creditors of the donee.
- 702.19 Matters governed by common law.
- 702.21 Applicability of chapter.
- 702.22 Applicability of general transfers at death provisions.

<sup>in 702.02</sup>  
**702.01 Definitions.** As used in this chapter, unless the context indicates otherwise:

(1) "Creating instrument" means the will, trust agreement or other document which creates or reserves the power of appointment.

(2) "Donor" means the person who creates or reserves the power of appointment; "donee" means the person in whom the power of appointment is created or reserved; and "appointee" means the person to whom an interest is appointed.

(3) "General power of appointment" means a power exercisable in favor of the donee, the donee's estate, the donee's creditors or the creditors of the donee's estate, whether or not it is exercisable in favor of others. A power to appoint to any person or a power of appointment which is not expressly restricted as to appointees may be exercised in favor of the donee or the donee's creditors if exercisable during lifetime, and in favor of the donee's estate or the creditors of the donee's estate if exercisable by will.

(4) "Power of appointment" means a power of appointment over or authority to appoint legal or equitable interests in real or personal property. A power of appointment and is a power created or reserved by a person having property subject to his or her disposition which enables the donee of the power of appointment to designate, within such limits as may be prescribed, the transferees of the property or the shares or the interests in which it shall be received; it does not include a power of sale, a power of attorney, a power of revocation or a power exercisable by a trustee or other fiduciary in his or her fiduciary capacity.

(5) "Special power of appointment" means a power of appointment exercisable only in favor of one or more persons not including the donee, the donee's estate, the donee's creditors or the creditors of the donee's estate and, when exercisable in favor of a class, so limited in size by description of the class that in the event of nonexercise of the power a court can make distribution to persons within the class if the donor has failed to provide for this contingency.

(6) "Unclassified power" means a power which is neither a general power nor a special power as defined in this section.

History: 1971 c. 66; 1983 a. 189; 1993 a. 486.

### 702.03 Manifestation of intent to exercise powers.

(1) Unless the person who executed it had a contrary intention, if a governing instrument, as defined in s. 854.01 (2), or an inter vivos governing instrument, as defined in s. 700.27 (1) (c), creates a power of appointment that expressly requires that the power be exercised by any type of reference to the power or its source, the donor's intention in requiring the reference is presumed to be to prevent an inadvertent exercise of the power of appointment. Extrinsic evidence, as defined in s. 854.01 (1), may be used to construe the intent.

(2) In the case of other powers of appointment, an instrument manifests an intent to exercise the power of appointment if the instrument purports to transfer an interest in the appointive property which the

X-ref  
854.13  
700.27  
700.164(c)

donee would have no power to transfer except by virtue of the power of appointment, even though the power of appointment is not recited or referred to in the instrument, or if the instrument either expressly or by necessary implication from its wording interpreted in light of the circumstances surrounding its drafting and execution manifests an intent to exercise the power of appointment. If there is a general power of appointment exercisable by will with no gift in default in the creating instrument, a residuary clause or other general language in the donee's will purporting to dispose of all of the donee's estate or property operates to exercise the power of appointment in favor of the donee's estate, but in all other cases such a clause or language does not in itself manifest an intent to exercise a power of appointment exercisable by will.

**History:** 1997 a. 188; 2005 a. 216.

#### **702.05 Exercise of powers of appointment.**

(1) **CAPACITY TO EXERCISE POWER.** A power of appointment can be exercised only by a person who would have the capacity to transfer the property covered by the power of appointment.

(2) **KIND OF INSTRUMENT AND FORMALITIES OF EXECUTION.** A donee can exercise a power of appointment only by an instrument which meets the intent of the donor as to kind of instrument and formalities of execution. If the power of appointment is exercisable by will, this means a will executed with the formalities necessary for a valid will. A written instrument signed by the donee is sufficient if the donor fails to require any additional formalities or fails to indicate a will, but if the power of appointment is to appoint interests in land, it can be exercised only by an instrument executed with sufficient formalities for that purpose.

(3) **CONSENT OF 3RD PERSONS.** When the consent of the donor or of any other person is required by the donor for the exercise of a power of appointment, such consent must be expressed in the instrument exercising the power of appointment or in a separate written instrument, signed in either case by the persons whose consent is required. If any person whose consent is required dies or becomes legally incapable of consenting, the power of appointment may be exercised by the donee without the consent of that person unless the donor has manifested a contrary intent in the instrument creating the power of appointment.

(4) **POWER OF APPOINTMENT VESTED IN 2 OR MORE DONEES.** Unless the donor manifests a contrary intent, when a power of appointment is vested in 2 or more persons, all must unite in its exercise, but if one or more of the donees dies, becomes incapable of exercising the power of appointment or renounces, releases or disclaims the power, the power of appointment may be exercised by the others.

(5) **PRESUMPTION OF NON-EXERCISE OF POWERS OF APPOINTMENT.** A personal representative, trustee or other fiduciary who holds property subject to a power of appointment may administer such property as if such power of appointment was not exercised if said fiduciary has no notice of the existence of document purporting to be a will of the donee of said power of appointment, in the case of a power of appointment exercisable by will, or other documentation of the donee purporting to exercise said power of appointment, if exercisable other than by will, six months after the death of the donee of said power of appointment.

**History:** 1971 c. 66; 1977 c. 309; 2005 a. 253.

A warranty deed grants a present fee simple interest. A purported reservation of a power of appointment in a warranty deed is ineffective. Powers may be reserved and a lesser interests granted, but not by warranty deed. *Lucareli v. Lucareli*, 2000 WI App 133, 237 Wis. 2d 487, 614 N.W.2d 60, 99-1679.

**702.07 Powers of appointment to be construed as exclusive.** The donee of any power of appointment may appoint the whole or any part of the appointive assets to any one or more of the permissible appointees and exclude others, except to the extent that the donor specifies either a minimum share or amount to be appointed to each permissible appointee or to designated appointees, or a maximum share or amount appointable to any one or more appointees.

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

**History:** 1977 c. 309; 1997 a. 188; 2005 a. 216.

#### **702.09 Release of powers of appointment.**

(1) Except as the creating instrument expressly provides that the power of appointment cannot be released or expressly restricts the time, manner or scope of release, the donee of any power of appointment may:

(a) At any time completely release the donee's power of appointment;

(b) At any time or times release the donee's power of appointment in any one or more of the following respects:

1. As to the whole or any part of the property which is subject thereto;
2. As to any one or more persons or objects, or classes of persons or objects, in whose favor such power of appointment is exercisable;
3. So as to limit in any other respect the extent to or manner in which it may be exercised.

(2) A release may be effected, either with or without consideration, by written instrument signed by the donee and delivered.

(3) Delivery of a release may be accomplished in any of the following manners, but this subsection is permissive and does not preclude a determination that a release has been delivered in some other manner:

- (a) Delivery to any person specified in the creating instrument;
- (b) Delivery to a trustee or to one of several trustees of the property to which the power of appointment relates, or filing with the court having jurisdiction over the trust;
- (c) Delivery to any person, other than the donee, who could be adversely affected by an exercise of the power of appointment; or
- (d) Recording in the office of register of deeds in the county where the property is located.

History: 1993 a. 301, 486.

**702.11 Irrevocability of creation, exercise and release of powers of appointment.** The creation, exercise or release of a power of appointment is irrevocable unless the power to revoke is reserved in the creation, exercise or release of the power of appointment.

**702.13 Recording instruments relating to powers of appointment.**

(1) Any of the following instruments relating to powers of appointment is entitled to be recorded as a conveyance upon compliance with s. 706.05 (1):

- (a) An instrument, other than a will, exercising a power of appointment;
- (b) An instrument expressing consent to exercise;
- (c) A disclaimer;
- (d) A release.

(2) If a power of appointment is exercised by a will, a certified copy of the will and of the certificate of probate thereof may be recorded.

History: 1971 c. 41 s. 11; 1977 c. 309.

**702.15 Disposition when special power of appointment is unexercised.** If the donee of a special power of appointment fails to exercise effectively the power of appointment, the interests which might have been appointed under the power of appointment pass:

- (1) If the creating instrument contains an express gift in default, then in accordance with the terms of such gift;
- (2) If the creating instrument contains no express gift in default and does not clearly indicate that the permissible appointees are to take only if the donee exercises the power of appointment, then to the permissible appointees equally, but if the power of appointment is to appoint among a class such as "relatives," "issue" or "heirs," then to those persons who would have taken had there been an express gift to the described class; or
- (3) If the creating instrument contains no express gift in default and clearly indicates that the permissible appointees are to take only if the donee exercises the power of appointment, then by reversion to the donor or the donor's estate. But if the creating instrument expressly states that there is no reversion in the donor, then any language in the creating instrument indicating or stating that the permissible appointees are to take only if the donee exercises the power of appointment is to be disregarded and the interests shall pass in accordance with sub. (2).

