

"RESEARCH APPENDIX"

... Drafting History Reproduction Request Form ...

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(Request Made By: Fern Knepp) (Date: 10/9/2012)

Note:

BOTH DRAFTS SHOULD HAVE THE SAME "REQUESTOR"

(exception: companion bills)



 Please transfer the drafting file for

2011 LRB 2788 (For: Rep. Risser)

to the drafting file for

2013 LRB 0010 (For: Rep. Risser)

----- **OR** -----

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2013 LRB _____ (For: Rep. / Sen. _____)

and place it in the drafting file for

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 Are These "Companion Bills" ?? ... Yes No

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("guts") from the original file: _____



State of Wisconsin
2011 - 2012 LEGISLATURE
2013 - 2014



LRB-2788/P1

TKK:cjs,ph

FFK+

0010

EMR

JL

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

DN

In 9-26

Out 10-5 (if possible)
please let us know
what is a
reasonable
time frame

or 10/8 A.M.
(if Friday is not possible)

4

Gen

1 AN ACT to create subchapter I (title) of chapter 701 [precedes 701.0101],
2 701.0101, 701.0102, 701.0103, 701.0104, 701.0105, 701.0106, 701.0107,
3 701.0108, 701.0109, 701.0110, 701.0111, subchapter II (title) of chapter 701
4 [precedes 701.0201], 701.0201, 701.0202, 701.0203, 701.0204, subchapter III
5 (title) of chapter 701 [precedes 701.0301], 701.0301, 701.0302, 701.0303,
6 701.0304, 701.0305, subchapter IV (title) of chapter 701 [precedes 701.0401],
7 701.0401, 701.0402, 701.0403, 701.0404, 701.0405, 701.0406, 701.0407,
8 701.0408, 701.0409, 701.0410, 701.0411, 701.0412, 701.0413, 701.0414,
9 701.0415, 701.0416, 701.0417, 701.0418, subchapter V (title) of chapter 701
10 [precedes 701.0501], 701.0501, 701.0502, 701.0503, 701.0504, 701.0505,
11 701.0506, 701.0507, subchapter VI (title) of chapter 701 [precedes 701.0601],
12 701.0601, 701.0602, 701.0603, 701.0604, subchapter VII (title) of chapter 701
13 [precedes 701.0701], 701.0701, 701.0702, 701.0703, 701.0704, 701.0705,
14 701.0706, 701.0707, 701.0708, 701.0709, subchapter VIII (title) of chapter 701
15 [precedes 701.0801], 701.0801, 701.0802, 701.0803, 701.0804, 701.0805,

1 701.0806, 701.0807, 701.0808, 701.0809, 701.0810, 701.0811, 701.0812,
 2 701.0813, 701.0814, 701.0815, 701.0816, 701.0817, subchapter IX (title) of
 3 chapter 701 [precedes 701.0901], 701.0901, 701.0902, 701.0903, subchapter X
 4 (title) of chapter 701 [precedes 701.1001], 701.1001, 701.1002, 701.1003,
 5 701.1004, 701.1005, 701.1006, 701.1007, 701.1008, 701.1009, 701.1010,
 6 701.1011, 701.1012 and 701.1013 of the statutes; **relating to:** the Wisconsin
 7 trust code.

Analysis by the Legislative Reference Bureau

✓ This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

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

Insert 2-8 →
 8 **SECTION 1.** Subchapter I (title) of chapter 701 [precedes 701.0101] of the
 9 statutes is created to read:

CHAPTER 701

SUBCHAPTER I

GENERAL PROVISIONS AND

DEFINITIONS

Insert 2-14 →
 14 **SECTION 2.** 701.0101 of the statutes is created to read:

15 **701.0101 Article I, Section 101 - Short title.** This chapter may be cited as
 16 the Wisconsin Trust Code. ✓

17 **SECTION 3.** 701.0102 of the statutes is created to read:

18 **701.0102 Article I, Section 102 - Scope.** This chapter applies to express,
 19 charitable or non-charitable, and testamentary or inter vivos trusts, and any trust
 20 created pursuant to a statute, judgment, or decree that requires the trust to be

1 administered in the manner of an express trust. This chapter does not apply to any
2 of the following: ✓

3 (1) A constructive or resulting trust. ✓

4 (2) A guardianship. ✓

5 (3) A conservatorship. ✓

6 (4) A custodial arrangement made pursuant to the uniform transfers to minors
7 act under ss. 54.854 to 54.898 or the uniform custodial trust act under ss. 54.950 to
8 54.988. ✓

9 (5) A common trust or a collective investment fund. ✓

10 (6) A trust created by a depository agreement with a financial institution. ✓

11 (7) A trust fund held for a business transaction, including an escrow or other
12 security arrangement.

13 (8) A voting trust. ✓

14 (9) A fund maintained pursuant to court order in conjunction with a
15 bankruptcy proceeding, business liquidation, or class action lawsuit. ✓

16 (10) A trust that is part of an employee benefit arrangement or an individual
17 retirement account. ✓

18 (11) A trust established under a qualified tuition savings program or
19 education savings account. ✓

20 (12) A trust account maintained on behalf of a client or customer by a licensed
21 service professional, including a trust account maintained by an attorney or by a real
22 estate broker. ✓

23 (13) Any other arrangement under which a person is a nominee or escrowee
24 for another.

25 SECTION 4. 701.0103 of the statutes is created to read: ✓

Insert 3-1)

701.0103 Article I, Section 103 - Definitions. In this chapter:

(1) "Action," with respect to an act of a trustee, includes a failure to act. ✓

(2) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041 (b) (1) (A) or 2514 (c) (1) of the Internal Revenue Code. ✓

(3) "Beneficiary" means a person that satisfies one of the following: ✓

(a) Has a present or future beneficial interest in a trust, vested or contingent. ✓

(b) In a capacity other than that of trustee, trust protector, or a directing party, holds a power of appointment over trust property. ✓

(4) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in s. 701.0405 (1). ✓

(5) "Conservator" means a person appointed by a court pursuant to s. 54.76. ✓

le *****NOTE: In general, under LRB drafting conventions, we use the article "a" to refer to a noun in the first instance and the article "the" to refer back to the noun previously identified. For that reason, I have changed "the court" to "a court." Please let me know if this modifies the intent of the particular statutory provision. I will identify other places where I make this change of referential articles.

(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 excluded trustee has no investment^{or} management responsibility. ✓

le *****NOTE: I changed "the trust" to "a trust."

*****NOTE: The most recent version of this definition (submitted by Victor Schultz by e-mail on 12/5/2011) added the words "invested or" before the first occurrence of "managed." Okay?

(7) "Directing party" means ^aany person other than the settlor who, pursuant ^{or an order of the court} to a trust instrument, ^{g acts} is given a power to direct specified ^{g an excluded} actions of the trustee. ✓

*****NOTE: I changed "the trust instrument" to "a trust instrument," but did not change "the settlor" to "a settlor" because "the settlor" refers back to the trust instrument. Okay?

*****NOTE: The most recent version of this definition (submitted by Victor Schultz by e-mail on 12/5/2011) substituted "any person other than the settlor" for "any party

6 (4) Directing party does not include a person whose power to direct specified acts arises by virtue of being a trust protector or pursuant to a general or limited power of appointment.

INS
6-8

move this definition to p. 6, line 8

other than the settlor" and eliminated "or consent to" from the phrase "given a power to direct or consent to specified actions..." Okay?