History: 1993 a. 486.

**702.17 Rights of creditors of the donee.**

(1) ~~GENERAL POLICY. If the donee has either a general power or an unclassified power which is unlimited as to permissible appointees except for exclusion of the donee, the donee's estate, the donee's creditors and the creditors of the donee's estate, or a substantially similar exclusion of appointment, any interest~~

which the donee has power to appoint or has appointed is to be treated as property of the donee for purposes of satisfying claims of the donee's creditors, as provided in this section.

(2) **DURING LIFETIME OF THE DONEE.** If the donee has an unexercised general power of the kinds specified in sub. (1) appointment, and can presently exercise such a power of appointment, any creditor of the donee may by appropriate proceedings reach any interest which the donee could appoint, to the extent that the donee's individual assets are insufficient to satisfy the creditor's claim. Such an interest is to be treated as property of the donee within ch. 816. If the donee has exercised such a power of appointment, the creditor can reach the appointed interests to the same extent that under the law relating to fraudulent conveyances the creditor could reach property which the donee has owned and transferred.

(3) **AT DEATH OF THE DONEE.** If the donee has at the time of his or her death a general power of the kinds specified in sub. (1) appointment, whether or not the donee exercises the power of appointment, any creditor of the donee may reach any interest which the donee could have appointed or has appointed, to the extent that the claim of the creditor has been filed and allowed in the donee's estate but not paid because the assets of the estate are insufficient.

(4) **ASSIGNMENT FOR BENEFIT OF CREDITORS.** Under a general assignment by the donee for the benefit of the donee's creditors, the assignee may exercise any right which a creditor of the donee would have under sub. (2).

(5) **THIRD PARTIES IN GOOD FAITH PROTECTED.** Any person acting without actual notice of claims of creditors under this section incurs no liability to such creditors in transferring property which is subject to a power of appointment or which has been appointed; and a purchaser without actual notice and for a valuable consideration of any interest in property, legal or equitable, takes such interest free of any rights which a creditor of the donee might have under this section.

**History:** Sup. Ct. Order, 67 Wis. 2d 585, 777 (1975); 1975 c. 218; 1993 a. 486.

**702.19 Matters governed by common law.** As to all matters within the scope of those sections of ch. 232, 1963 stats., which have been repealed, and not within this chapter or any other applicable statute, the common law is to govern. This section is not intended to restrict in any manner the meaning of any provision of this chapter or any other applicable statute.

**History:** 1983 a. 192 s. 304.

**702.21 Applicability of chapter.** The provisions of this chapter are applicable to any power of appointment existing on May 16, 1965, as well as a power of appointment created after such date.

**702.22 Applicability of general transfers at death provisions.** Chapter 854 applies to transfers at death under an instrument that creates or exercises a power of appointment.

**History:** 1997 a. 188.

For TKK

08/12/12

**UTC ARTICLE 10 SUBCOMMITTEE**

**COMMENTS ON LRB INITIAL DRAFT RELEASED JANUARY 2012**

All references to "LRB" means the PDF file LRB-2788/P1, 2011-2012 Legislature

Prepared by Phil Halley on behalf of the UTC Article 10 Subcommittee (06/24/12)

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✓ **LRB p. 98, ln. 4**

\*\*\*\*NOTE: No title was provided for this subchapter X. If other subchapters have titles, each subchapter must have a title.

**Subcommittee Response:** The title is **LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE**

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✓ **LRB p. 98, ln. 14 (s. 701.1001)**

\*\*\*\*NOTE: Order a trustee to account for something? Or to give an accounting of something?

**Subcommittee Response:** This is directly from the UTC and has a meaning to trust lawyers.

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✓ **LRB p. 98, ln. 16 (s. 701.1001)**

\*\*\*\*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?

**Subcommittee Response:** Recommend modifying par. (e) to read as follows:

“(e) Appoint a special fiduciary with such duties and authority ordered by the court to take possession of the trust property and administer the trust.”

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✓ **LRB p. 99, ln. 3 (s. 701.1001)**

\*\*\*\*NOTE: How does s. 701.1012 limit this provision?

***Subcommittee Response:*** Section 701.1012 includes protections for innocent third parties dealing with the trustee.

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✓ **LRB p. 99, revise ln. 7 and insert after line 20 (s. 701.1002)**

***Subcommittee Comment.*** This is not in response to an LRB comment, but is in response to a change made by the Study Group to section 701.0812. New subsection (3) should be added to s. 701.1002, moved from s. 701.0812(2), since it is a liability provision. It should read: “(3) A successor trustee shall not be liable for the acts and omissions of a former trustee or other fiduciary of the trust.” The title of the section should be changed accordingly to “**701.1002 Article X, Section 1002 - Damages for breach of trust; liability of successor trustee.**”

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✓ **LRB p. 102, ln. 1 (s. 701.1004)**

\*\*\*\*NOTE: I’m not sure the phrase “unless the court finds good cause” works without additional explanation, but perhaps I am being hyper-critical. If I am reading it correctly, I believe the phrase means good cause to allow attorneys fees and costs to be paid from the trust. Yes? Would it be a problem to state that explicitly?

***Subcommittee Response:*** We agree and recommend modifying the sentence beginning on p. 101 at ln. 11 to read as follows:

” If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause to allow attorneys fees and costs to be paid from the trust, the court shall enter an order prohibiting the payment of further attorneys fees and costs from the assets of the trust and shall order attorneys fees or costs previously paid from assets of the trust in such proceeding to be refunded.”

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✓ **LRB p. 102, ln. 5 (s. 701.1004)**

\*\*\*\*NOTE: I'm not familiar with the phrase "to refund timely." Could the last sentence close with "failure to refund the trust in a timely manner?"

**Subcommittee Response:** We agree to revise and recommend modifying par. (d) to read as follows:

"(d) If the court orders a refund under par. (c), the court may enter such sanctions as are appropriate if a refund is not made as directed by the court, including striking defenses or pleadings filed by the trustee. Nothing in this paragraph limits other remedies and sanctions the court may employ for the failure to refund to the trust in a timely manner."

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✓ **LRB p. 102, ln. 6 (s. 701.1004)**

No LRB Note, but on further review the Subcommittee recommends the following modification of par. (e):

"(e) ~~Nothing~~ Subject to s. 701.1005, nothing in this subsection limits the power of the court to review fees and costs or the right of any interested persons to challenge fees and costs after payment, after an accounting, or after conclusion of the litigation."

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✓ **LRB p. 103, ln. 6 (s. 701.1005)**

\*\*\*\*NOTE: What must the report include in order to "adequately disclose the existence of a potential claim"? How much detail or evidence? How smart must the beneficiary be?

**Subcommittee Response:** Adequate disclosure is a factual determination made based on facts and circumstances. The Subcommittee recommends retaining the language as is, which is directly from the UTC.

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✓ **LRB p. 103, ln. 14 (s. 701.1005)**

\*\*\*\*NOTE: I'm not sure the word "period" is, by itself, sufficient.

**Subcommittee Response:** We agree and recommend changing subsection (4) to read as follows:

"(4) Subsections (1) and (3) shall not apply to a claim for fraud as to which the periodtime for asserting a claim shall be governed by applicable law."

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✓ **LRB p. 103, ln. 19 (s. 701.1006)**

\*\*\*\*NOTE: How likely is this to happen? How does it happen?

**Subcommittee Response:** These questions do not imply a drafting issue. However, after reviewing the language in s. 701.1006, we decided to change the initial draft to reflect the UTC language. Change s. 701.1006 to read:

**"701.1006 Article X, Section 1006 – Reliance on trust instrument.** A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance."

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✓ **LRB p. 106, ln. 1 (first of four Notes) (s. 701.1011)**

\*\*\*\*NOTE: Is "holding an interest as a general partner" the same as being a general partner? If so, can we just say "is a general partner"?

**Subcommittee Response:** It is clear from the subsection read as a whole that it refers to holding the interest in a fiduciary capacity. This is UTC language with which the Committee is satisfied.

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✓ **LRB p. 106, ln. 1 (second of four Notes) (s. 701.1011)**

\*\*\*\*NOTE: I substituted ch. 178 for the Uniform Partnership Act and ch. 179 for the Uniform Limited Partnership Act. That said, is there a particular section in those chapters, governing notice or disclosure, that should be cross-referenced here?

**Subcommittee Response:** The references to ch. 178 and ch. 179 should be deleted, as neither chapter includes a provision that would have implications here. As a result, subsection (1) should read as follows:

“(1) Unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust’s acquisition of the interest if the fiduciary capacity was disclosed in the contract.”

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✓ **LRB p. 106, ln. 1 (third of four Notes) (s. 701.1011)**

\*\*\*\*NOTE: This subsection refers to “the fiduciary capacity.” Whose fiduciary capacity and with respect to what or whom?

**Subcommittee Response:** See the response to the first of the Notes above. It is clear to the Committee that it is the trustee’s fiduciary capacity. This is UTC language with which the Committee is satisfied.

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✓ **LRB p. 106, ln. 1 (fourth of four Notes) (s. 701.1011)**

\*\*\*\*NOTE: As drafted, the trust is acquiring an interest as a general partner. Is that your intent? How or why would a trust do that?

**Subcommittee Response:** Yes, that is the intent. There are various ways in which a trust could acquire an interest as a general partner. The second question above does not appear to involve a drafting issue.

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✓ **LRB p. 106, ln. 3 (s. 701.1011)**

\*\*\*\*NOTE: Does the partnership at issue here have to have any relationship to the trust for which the person who holds an interest as a general partner serves as a trustee?

**Subcommittee Response:** The partnership has a relationship to the trust by virtue of the trustee holding an interest as a general partner of the trust.

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✓ **LRB p. 106, ln. 6 (s. 701.1011)**

\*\*\*\*NOTE: Does the partnership at issue here have to have any relationship to the trust for which the person who holds an interest as a general partner serves as a trustee? If so, that should be spelled out. If not, why would the settlor be liable for liabilities of the partnership?

**Subcommittee Response:** The partnership has a relationship to the trust by virtue of the trustee holding an interest as a general partner of the trust. The interest is an asset of the trust. The settlor is liable in this instance under agency law principles, but the Trust Code does not need to explain the underlying theory.

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✓ **LRB p. 107, ln. 6 (s. 701.1012)**

\*\*\*\*NOTE: This subsection apparently includes beneficiaries, whereas subs. (1), (2), and (4) do not. Is that intentional?

**Subcommittee Response:** Yes, it is intentional. The Comment to UTC Section 1012 provides in pertinent part as follows: “Subsection (c) protects any person, including a beneficiary, who in good faith delivers property to a trustee.”

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✓ **LRB p. 108, ln. 1 (s. 701.1013)**

\*\*\*\*NOTE: What is being signed or otherwise authenticated in this paragraph?

**Subcommittee Response:** It could be any kind of writing, which the Subcommittee believes is implicit. This language is from the UTC.

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✓ **LRB p. 108, ln. 21 (s. 701.1013)**

No LRB Note, but on further review the Subcommittee recommends the following modification of subsection (8):

“(8) A person making a demand for copies of the trust instrument or excerpts, beyond those excerpts described in subsection (5), from the trust instrument in addition to a certification of trust is liable for costs, expenses, reasonable attorneys fees and damages if the court determines that the person did not act in good faith in demanding the copies.”

Document comparison by Workshare Compare on Thursday, August 16, 2012  
1:27:21 PM

Input:	
Document 1 ID	file://F:\Documents\RPPT Board of Governors\Powers of Appointment\2011 -- Chapter 702.doc
Description	2011 -- Chapter 702
Document 2 ID	file://F:\Documents\RPPT Board of Governors\Powers of Appointment\2012 -- Proposed Chapter 702.doc
Description	2012 -- Proposed Chapter 702
Rendering set	standard

Legend:	
<u>Insertion</u>	
<del>Deletion</del>	
<del>Moved from</del>	
<u>Moved to</u>	
Style change	
Format change	
<del>Moved deletion</del>	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	82
Deletions	12
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	94

## Knepp, Fern

---

**From:** victor.schultz@micorp.com  
**Sent:** Tuesday, September 04, 2012 6:35 PM  
**To:** Kuczenski, Tracy; Knepp, Fern  
**Subject:** Re: WI Trust Code - update  
**Attachments:** Revised trust protector proposal - section 818 - submitted to LRB 9-2012.doc; UTC section 701.0418 (Revised by PJH and AJW for LRB) 9-2012.doc

This is a resend - I did not send the most updated version of section 818. The updated memo is attached below.

---

Victor J. Schultz, JD | Vice President | Estate Planning Specialist - Financial Planning Strategy | BMO Harris Bank N.A. | 111 East Kilbourn Avenue, Suite 200 | Milwaukee, Wisconsin 53202 |  
Phone (414) 287-7019 / Cell (262) 844-8756 / Toll free 800-342-2265  
email: [victor.schultz@micorp.com](mailto:victor.schultz@micorp.com)

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▼ Victor Schultz---09/04/2012 04:22:19 PM---Tracy and Fern - here are the final two sections for you to insert into draft #2 of the UTC bill. W

From: Victor Schultz/MICorporation  
To: "Kuczenski, Tracy" <[Tracy.Kuczenski@legis.wisconsin.gov](mailto:Tracy.Kuczenski@legis.wisconsin.gov)>  
Cc: "Knepp, Fern" <[Fern.Knepp@legis.wisconsin.gov](mailto:Fern.Knepp@legis.wisconsin.gov)>, "Wiensch, Adam J." <[awiensch@foley.com](mailto:awiensch@foley.com)>, "Halley, Philip J. PJH (5426)" <[PHALLEY@whdlaw.com](mailto:PHALLEY@whdlaw.com)>  
Date: 09/04/2012 04:22 PM  
Subject: Re: WI Trust Code - update

---

Tracy and Fern - here are the final two sections for you to insert into draft #2 of the UTC bill. While our committee continues to review and discuss these sections, we are interested in your comments as you complete a full version of the proposed bill.

FYI - section 701.0418 (sometime referred to as the "decanting statute") is a complete revision of the section that was previously submitted to you. Section 418 is not part of the UTC, but is a rapidly gaining popularity as about 18 states have adopted similar provisions, including 6 states within the past 12 months. At our next meeting, committee will review the recently enacted statutes, which may result in further revision after we receive you draft #2.

*(See attached file: UTC section 701.0418 (Revised by PJH and AJW for LRB) 9-2012.doc)*

Section 701.0818 is the trust protector statute that was referred to in our first draft, but no language was provided until now. Creation of the draft language has resulted in two changes to section 701.0103 - a definition of "trust protector" and a revised definition of "trust instrument." At the end of August, the state of Missouri adopted the country's first statute devoted solely to the concept of a trust protector. At our next meeting, our committee will review the Missouri statute, which may result in further revisions to this section after we receive your draft #2.

*(See attached file: Revised trust protector proposal - section 818 - submitted to LRB 9-2012.doc)*

Based on our discussions, you thought you would be able to insert sections 418 and 818 into the bill by next week and that we hopefully could expect to receive draft #2 from editing by the end of September.

---

Victor J. Schultz, JD | Vice President | Estate Planning Specialist - Financial Planning Strategy | BMO Harris Bank N.A. | 111 East Kilbourn Avenue, Suite 200 | Milwaukee, Wisconsin 53202 |  
Phone (414) 287-7019 / Cell (262) 844-8756 / Toll free 800-342-2265  
email: [victor.schultz@micorp.com](mailto:victor.schultz@micorp.com)

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☐ "Kuczenski, Tracy" ---09/04/2012 09:44:05 AM---Hi Victor - I was only in the office on Tuesday and Wednesday of last week, and Fern

From: "Kuczenski, Tracy" <[Tracy.Kuczenski@legis.wisconsin.gov](mailto:Tracy.Kuczenski@legis.wisconsin.gov)>  
To: <[victor.schultz@micorp.com](mailto:victor.schultz@micorp.com)>  
Cc: "Knepp, Fern" <[Fern.Knepp@legis.wisconsin.gov](mailto:Fern.Knepp@legis.wisconsin.gov)>  
Date: 09/04/2012 09:44 AM  
Subject: WI Trust Code - update

---

Hi Victor –

I was only in the office on Tuesday and Wednesday of last week, and Fern was on vacation all week. We're just checking in with you -- neither of us received any e-mails containing the revisions we discussed on Friday August 24<sup>th</sup>. Just making sure we didn't miss anything...