1 (8) "Disabled individual" means an individual who meets one of the following

2 tests: Individual with a disability

3 (a) The individual receives social security, supplemental security income, or
4 medicaid ^{medical assistance} benefits on the basis of being ^{an} a disabled individual as defined by such
5 program. ✓ with a disability

6 (b) The individual has a medically determined mental or physical impairment
7 of a type and severity that would ^{cause the individual to be considered disabled} qualify the individual for social security,
8 supplemental security income, or medicaid if the individual applied and was ^{purposes of participating in}
9 financially eligible, ^{to be} regardless of the person's age, work record, ^{medical assistance program,} and engagement in
10 substantial gainful activity. ^{for one of those programs based on disability, and if the individual's education, work record}

***NOTE: I think this definition is problematic. "Mental or physical impairment" is a broad, vague phrase, and I'm not sure what "medically determined" means. Who is qualified to make such a determination? Might I suggest tying the definition for "disabled individual" to one of the definitions for disability or disabled individuals under current law? See, for example, the definition of physical disability at s. 15.197 (4) (a) 2. and the definitions of developmental disability at ss. 49.498 (1) (c) and 51.01 (5) (a). Note also that "child with a disability" is defined at s. 115.76 (5) and that there are definitions for "person with a disability" and "individual with a disability" and "permanently and totally disabled veteran," among others.

were disregarded
The fact that the individual is age 65 or older is not a bar to being considered an individual with a disability

Insert 5-13

11 (9) "Environmental law" means a federal, state, or local law, rule, regulation,
12 or ordinance relating to protection of the environment. ✓

****NOTE: I'm not sure this definition works for the manner in which the term is used elsewhere in the draft. I don't believe "relating to protection of the environment" would encompass a law that requires the clean-up or remediation of contaminated property or a law that would impose liability on an entity for despoliation or damage to the environment. That said, I am not sure it is necessary to provide a definition for "environmental law" at all.

13 (10) "Excluded trustee" means ^a any trustee who, pursuant to a trust
14 instrument, is excluded from exercising specified powers that are given to a directing
15 party, and who is directed to act in accordance with the exercise of such powers by
16 the directing party. ✓ subs.

→ XXXX (NOTE) It is LRB drafting policy to avoid using "any" as an adjective if "a" or "an" can be used with the same result. I made a similar change in para. (7) and (27) ✓

****NOTE: I replaced "the trust instrument" with "a trust instrument" in the first line of this subsection. I also replaced "such trustee" with "that trustee".

****NOTE: The most recent version of this definition (submitted by Victor Schultz by e-mail on 12/5/2011) omitted the following material that had been included in a previous version: "If the trust instrument provides that a trustee as to one or more specified matters is to act, omit action, or make decisions only with the consent of a directing party, then that trustee is an excluded trustee with respect to such specified matters." Okay?

1 (11) "Guardian" means a person appointed by a court as guardian of the estate
2 of a minor or adult individual pursuant to s. 54.10. "Guardian" does not include a
3 guardian ad litem or guardian of the person.

4 (12) "Incapacity" means the inability to receive and evaluate information
5 effectively or to communicate decisions to such an extent that the individual lacks
6 the capacity to manage his or her decisions. A trustee may rely on the written report
7 of an examining physician in determining whether an individual is under incapacity.

****NOTE: I changed "The trustee" to "A trustee" in the second sentence of this subsection. That said, it seems as though the second sentence of this subsection is substantive, rather than definitional. That is, it goes to what evidence may be used by a trustee to determine whether a person is under incapacity, not what incapacity means. Is there a more appropriate section within which to place this second sentence?

8 (13) "Interests of the beneficiaries" means the beneficial interests provided in
9 the terms of a trust.

****NOTE: I changed "the trust" to "a trust".

10 (14) "Internal Revenue Code" means the Internal Revenue Code of 1986, as
11 amended, or such subsequent federal revenue law as may be in effect from time to
12 time.

13 (15) "Jurisdiction," with respect to a geographic area, includes a state or
14 country.

15 (16) "Person" means an individual, corporation, business trust, estate, trust,
16 partnership, limited liability company, association, joint venture, government;

Insert 6-13
move

Insert definition of "Individual with a disability" from p. 5, (line 1.)