Tracy

Tracy K. Kuczenski

*Legislative Attorney*

Wisconsin Legislative Reference Bureau

[tracy.kuczenski@legis.wisconsin.gov](mailto:tracy.kuczenski@legis.wisconsin.gov)

(608) 266-9867

## **Revised Trust Protector Proposal**

### **Add to section 103 – Definitions**

“Trust protector” means any person or committee of persons, other than the settlor, who is expressly granted in the trust instrument one or more powers over the trust other than a power to direct the trustee’s investment decisions, distribution decisions or other decisions of the trustee required in carrying out the duties of the trustee in administering the trust.

“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 to the trust or modifications to the trust under subchapter IV or section 701.0111.

### **Section 818 – Trust Protector**

**(a)** A trust instrument may appoint a trust protector, whether referred to by that name or some other name or not given any title.

**(b)** The trust protector shall have those powers specified in the trust instrument and the trust instrument may specify whether a particular power is to be exercised in a fiduciary or non-fiduciary capacity. The powers may include but are not limited to the following.

**(1)** The following powers shall be deemed exercisable in a fiduciary capacity in absence of a clear direction in the trust instrument:

**(A)** Modify or amend the instrument to respond to opportunities related to, or changes in, restraints on alienation or other state laws restricting the terms of a trust, the distribution of trust property or the administration of the trust.

**(B)** Change any one or more of the place of administration, tax situs of the trust, and governing law of the trust.

**(C)** Interpret terms of the instrument at the request of the trustee.

**(D)** Correct errors or ambiguities that might otherwise require court construction or defeat the settlor’s intent.

**(E)** Review and approve a trustee’s reports or accounting.

**(F)** Resolve disputes between the trustee and any beneficiary.

**(2)** The following powers shall be deemed exercisable in a non-fiduciary capacity in absence of a clear direction in the trust instrument:

**(A)** Modify or amend the instrument to achieve a different tax status or to respond to changes in federal or state law.

**(B)** Eliminate or modify the interests of any beneficiary or add a new beneficiary; provided, however, the trust protector shall not modify any beneficial interest of a trust that qualified for a marital deduction or charitable deduction from federal or state estate tax in a manner that would have caused such trust not to qualify for such deduction.

**(C)** Modify the terms of any power of appointment granted under the trust; provided, however, such modification may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument.

**(D)** Remove, replace or appoint a trustee, trust protector, directing party or any other special fiduciary.

**(E)** Terminate the trust.

**(F)** Appoint assets to a new trust under section 701.0418.

**(G)** Appoint a successor trust protector, trustee, directing party or other special fiduciary.

**(H)** Advise the trustee on matters concerning a beneficiary.

**(I)** Consent to, veto or advise the trustee on the exercise of any trustee duties and powers, including the duty to provide notification to qualified beneficiaries under section 701.0813.

**(3)** Any other power granted to the trust protector which is not subject to a clear direction on the capacity of the power shall be deemed exercisable in a non-fiduciary capacity.

**(4)** Any power granted to a trust protector who is also serving as a trustee shall be exercisable in a fiduciary capacity.

**(c)** A trust protector may resign or release any power granted to the trust protector by giving written notice to the trustee any successor trust protector.

**(d)** A trust protector shall not be liable for any exercise or non-exercise of non-fiduciary powers unless such exercise or non-exercise is determined to be in bad faith or for the actions or inactions of a fiduciary over whom the trust protector has a power of removal unless the failure to exercise such power of removal is determined to have been in bad faith. In addition, with respect to either fiduciary or non-fiduciary powers, unless otherwise provided in the trust instrument, the trust protector shall have no fiduciary responsibility to elect to exercise its powers and shall have no duty to monitor the conduct of the trustees or any other fiduciary or changes in the law or circumstances of the beneficiaries.

(e) The trust protector shall be prohibited from exercising any authority, power or discretion in a manner that would create or expand any beneficial interest, power of appointment, right of withdrawal or right to receive trust property as a result of the exercise of a power of appointment in favor of:

(1) The trust protector, his or her estate, his or her creditors, or creditors of his or her estate.

(2) Any ancestor or descendant of the trust protector who is not also related to the settlor or the spouse of any such individual.

(3) Any other person related to the trust protector by blood or marriage who is not also related to a descendant of the settlor or the spouse of any such individual.

(4) Any officer, employee or director of any corporate trust protector or corporate trustee.

(f) A trust protector shall not be subject to the direction of the settlor and the settlor shall have no cause of action against the trust protector. However, a trust protector may consider a settlor's goals, objectives and philosophies in establishing the trust and its structure when exercising the powers granted, and may do so regardless of whether the settlor is deceased.

(g) A trustee or other fiduciary who acts consistent with a modification of the trustee's or other fiduciary's powers, authority or discretion as a result of the action of a trust protector shall have no liability for any loss or other injury associated with so acting pursuant absent a breach of a duty owed for the exercise of such powers, authority or discretion as modified. A trustee or other fiduciary may refuse to act consistent with such a modification if such trustee or other fiduciary knows that such modification is manifestly contrary to the terms of the trust or would constitute a serious breach of any fiduciary duty owed by the trust protector. A trustee has no duty to monitor the conduct of the trust protector, provide advice to or consult with the trust protector, or communicate with or warn or apprise any beneficiary concerning instances in which the trustee would or might have exercised the trustee's own discretion in a manner different from the manner exercised by the trust protector.

(h) A trust protector is entitled to receive, from the assets of the trust for which the trust protector is acting, reasonable compensation and reimbursement of the reasonable costs and expenses incurred in determining whether to carry out, and in carrying out, the express powers given to the trust protector.

(i) A trust protector is entitled to receive, from the assets of the trust for which the trust protector is acting, reimbursement of the reasonable costs and expenses, including attorney's fees, of defending any claim made against the trust protector arising from the acts or omissions of the trust protector acting in that capacity unless it is established by clear and convincing evidence that the trust protector was acting in bad faith or with reckless indifference.

(j) The trust protector is entitled to receive information regarding the administration of the trust as follows:

(1) Upon the reasonable request of the trust protector, the trustee shall promptly provide to the trust protector any and all information related to the trust that may relate to the exercise of nonexercise of the power expressly granted to the trust protector. The trustee has no obligation to provide any information to the trust protector absent a request for the information by the trust protector.

(2) If the trustee is bound by confidentiality restrictions with respect to a trust asset or other information about the trust, a trust protector who requests information about the asset or other information shall agree to be bound by the confidentiality restrictions before receiving information from the trustee.

(k) A term of trust relieving a trust protector of liability for breach of duty is unenforceable to the extent the term:

(1) Relieves the trust protector of liability for a breach committed in bad faith or with reckless indifference.

(2) Was inserted as the result of an abuse by the trust protector of a confidential relationship to the settlor. An exculpatory term drafted or caused to be drafted by the trust protector is invalid as an abuse of a fiduciary or confidential relationship unless the trust protector proves that the exculpatory term was fair under the circumstances existing at the time the trust instrument was signed and that its existence and contents were adequately communicated to the settlor.

(L) If a person accepts an appointment to serve as a trust protector of a trust having its principal place of administration in this State, the person submits to the jurisdiction of the courts of this State with respect to matters involving the trust, regardless of any term to the contrary in an agreement or instrument.

(m) If a trust protector is exercising a power to direct a trustee's or directing party's investment decisions, distribution decisions or other decisions of the trustee required in carrying out the duties of the trustee or the directing party in administering the trust, the trust protector's exercise or non-exercise of such power shall be subject to the provisions of section 701.0808.

**REVISION TO 701.418 (Revised by PJH and AJW 08/28/12)**

**701.0418 Article IV, Section 418 - Trustee's power to appoint assets to new trust. (1) DEFINITIONS.** In this section:

(a) "Absolute power" means a power to invade trust assets for the benefit of one or more beneficiaries that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, whether or not the term "absolute" is used. "Absolute power" includes a power to invade trust assets for purposes such as best interests, welfare, comfort, or happiness.

(b) "First trust" means the trust whose assets are appointed pursuant to the power granted under sub. (2).

(c) "Second trust" means the trust or trusts to which assets are appointed under sub. (2).

(d) "Standard," when used with reference to the basis upon which a decision is made by a trustee to invade income or principal, means power other than absolute power.

(2) **POWER TO APPOINT.** Except as otherwise provided in this section, a trustee who has the power under the terms of the first trust to invade the principal of the first trust for the benefit of a beneficiary who is eligible for or entitled to the income of the first trust or entitled to an annuity or unitrust payment from the first trust, whether or not the trustee has absolute power to invade principal and whether or not there is a current need to invade principal under the terms of the first trust, may exercise such power by appointing part or all of the assets of the first trust in favor of a trustee of a second trust under a trust instrument the same as or other than that governing the first trust if the exercise of such power satisfies all of the following:

(a) Does not reduce any fixed income, annuity, or unitrust interest of a beneficiary.

(b) Results in the trustee of the second trust having the power to invade the income or principal of the second trust under a standard that is no broader than the standard set forth in the first trust. This paragraph does not apply to a term of a second trust described under sub. (4) (a) 8. or 9.

(c) 1. Except as provided in subd. 2., is in favor of the beneficiaries of the first trust.

2. Subject to par. (a), if the terms of the first trust grant the trustee absolute power to invade principal, the beneficiaries of the second trust may include less than all of the beneficiaries of the first trust.

**(3) LIMITATIONS ON EXERCISE OF POWER.** The power under sub. (2) may not be exercised by a trustee if any of the following apply:

(a) The trust instrument creating the first trust expressly prohibits exercise of such power by specific reference to this section or by reference to the term “decanting.”

(b) Any contribution to the first trust qualified for a marital or charitable deduction for federal income, gift, or estate tax purposes under the Internal Revenue Code and the second trust contains any provision which, if included in the first trust, would have prevented the first trust from qualifying for such deduction or would have reduced the amount of such deduction or omits any provision which, if omitted from the first trust, would have prevented the first trust from qualifying for such deduction or would have reduced the amount of such deduction.

(c) 1. a. Except as provided in subd. 2., and subject to subd. 1. b., the trustee has a beneficial interest in the first trust.

b. The restriction relating to a trustee under subd. 1. a. shall not preclude the power under sub. (2) from being exercised by a cotrustee or cotrustees even where the terms of the first trust, applicable law, or other circumstances would otherwise require the majority or unanimous action of the trustees of the first trust.

2. Subdivision 1. does not apply if the second trust includes terms described in sub. (4) (a) 8. or 9. and the trustee's only beneficial interest in the first trust is as a remainder beneficiary.

(d) If such exercise would impair currently exercisable withdrawal rights of a beneficiary of the first trust where such withdrawal rights were granted to such beneficiary in a manner designed to allow contributions subject to such withdrawal rights to qualify for the federal gift tax annual exclusion or if the terms of the second trust would otherwise impair qualification of gifts previously made to the first trust for the federal gift tax annual exclusion.

(e) Where the exercise of such power would violate a rule against perpetuities applicable to the first trust or suspend a trustee's power of alienation over assets of the first trust in a manner that would cause the second trust to be void in whole or in part.

(f) Where the exercise of such power would impair the essential purpose of a trust for a disabled individual.

**(4) PERMISSIBLE TERMS OF SECOND TRUST.** (a) Subject to the limitations of this section, the trust instrument of the second trust may provide for terms intended to achieve one or more purposes such as the following (though the list below is not exclusive):

1. Correct a drafting error.
2. Clarify potentially ambiguous terms of the first trust.
3. Change the age of distribution to a beneficiary.
4. Extend the trust's duration.
5. In the case of a first trust over which the trustee has absolute power with respect to invasion of income and principal, modify terms governing such invasion.
6. In the case of a first trust over which the trustee has absolute power with respect to invasion of income and principal, grant, eliminate or modify general or special powers of appointment.
7. Add provisions to protect the interests of one or more beneficiaries, including

provisions to protect beneficiaries from self-destructive behavior.

8. Change the terms of the trust applicable to a beneficiary who is a disabled individual, regardless of whether the first trust includes standards for distribution, where the purpose of such change is to allow such beneficiary to qualify or continue to be qualified to receive benefits under a government program.

9. Provide for transfer of trust assets to a community trust. In this subdivision, "community trust" means a master trust that is established and managed by a nonprofit organization that maintains sub-accounts for individual beneficiaries that meet the definition of a trust for a disabled individual.

10. Add or remove spendthrift trust provisions.

11. Modify investment provisions, including those relating to permissible investments, use of investment advisors, directed trust property, or self-dealing transactions.

12. Change present or future trustees, including by defining the method by which trustees or cotrustees may be appointed or removed and replaced.

13. Provide for appointment of a trust protector and define the powers of such trust protector.

14. Provide for appointment of a directing party and define the powers of such directing party.

15. Change the principal place of administration of the trust.

16. Change the governing law of the trust.

17. Allow for division of or merger of one or more trusts.

18. Add or modify trustee, trust protector, or directing party exculpatory provisions.

19. Change other administrative provisions which the trustee believes will provide for more effective and efficient administration of the trust.

20. Include provisions to obtain desirable tax treatment or to avoid adverse tax

consequences, including provisions relating to grantor trust status under section 671 et seq. of the Internal Revenue Code.

(b) If any term of the second trust would reduce the potential liability of a trustee, including a term that adopts or expands an exculpatory provision relating to trustees, unless the exercise of the power under sub. (2) is approved by the court, a trustee of the first trust who would benefit from the adoption of such term in the second trust must abstain from the consideration of and the adoption of such term, and such term may be considered and adopted only by such other trustees of the first trust who would not benefit from such term.

(5) PROCEDURAL MATTERS. (a) A trustee's exercise of the power under sub. (2) shall be by an instrument in writing, signed and acknowledged by the trustee, and filed with the records of the first trust. Such exercise may be upon notice, without court approval, under the procedure described in par. (b) below, or with court approval, under the procedure described in par. (c) below.

(b) The trustee shall give notice to all qualified beneficiaries, any trust protector, any directing party of the first trust (and the settlor, if living) at least 30 days prior to the effective date of the trustee's exercise of the power under sub. (2) of the manner in which the trustee intends to exercise the power. Providing a copy of the proposed instrument exercising the power, the proposed effective date of such exercise, a copy of the trust instrument of the first trust, and a copy of the trust instrument of the second trust shall satisfy the trustee's notice obligation under this paragraph. If all persons to whom notice must be given waive the notice period by signed instrument delivered to the trustee, the trustee may exercise the power in the manner proposed immediately, but waiver of the notice period shall not constitute consent to the exercise of the power by a person waiving notice. The trustee's notice under this paragraph shall have the same effect as a court order; provided, however, if a person to whom notice must be given delivers a written objection to the trustee before the effective date of the exercise of the power, and such objection is not thereafter withdrawn, the trustee may exercise the power under sub. (2) as specified in the proposed instrument exercising the

power only with court approval.

(c) 1. The trustee may, at the trustee's option, petition a court to approve a proposed exercise of the power under sub. (2). The trustee shall give notice of such petition to all qualified beneficiaries, any trust protector, and any directing party of the first trust (and to the settlor, if living). Such notice shall include the proposed effective date of the exercise of the power and the manner in which the trustee intends to exercise the power. Providing a copy of the proposed instrument exercising the power, the proposed effective date of such exercise, a copy of the trust instrument of the first trust, and a copy of the trust instrument of the second trust shall satisfy the trustee's notice obligation under this paragraph.

2. In determining whether to grant or deny a petition under subd. 1., except as provided in subd. 3, the court shall consider the following factors:

- a. The purpose of the proposed exercise of the power under sub. (2).
- b. If applicable, the reasons for any objection made by a beneficiary.
- c. Any changes in circumstances occurring since the creation of the first trust.
- d. Whether the exercise complies with the requirements of this section.

3. If no person to whom notice must be given files an objection with the court, the court shall enter an order approving the exercise of the power as set forth in the notice unless the court determines that the exercise does not comply with the requirements of this section.

**(6) MISCELLANEOUS PROVISIONS.**

(a) The exercise of the power under sub. (2) is deemed to be the exercise of a special power of appointment.

(b) The power under sub. (2) may be exercised even though the first trust includes a spendthrift clause or a provision that prohibits amendment or revocation of the trust.

(c) This section does not create or imply a duty to exercise the power under

sub. (2) and a trustee that does not exercise the power under sub. (2) shall not be liable for the failure to exercise such power.

(d) This section shall not limit any trustee who has a power to invade principal to appoint property in further trust to the extent such power arises under the terms of the first trust or under any other section of this chapter or under another provision of law or under common law.

(e) Subsection (2) shall not apply to trusts described in s. 445.125.

(f) The appointment of all of the assets comprising the first trust in favor of the trustee of the second trust shall be deemed to include subsequently discovered assets otherwise belonging to the first trust and assets paid to or acquired by the first trust subsequent to the appointment in favor of the second trust.