1 governmental subdivision, agency, or instrumentality; public corporation; or any
2 other legal or commercial entity. ✓

3 (17) "Power of withdrawal" means a presently exercisable general power of
4 appointment ^{↑ as defined under § 702.02(5) ↑} but does not include any of the following: ✓

****NOTE: This definition refers to a power of appointment, but the term "power of appointment" is, itself, not defined; I think the draft could be improved by providing a definition for power of appointment.

5 (a) A power exercisable by a trustee and limited by an ascertainable standard. ✓

6 (b) A power exercisable by another person only upon consent of a trustee or ^{of} a
7 person holding an adverse interest. ✓

****NOTE: I changed "the trust" to "a trust."
****NOTE: I am not clear why the first person identified in this paragraph is "another person"; is the point to distinguish this other person from the person holding an adverse interest? If so, would it be acceptable for the paragraph to read: "A power exercisable by a person only upon consent of a trustee or another person holding an adverse interest"? Also, does the clause "holding an adverse interest" modify trustee or only person?

8 (18) "Property" ✓ means anything that may be the subject of ownership, whether
9 real or personal or legal or equitable, or any interest therein. ✓

10 (19) "Qualified beneficiary" ✓ means a beneficiary who, on the date ^{on which} the
11 beneficiary's qualification is determined, satisfies any of the following:

12 (a) Is a distributee or permissible distributee of trust income or principal. ✓

****NOTE: The phrase "Without considering the existence or exercise of a power of appointment" appears, below, in pars. (b) and (c), but not in par. (a). Does that mean that a power of appointment should be considered in determining whether a distributee or permissible distributee described in par. (a) is a qualified beneficiary?

13 (b) Without considering the existence or exercise of a power of appointment,
14 would be a distributee or permissible distributee of trust income or principal if the
15 interests of the distributees described in par. (a) ✓ terminated on that date without
16 causing the trust to terminate.

(NO PT) Because the terms "income" and "principal" are defined only for purposes of Subchapter XI, I did not remove the word "trust" from pars. (a), (b), or (c).

1 (c) Without considering the existence or exercise of a power of appointment,
2 would be a distributee or permissible distributee of trust income or principal if the
3 trust terminated on that date.

4 (20) "Revocable," as applied to a trust, means ^{a trust that can be revoked} revocable by the settlor without
5 the consent of the trustee or a person holding an adverse interest, regardless of
6 whether the settlor ^{is incapacitated} has the mental capacity to do so.

****NOTE: This definition is problematic. It defines the term, revocable, by using the defined term, revocable. This is circular. Further, the last clause of this definition is not clear; what action does "has the mental capacity to do so" refer to? Does "to do so" refer to the action of revoking a trust? If so, I think that word (revoke) needs to be used, and then defined. What does the action "revoke" mean with respect to a trust?

7 (21) "Settlor" means a person, including a testator, who creates, or contributes
8 property to, a trust. If more than one person creates or contributes property to a
9 trust, each person is a settlor of the portion of the trust property attributable to that
10 person's contribution except to the extent another person has the power to revoke the
11 trust or withdraw that portion.

****NOTE: I believe the second sentence of this definition is substantive, rather than definitional. I recommend that it be moved to a section dealing with the creation of a trust and the powers of persons who contribute to a trust.

12 (22) "Spendthrift provision" means a term of a trust ^{that} which restrains either or
13 both of a voluntary or involuntary transfer of a beneficiary's interest.

14 (23) "State" means a state of the United States, the District of Columbia,
15 Puerto Rico, the United States Virgin Islands, any territory or insular possession
16 subject to the jurisdiction of the United States, and an Indian tribe ^{or} band ^{or nation}
17 recognized by federal law or formally acknowledged by a state.