(g) Except as otherwise provided by the trustee in exercising the power under sub. (2), the appointment of part but not all of the assets of the first trust in favor of the second trust shall not include subsequently discovered assets belonging to the first trust and assets paid to or acquired by the first trust subsequent to the appointment in favor of the second trust. Such assets shall remain the assets of the first trust.

(h) If the beneficiaries of the first trust are defined, in whole or in part, as a class of persons, for purposes of this section such class shall include any person who falls within the class of persons after the appointment to the trustee of the second trust.

(i) No trustee exercising the power under sub. (2) shall be liable to any beneficiary unless such beneficiary can prove that the trustee, in exercising the power, did not act in good faith.

ARTICLE 12

MISCELLANEOUS PROVISIONS

**SECTION 1201. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this <sup>Chapter</sup> Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

WISCONSIN UTC COMMITTEE COMMENT

No change from UTC.

**SECTION 1202. ELECTRONIC RECORDS AND SIGNATURES.** The provisions of this <sup>Code</sup> [Code] governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

WISCONSIN UTC COMMITTEE COMMENT

No change from UTC.

**SECTION 1203. SEVERABILITY CLAUSE.** If any provision of this [Code] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this [Code] which can be given effect without the invalid provision or application, and to this end the provisions of this [Code] are severable.

Ch.  
440

Ch. 137  
Not apply to  
testimony  
440.9985

WISCONSIN UTC COMMITTEE COMMENT

No change from UTC.

**SECTION 1204. EFFECTIVE DATE.** This [Code] takes effect on

\_\_\_\_\_ . except as otherwise specifically provided.

*cls*

*551*

*See 551.701  
203*

WISCONSIN UTC COMMITTEE COMMENT

No change from UTC.

**SECTION 1205. REPEALS.** The following Acts are repealed:

(1) Chapter 701;

(2) \_\_\_\_\_;

(3) \_\_\_\_\_; and

(4) \_\_\_\_\_.

WISCONSIN UTC COMMITTEE COMMENT

Reference to Chapter 701 was added.

**SECTION 1206. APPLICATION TO EXISTING RELATIONSHIPS.**

(a) Except as otherwise provided in this [Code], on \_\_\_\_\_:

(c) If application of any provision of the [Code] to a trust in existence on

\_\_\_\_\_, is unconstitutional, it shall not affect application of the provision to a trust created after that date.

WISCONSIN UTC COMMITTEE COMMENT

Section 701.813, Duty to inform and report, is the only section with a different rule regarding its application to existing relationships. Section 701.813(5) provides that 701.813(2)(b), (2)(c), and (3) do not apply to a trustee who accepts a trusteeship before the effective date of the Wisconsin UTC, an irrevocable trust created before the effective date of the Wisconsin UTC or a revocable trust that becomes irrevocable before the effective date of the Wisconsin UTC.

8  
0 — Section 1206(c) was added consistent with current Chapter 701.

(1)  
What about 701.0602(-)  
specific applicability

701.0813(2)(b) & (c) & (3)

In text  
initial app

Excer

(1) this [Code] applies to all trusts created before, on, or after

\_\_\_\_\_;

(2) this [Code] applies to all judicial proceedings concerning trusts commenced on or

after \_\_\_\_\_;

(3) this [Code] applies to judicial proceedings concerning trusts commenced before

\_\_\_\_\_, unless the court finds that application of a particular provision of this [Code] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this [Code] does not apply and the superseded law applies;

(4) any rule of construction or presumption provided in this [Code] applies to trust

instruments executed before \_\_\_\_\_, unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done before \_\_\_\_\_ is not affected by this [Code].

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed

period that has commenced to run under any other statute before

\_\_\_\_\_, that statute continues to apply to the right even if it has been repealed or superseded.

December 16, 2012 Draft

✓ “Directing party” means a person who, in a trust instrument, is granted a power to direct a trustee’s investment or distribution decisions or a power to make investment or distribution decisions regarding trust property and the power is granted to the person in a capacity other than as a trustee or a trust protector. For purposes of this subsection, a power of appointment is not a power to direct a trustee’s investment or distribution decisions or a power to make investment or distribution decisions regarding trust property.

“Trust protector” means a person who, in a trust instrument, is granted any of the following powers in a capacity other than as a trustee or a directing party:

- (a) The power to modify or interpret the terms of the trust.
- (b) The power to consent to or veto a trustee’s or directing party’s decision regarding the investment , distribution, or administration of trust property.
- (c) The power to advise a trustee or directing party regarding the investment , distribution, or administration of trust property.
- (d) The power to direct decisions, other than investment or distribution decisions, about the administration of the trust.
- (e) The power to remove and replace a trustee or any directing party or trust protector, or appoint a successor.

✓ *“Directed trust property” means all or any portion of the property of a trust that is invested or managed by, or at the direction of, a directing party and for which the trustee has no investment or management responsibility.*

## **Section 818. Trust Protector**

**(1) APPOINTMENT** A settlor or a court may appoint a trust protector in a trust instrument, whether referred to as a trust protector, another title or no title. A trust protector has the powers delineated in the trust instrument.

**(2) LEGAL CAPACITY OF TRUST PROTECTOR POWERS** A settlor or a court may specify in a trust instrument whether a particular power granted to a trust protector is required to be exercised in a fiduciary, non-fiduciary or personal capacity.

**(a)** A trust protector with powers exercisable in a fiduciary capacity must exercise such powers consistent with the terms of the trust and shall have similar fiduciary duties and obligations to the beneficiaries of the trust as a trustee would. Subject to subsection (f), a trust protector, with respect to powers exercisable in a fiduciary capacity, may likewise be held liable for any damage associated with the violation of such duties.

**(b)** A trust protector with powers exercisable in a non-fiduciary capacity has no fiduciary duties to the beneficiaries or any other party, may exercise such powers in a manner which is inconsistent with the terms of the trust, but must act in good faith. A trust protector may be held liable (1) if it is proved that the trust protector’s exercise or non-exercise of non-fiduciary powers was not in good faith or (2) for the actions or

inactions of a fiduciary over whom the trust protector has a power of removal if it is proved that the failure to exercise such power of removal was not in good faith.

(c) A trust protector with powers exercisable in a personal capacity has no fiduciary duties to the beneficiaries or any other party and may exercise such powers in a manner which is inconsistent with the terms of the trust. A trust protector with powers exercisable in a personal capacity is not subject to any standard of care with respect to the exercise or non-exercise of such powers, including an obligation to act in good faith, and may not be held liable for the exercise or non-exercise of any such powers or for the actions or inactions of a fiduciary over whom the trust protector has a power of removal exercisable in a personal capacity.

(d) A trust protector shall have no duty to exercise its powers and shall have no duty to monitor the conduct of the trustees or any directing party, nor any duty to monitor changes in the law or circumstances of the beneficiaries.

### **(3) TRUST PROTECTOR POWERS**

(a) Except as provided in pars. (b) – (d), if a trust instrument does not specify whether a particular power is required to be exercised in a fiduciary, nonfiduciary or personal capacity, the power is to be exercised in a nonfiduciary capacity, including the power to do any of the following:

1. Modify or amend the trust instrument to respond to opportunities related to, or changes in, restraints on alienation or other state laws restricting the terms of a trust, the distribution of trust property or the administration of the trust.

2. Modify or amend the trust instrument to achieve a different tax status or to respond to changes in federal or state law.

3. Change the principal place of administration, the tax situs of the trust, or the governing law of the trust.

4. Eliminate or modify the interests of a beneficiary or add a new beneficiary or class of beneficiaries, provided, however, the trust protector shall not modify any beneficial interest of a trust that qualified for a marital deduction or charitable deduction from federal or state estate tax in a manner that would have caused such trust not to qualify for such deduction.

5. Modify the terms of a power of appointment granted under the trust, provided, however, such modification may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument.

6. Remove, replace or appoint a trustee, trust protector, or directing party.

7. Terminate the trust.
8. Appoint assets to a new trust under section 701.0418.
9. Appoint a successor trust protector, trustee, or directing party.
10. Advise the trustee on matters concerning a beneficiary.
11. Advise the trustee on the exercise of a trustee duty or power, including the duty to provide notification to qualified beneficiaries under s. 701.0813.
12. Except as provided in sub. (b)5., consent to or veto specified actions of a trustee or a directing party.

**(b)** If a trust instrument grants a trust protector the power to do any of the following actions and the trust instrument does not specify whether the power is to be exercised in the trust protector's fiduciary, nonfiduciary or personal capacity, the power is to be exercised in a fiduciary capacity:

1. Interpret terms of the instrument at the request of the trustee.
2. Correct errors or ambiguities that might otherwise require court construction or defeat the settlor's intent.
3. Review and approve a trustee's reports or accounting.
4. Resolve disputes between the trustee or a directing party and a beneficiary.
5. Consent to or veto distributions to a beneficiary.

**(c)** A trust protector who is also the settlor or a qualified beneficiary shall exercise any power granted to the trust protector in a personal capacity.

**(d)** A trust protector who is also serving as a trustee or a directing party shall exercise any power granted to the trust protector in a fiduciary capacity.

**(e)** A trust protector may resign or release any power granted to the trust protector by giving written notice to the trustee and to any successor trust protector.

**(4) POWERS THAT MAY NOT BE EXERCISED** A trust protector may not exercise its powers to:

(a) Create or expand any beneficial interest, power of appointment, right of withdrawal or right to receive Trust property as a result of the exercise of a power of appointment in favor of the trust protector, his or her estate, his or her creditors, or creditors of his or her estate.

(b) Modify or amend a trust in order to:

1. Remove a requirement pursuant to 42 U.S.C. section 1396p(d)(4) to pay back a governmental entity for benefits provided to the permissible beneficiary at the death of that beneficiary.

2. Reduce or eliminate an income interest of the income beneficiary of any of the following trusts:

a. A trust for which a marital deduction has been taken for federal income tax purposes under section 2056 or 2523 of the Internal Revenue Code or for state tax purposes under any comparable provision of applicable state law, during the life of the settlor's spouse.

b. A charitable remainder trust under section 664 of the Internal Revenue Code, during the life of the noncharitable beneficiary.

c. A grantor retained annuity trust under section 2702 of the Internal Revenue Code, during any period in which the settlor is a beneficiary.

d. A trust for which an election as a qualified Subchapter S Trust under section 1361(d) is currently in place.

(c) Cause the trust property to be included in the trust protector's gross estate for federal or state tax purposes.

**(5) SETTLOR RIGHTS** A trust protector is not subject to the direction of the settlor and the settlor may not bring a cause of action against the trust protector. A trust protector may consider a settlor's goals, objectives and philosophies in establishing the trust and the trust's structure when exercising the powers granted to the trust protector and may do so regardless of whether the settlor is deceased.

**(6) TRUSTEE AND DIRECTING PARTY RESPONSIBILITIES** A trustee and any directing party are not liable for any loss that results from the trustee or the directing party taking actions that are consistent with a modification of the trustee's or the directing party's powers, authority, or discretion as a result of the action of a trust protector unless the trustee or the directing party breaches a duty owed for the exercise of the power, authority or discretion, as modified by the trust protector. A trustee and any directing party may refuse to act consistently with a trust protector's

modification if the trustee or the directing party knows the modification is manifestly contrary to the terms of the trust or would constitute a serious breach of any duty owed by the trust protector. A trustee and any directing party have no duty to monitor the conduct of the trust protector, provide advice to or consult with the trust protector, or communicate with, warn, or apprise any beneficiary concerning instances in which the trustee or the directing party would or might have exercised the trustee's or the directing party's discretion in a manner different from the manner exercised by the trust protector.

**(7) RIGHT TO INFORMATION** A trust protector has the right to request information about the trust from the trustee and, provided such information is related to the exercise or nonexercise of a power expressly granted to the trust protector in the trust instrument, the trustee has the duty to provide the requested information. Except as otherwise provided in this chapter, the trustee has no obligation to provide any information to the trust protector that the trust protector does not request. If the trustee is bound by any confidentiality restrictions with respect to the information requested, the trustee may require that the trust protector agree to be bound by the confidentiality restrictions before delivering such information to the trust protector.

**(8) REIMBURSEMENT OF ATTORNEY FEES AND COSTS** A trustee shall provide to a trust protector, from the assets of the trust for which the trust protector is acting, reimbursement of attorney's fees and expenses, including the cost of defending any claim made against the trust protector arising from the acts or omissions of the trust protector acting in that capacity, unless it is established that the trust protector was not acting in accordance with the applicable standard of care.

**(9) APPLICATION OF OTHER SECTIONS TO TRUST PROTECTORS** The following sections of this chapter apply to a trust protector as if the trust protector was the trustee.

- (a) Section 701.0701 regarding accepting or declining the appointment as trust protector.
- (b) Section 701.0708 regarding compensation of trust protector.
- (c) Section 701.0709 regarding reimbursement of expenses.
- (d) Section 701.1001 regarding remedies for breach of trust by a trust protector acting in a fiduciary or nonfiduciary capacity.
- (e) Section 701.1002 regarding damages for breach of trust by a trust protector acting in a fiduciary or nonfiduciary capacity.
- (f) Section 701.1003 regarding damages in absence of breach.
- (g) Section 701.1005 regarding limitation of actions against a directing party.
- (h) Section 701.1006 regarding reliance on trust instrument.
- (i) Section 701.1007 regarding events affecting administration or distributions.
- (j) Section 701.1008 regarding exculpation of a directing party.

(k) Section 701.1009 regarding a beneficiary's consent, release or ratification.

(L) Section 701.1010 regarding personal liability of a directing party.

**(10) JURISDICTION** If a person accepts an appointment to serve as a trust protector of a trust having its principal place of administration in this state, the person submits to the jurisdiction of the courts of this state as provided in s. 701.0202(1) with respect to matters involving the trust.

check x-ref for 701.0103 (9) & (10)

Prepared 11/30/12

### COMMENTS ON SECTIONS 1 -6 AND SUBCHAPTER ONE (SECTIONS 7 - 19): SECOND DRAFT

✓ 1. 227.07(3) PAGE 4 LINE 6-8 AND LINE 14

We intend that court supervision of testamentary trusts no longer be required, however a court can still invoke supervision under section 701.0201(1). We propose the sentence beginning on line 6 read:

*"This subsection does not affect a discharge if required by the court under s. 701.0201(1) or other applicable statutes and does not ...."*

✓ 2. 227.105(1)(c) PAGE 4 LINE 17

We intend that the new definition of trustee replace the old definition.

✓ 3. 700.27(8)(a) PAGE 7 LINE 10

We approve of your revised language.

✓ 4. 701.0103(6) PAGE 9 LINES 16 - 18

We decided the definition of "excluded trustee" is not necessary. Please change the definition of directed trust property to eliminate the reference to excluded trustee:

(6) *"Directed trust property" means all or any portion of the property of a trust that is invested or managed by a directing party and for which the trustee has no investment or management responsibility.*

5. 701.0103(7) PAGE 9 LINE 19

Replace the definition of directing party with the following:

*"Directing party" means a person who is granted in the trust instrument or in an order of the court a power, in a capacity other than as trustee, to direct the trustee's investment decisions, distribution decisions or other decisions that are required to be performed by the trustee in carrying out the trustee's duties in administering a trust.*

or a trust protector?  
or make

power to direct the trustee

Power of appointment ≠ make the person a directing party  
Similar for a trust protector

6. 701.0103(8) PAGE 10 BEFORE LINE 1

This is the UTC language and may be kept as is, or if you feel it is necessary, you can add "or remediation" after the word "protection" on line 25.

The UTC comment to this provision provides:

*"To encourage trustees to accept and administer trusts containing real property, the Uniform Trust Code contains several provisions designed to limit exposure to possible liability for violation of "environmental law" (paragraph (6)). Section 701(c)(2) authorizes a nominated*

Ins 9-18

include a comment

Ask Tracy

trustee to investigate trust property to determine potential liability for violation of environmental law or other law without accepting the trusteeship. Section 816(13) grants a trustee comprehensive and detailed powers to deal with property involving environmental risks. Section 1010(b) immunizes a trustee from personal liability for violation of environmental law arising from the ownership and control of trust property.”

✓ 7. 701.0103(9) PAGE 10 LINE 4

We decided the definition of “excluded trustee” is not necessary. Please delete this definition.

✓ 8. 701.0103(10) PAGE 10 LINES 5-7

The term should be “Guardian of the estate” in lines 5 and 6 rather than guardian because we use both the terms “guardian of the estate” and “guardian of the person” in other places in ch. 701, specifically section 701.0303(2). Since we are adding a definition of guardian of the person the reference to guardian of the person on line 7 can be deleted. Thus section 701.0103(10) would read:

*“Guardian of the estate” means a person appointed by a court as guardian of the estate of a minor or adult individual pursuant to s. 54.10. “Guardian of the estate” does not include a guardian ad litem.”*

We also wish to add a definition for guardian of the person as a new subsection 701.0103(11) as follows:

*“Guardian of the person” means a person appointed by the court as guardian of the person of a minor or adult individual pursuant to s. 54.10. Guardian of the person does not include a guardian ad litem.”*

9. 701.0103(12) PAGE 10 LINE 11

We wish to revise the definition of individual with a disability as follows:

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

10. 701.0103(14) PAGE 11 LINE 7 ✓

The Wisconsin Statutes contain a variety of references to definitions of "Internal Revenue Code." Many of these are substantive choices that reflect the legislature's view that certain federal changes should not be taken into account in determining Wisconsin taxable income. That is not an issue here. The intent here is that the definition reflects the current provisions of the Internal Revenue Code. We recommend that we keep the definition as is.