****NOTE: The definition provided for "state" in the drafting instructions defined state to mean one of several enumerated entities and to include an Indian tribe or band. When a term is defined with the word, "means," the definition is generally interpreted in a restrictive manner. That is, only the enumerated terms fall within the defined term. In contrast, when a term is defined with the word, "includes," the definition is expansive, and the enumerated terms are but examples of the defined term.

NO #

In the previous draft, I indicated that this

It was not clear to me whether an Indian tribe or band would fall under the category "any territory or insular possession subject to the jurisdiction of the United States." If, however, an Indian tribe would not fall within this category, it is not appropriate to define a state to include Indian tribes, because an Indian tribe does not fall within any of the other enumerated categories. For that reason, I changed the definition of state to mean a "state of the United States . . . and an Indian tribe..." Okay?

No 9

I don't believe this concern has been resolved

That said, the definition is also problematic in that it defines a "state" to be both a place and a group of people (Indian tribe or band). It is not clear how a state as a group of people would work in practice; for example, what does it mean under proposed s. 701.0108(2)(b), where a trustee is not required to transfer a trust's principal place of administration to an Indian tribe or band? (Instead of Indian tribe or band, is there another term that would identify the place or territory over which an Indian tribe or band has jurisdiction?)

Insert 9-3 (from next page)

(24) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

(25) "Trust for a disabled individual" means any trust that is established for the benefit of a disabled individual of any age who has a medically determined impairment, if the trust does not result in ineligibility for public assistance under ch.

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if he or she applied for medical assistance and was otherwise eligible

****NOTE: I substituted the phrase "individual with a disability" with "disabled individual, which is a defined term. That said, is it necessary to use both "disabled individual" and "who has a medically determined impairment" to describe the individual? Do you want to define "medically determined impairment"?

(26) "Trust instrument" means an instrument executed by a settlor or an order of the court that contains terms of the trust, and includes any amendments executed by the settlor, nonjudicial settlement agreements, and modifications by court order or as otherwise permitted by statute.

****NOTE: I changed the first reference to settlor from "the settlor" to "a settlor."

****NOTE: Do you intend "or as otherwise permitted by statute" to refer back to modifications? If so, is it possible that some law other than statutes would permit modifications? If not, what does this clause refer back to?

(27) "Trust protector" means any person, other than a settlor or a qualified beneficiary, whose appointment is provided for in the trust instrument and who has any of the powers defined in s. 701.0818. Trust protector includes advisers to the trust

trustee, or directing party, who is appointed under

****NOTE: The most recent definition of this term, submitted by Victor Schultz by e-mail on 12/5/2011, eliminated "or who is appointed by a court of competent jurisdiction and whose powers are" following "trust instrument" and substituted "and who has any of the powers...". Also eliminated was ", but excludes a directing party" following the cross-reference to s. 701.0818. Okay?

****NOTE: This definition refers to the "powers defined in s. 701.0818" (in the drafting instructions, the language read "powers defined in section 818"). However, the drafting materials did not include any material for a section 818. Is this a numbering error? Or is the material for section 818 not yet completed?

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10-1

(2) "Trustee" includes an original, additional, and successor trustee, and a cotrustee.

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Insert
9-3
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(move to
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previous page)

SECTION 5. 701.0104 of the statutes is created to read:

701.0104 Article I, Section 104 - Knowledge. (1) Subject to sub. (2), a person has knowledge of a fact if any of the following apply:

- (a) The person has actual knowledge of the fact.
- (b) The person has received a notice or notification of the fact.
- (c) The person has reason to know the fact from all the facts and circumstances known to the person at the time in question.

(2) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been received by the employee if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the trust would be materially affected by the information.

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applies

1 SECTION 6. 701.0105 of the statutes is created to read:

2 701.0105 Article I, Section 105 ^{← m} - Default and mandatory rules. (1)

3 Except as otherwise provided in ^{sub. (2)} the terms of the trust, this chapter governs the
4 duties and powers of a trustee, relations among trustees, and the rights and interests
5 of a beneficiary.

6 (2) The terms of a trust prevail over any provision of this chapter except for the
7 following:

8 (a) The requirements for creating a trust.

9 (b) The duty of a trustee or a directing party to act in good faith and in
10 accordance with the terms and purposes of a trust instrument and the interests of
11 the beneficiaries.

****NOTE: I changed "the trust instrument" to "a trust instrument."

12 (c) The requirement that a trust and its terms be for the benefit of its
13 beneficiaries, and that the trust have a purpose that is lawful.

14 (d) The power of a court to modify or terminate a trust under ss. 701.0410 to
15 701.0416.

16 (e) The effect of a spendthrift provision and the rights of certain creditors and
17 assignees to reach a trust as provided in ss. 701.0501 to 701.0507.

18 (f) The power of the court under s. 701.0702.

19 (g) The power of the court under s. 701.0708 (2) to adjust a trustee's
20 compensation specified in the terms of the trust.

21 (h) The effect of an exculpatory term under s. 701.1008.

22 (i) The rights under ss. 701.1010 to 701.1013 of a person other than a trustee
23 or beneficiary.

FK
Ins. 11-5

****NOTE: What are the rights being referred to here? Sections 701.1010 to 701.1013 don't describe or refer to any rights.

(j) Periods of limitation for commencing a judicial proceeding. ✓

(k) The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice. ✓

(L) The jurisdiction of the court and venue for commencing a proceeding as provided in ss. 701.0202, 701.0203 and 701.0204. ✓

(m) The jurisdiction of the court under ss. 701.0807 (4), 701.0808 (6) and 701.0818 (7). (15) ✓

****NOTE: The drafting instructions for this paragraph referenced "the jurisdiction of the court under . . . s. 701.0808 (8);" however, that section, before it was renumbered s. 701.0808 (7) by the elimination of s. 701.0808 (5), made no reference to jurisdiction. I changed the reference in this paragraph to s. 701.0808 (6). Please review.

****NOTE: This paragraph cross-references s. 701.0818 (7). However, the drafting materials did not include any material for a section 701.0818. Is this a numbering error? Or is the material for section 818 not yet completed?

SECTION 7. 701.0106 of the statutes is created to read:

701.0106 Article I, Section 106 - Common law of trusts; principles of equity. The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state. ✓

SECTION 8. 701.0107 of the statutes is created to read:

701.0107 Article I, Section 107 - Governing law. The meaning and effect of the terms of a trust are determined by one of the following:

(1) The law of the jurisdiction designated in the trust instrument provided there is a sufficient nexus to the designated jurisdiction at the time of the creation of the trust or during the trust administration, including the place of execution of the trust instrument, the location of real property held by the trust, or the residence or location of an office of the settlor, trustee, or any beneficiary. ✓

****NOTE: The word nexus is used only six times in the statutes; in one case in the title of a subsection and in one case to identify a hallucinogenic substance. In two of the

other three instances, nexus is followed closely by the word between. I have a couple of thoughts/questions. First, can we substitute connection or ties or links for nexus? Second, I don't believe it is entirely clear what the nexus, or connection, is between or to: between or to the designated jurisdiction and what? The trust instrument? The settlor? The beneficiaries? The trust property? Can the beginning of the subsection read as follows: "The law of the jurisdiction designated in the trust instrument, provided there is a sufficient nexus between the [fill in the blank] and the designated jurisdiction?"

****NOTE: I eliminated the phrase "but not limited to" from this subsection, which our LRB drafting manual identifies as redundant.

****NOTE: Perhaps these are obvious questions, but this provision does not address who determines whether there is a sufficient nexus, what standard is applied to make such a determination, and when that determination is made. Should these issues be addressed in this provision, or are these questions answered by case law?

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(2) In the absence of a controlling designation in the ^{terms of a} trust instrument, the law

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of the jurisdiction in which the settlor is domiciled when the trust becomes irrevocable.