11. 701.0103( ) and 701.0103(17) PAGE 11 AFTER LINE 13 and LINE 14-15

You have suggested and we agree that a definition of power of appointment would be helpful. We believe that the definition of power of appointment should track the definition in chapter 702. If we define power of appointment, should we also define or reference general power of appointment or special power of appointment? We propose the following. The bracketed language could be removed if you do not recommend we also define general and special power of appointment.

✓ *"Power of appointment" means a power of appointment as defined in s. 702.02(6). [General power of appointment is defined in s. 702.02(5). A special or limited power of appointment is defined in s. 702.05(7).]*

If we reference the definition of general power of appointment in this definition, we can delete the reference to s. 702.02(5) in the definition of "power of withdrawal." (Page 11, Line 15)

12. 701.0103(19)(a) PAGE 12 LINE 1

The proposed change is OK.

13. 701.0103(23) PAGE 12 LINE 22

20 This is substantially similar to the UTC definition. An Indian tribe, band or nation are all examples of organizational units of Native Americans with ability to exercise various types of legal authority. This is a reference to the entity. We understand your question, but still prefer to stay with the language as drafted.

14. 701.0103(28) PAGE 13 LINE 14

Replace the definition of trust protector with the following:

*modify the terms of trust instrument, consent, veto, or advise*  
*regarding investment, distribution, & administrative decisions*  
"Trust protector" means a person who is granted in the trust instrument or in an order of the court one or more powers over the trust instrument, (the trustee or directing party), or the trust property, in a capacity other than as a trustee or a directing party.

You asked if every trustee is also a trust protector. No, these parties have powers that are exercisable in different capacities. You asked if we intend for the definitions of a directing party and a trust protector to overlap. Again, the answer is no, we intend that these parties have powers that exercised in a different capacity. However, the same person could have general

trustee powers and/or powers exercisable as a trust protector and/or powers exercisable as a directing party.

The trustee is the person designated as trustee under the terms of the trust or by a court. Our definition of trustee follows the UTC definition that describes who is included in the definition of trustee. A trustee has the powers and duties described in subchapter 8. The powers are specifically described in s. 701.0815 and s. 701.0816.

A directing party is appointed in the trust instrument or by the court and has a power exercisable in a capacity other than as trustee to direct the investment decisions, distribution decisions or other administrative decisions of the trustee.

A trust protector is also appointed in the trust instrument or by the court and has those powers delineated in the trust instrument to take action with respect to the trust instrument, the trustee or the directing party or the trust property. These powers are exercisable in a capacity other than as trustee or as a directing party.

15. 701.0105(1) PAGE 15 BEFORE LINE 1

✓ We think we should keep the original UTC language. The UTC Comment gives some additional insight:

“Subsection (a) emphasizes that the Uniform Trust Code is primarily a default statute. While this Code provides numerous procedural rules on which a settlor may wish to rely, the settlor is generally free to override these rules and to prescribe the conditions under which the trust is to be administered. With only limited exceptions, the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are as specified in the terms of the trust. Subsection (b) lists the items not subject to override in the terms of the trust.”

However, we have added the new concepts of a directing party and a trust protector. Perhaps subsection (1) should read as follows:

*(1) Except as otherwise provided in the terms of the trust, this chapter governs the duties and powers of a trustee and any directing party or trust protector, relations among trustees and any directing parties or trust protectors, and the rights and interests of a beneficiary.*

✓ 16. 701.0108(1)(b) PAGE 17 LINE 3

Your proposed change is OK. This subsection would read:

*(b) If the principal place of administration is not validly designated in the trust instrument, the jurisdiction where the trustee’s usual place of business is located or, if the trustee has no place of business, the jurisdiction where the trustee’s residence is located.*

✓ 17. 701.0108(1)(c) PAGE 17 LINE 7

After the word beneficiaries add “*and any trust protectors and directing parties.*”

18. 701.0108(d)1. PAGE 17 LINE 19

Your proposed change is OK. This subsection would read:

1. *If there is only one corporate trustee, the jurisdiction where the usual place of business of the corporate trustee is located.*

19. 701.0108(1)(d)2. PAGE 17 LINE 21

In response to your comment at the top of page 18, the court would decide the place of jurisdiction if the cotrustees could not agree. We suggest this subsection read:

2. *The jurisdiction where the usual place of business or the residence of any of the cotrustees is located as agreed to by all of the cotrustees with notice to the qualified beneficiaries and any trust protectors and directing parties, or as determined by the court if the cotrustees cannot agree.*

20. 701.0108(1)(e) PAGE 18

*If the cotrustees cannot agree on a jurisdiction,*

In response to the second note on page 18, line 3, we agree that a new subsection should be added to the end of (1) that references the trustee's power to select and move the principal place of administration. We suggest adding a new subsection that reads:

- (e) *The jurisdiction selected by the trustee under sub. (2).*

21. 701.0108(2) PAGE 18 LINE 3

In response to the first note, we think there is an important reason to include the language "but has no affirmative duty to." This language rebuts any argument that the trustee's fiduciary duty may obligate it to transfer the principal place of administration in a specific situation. Thus subsection (2) should read:

- (2) *Without precluding the right of the court to approve or disapprove a transfer and subject to sub. (4), 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.*

22. 701.0108(3) PAGE 18 LINE 4

After the word beneficiaries add "*and any trust protectors and directing parties*".

23. 701.0108(3)(e) PAGE 18 LINE 15

After the word beneficiary add "*or any trust protector or directing party*".

24. 701.0108(4) PAGE 18 LINE 18

After the word beneficiary add "*or any trust protector or directing party*".

25. 701.0111(5) PAGE 21 LINE 11

To the extent that subsection (5) complies with subsection (4), a nonjudicial settlement agreement may resolve any matter involving a trust. The proposed change is OK unless you suggest a further reference to (4) is necessary.

Done

**Knepp, Fern**

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**From:** victor.schultz@bmo.com  
**Sent:** Friday, November 23, 2012 12:18 PM  
**To:** Knepp, Fern; Kuczenski, Tracy  
**Cc:** Wiensch, Adam J.  
**Subject:** Re: Wisconsin Trust Code  
**Attachments:** Wisconsin Chapter 881.doc; Wisconsin Chapter 881-clean copy.doc

Hello Fern and Tracy:

Our Study Group last met on November 15 and we finalized our comments on draft #2 of the Code. I am in the process of accumulating and reviewing all of the final comments on each of the subchapters and on our drafts of the changes to the principal and income act (subchapter 11) and the prudent investor act (Chapter 881). I will route all of the comments to you piecemeal, starting with the comments on final changes to the prudent investor act (Chapter 881). I will send all of the final comments to you by November 30. We also expect to send you the legal analysis of the bill around the same time. Our hope and expectation is the draft #3 will be available for review by the end of December.

Here are the comments to Chapter 881:

1. Sections 881.01(1)(a) and (b). The definitions of beneficiary and fiduciary have been revised as shown in the attached memo.  
*- email re commas*
2. Section 881.01(4). The provisions of section 881.05 have now been incorporated into this subsection of the prudent investor act.
3. Section 881.01(5). This subsection no longer needs to be amended.
4. Section 881.01(12m). This subsection is no longer necessary since it has been incorporated into section 881.01(4).
5. Section 881.05. We believe this section should be deleted since it has been incorporated into section 881.01(4).

*Applies to all property, however required. If deleted what applies to property/assets that were acquired in purchase of the fid. acc. excluded discretion*

Victor J. Schultz | Vice President | Estate Planning Specialist - Financial Planning Strategy | BMO Harris Bank N.A. | 111 East Kilbourn Avenue, Suite 200 | Milwaukee, Wisconsin 53202 | Phone (414) 287-7019 / Cell (262) 844-8756 / Toll free 800-342-2265  
email: [victor.schultz@bmo.com](mailto:victor.schultz@bmo.com)

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*Commas "as defined"  
2.01(1)(c)*