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having the most significant relationship to the matter at issue

****NOTE: What is a "controlling designation"? Does it depend on the outcome of the nexus test in sub. (1)? If not, how is it different than the nexus test under sub. (1)?

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(3) In the event of a conflict in the determination of governing law between

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jurisdictions, the law of the jurisdiction having the most significant relationship to

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the matter at issue.

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SECTION 9. 701.0108 of the statutes is created to read:

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701.0108 Article I, Section 108 ^{← = m} - Principal place of administration. (1)

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Without precluding other means for establishing a sufficient connection with the jurisdiction designated in the trust instrument, terms of a trust designating the principal place of administration are valid and controlling if any of the following apply:

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jurisdiction designated in the trust instrument, terms of a trust designating the

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principal place of administration are valid and controlling if any of the following

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apply:

****NOTE: If there are other means for establishing a sufficient connection, shouldn't they be included here? I don't know what "without precluding other means" means or whether it really adds anything if it is not clear what those other means might be.

13

(a) A trustee's principal place of business is located in or a trustee is a resident

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of the jurisdiction designated in the trust instrument.

1 (b) All or part of the administration of the trust occurs in the jurisdiction
2 designated in the trust instrument.

3 (c) The trust instrument designates the jurisdiction where the settlor is
4 domiciled at the time the trust instrument is executed.

5 (2) (a) Subject to par. (b), a trustee shall administer a trust at a place
6 appropriate to its purposes, its administration, and the interests of the beneficiaries.

****NOTE: What does it mean to administer a trust at a place appropriate to its administration? That seems circular.

7 (b) A trustee shall not be required to transfer a trust's principal place of
8 administration to another state or to a jurisdiction outside of the United States.

****NOTE: This paragraph begins "A trustee shall not be required..." By whom or what may a trustee not be required?

****NOTE: I split the second half of the sentence into its own paragraph. That said, I am confused by this paragraph, which seems to say that the principal place of administration of every trust must be in this state even if other factors, including perhaps the factors contributing to the "sufficient connection," place the jurisdiction of the trust in another state. Am I missing something? Should there be some conditions on the prohibition that the trustee not be required to transfer the principal place of administration?

Or, perhaps this paragraph (2) (b) should be the conditional of subsection (3) and not subsection (2)? That is, a trustee may transfer the principal place of administration to another state if it is appropriate to the purposes of the trust and the interests of the beneficiaries; but may not be required to make such a transfer? If so, I suggest the following modifications: Begin sub. (2) with "Subject to sub. (3),..." Renumber sub. (2) (b) to be sub. (3) (b). Renumber sub. (3) to sub. (3) (a) and start this sub. (3) (a) with "Except as provided in par. (b)..." Let me know how you wish me to proceed.

9 ^B (2) ³ Without precluding the right of the court to approve or disapprove a
10 transfer, a trustee may transfer a trust's principal place of administration to another
11 state or to a jurisdiction outside of the United States that is appropriate to the trust's
12 purposes, its administration, and the interests of the beneficiaries.

****NOTE: When is court approval required? Instead of saying "Without precluding the right..." can this read "Subject to the power of a court..."?

~~NO~~ Adding "but has no affirmative duty to" after "may" is unnecessary because "may" is permissive and does not require the trustee to take any action. Okay? ✓

^{C3} ****NOTE: This subsection makes sub. (1) just a starting point and allows the trustee to transfer the principal place of administration to any jurisdiction. Is this the intent? If so, you may want to add a

says paragraph under sub. (1) that says something like "the trustee under sub. (2)." //

1 ~~4~~ (3) (4) The trustee shall notify the qualified beneficiaries of a proposed transfer
2 of a trust's principal place of administration not less than 30 days before initiating
3 the transfer. The ^{trustee shall include in the} notice of proposed transfer ~~must include~~ all of the following:

4 (a) The name of the jurisdiction to which the principal place of administration
5 is to be transferred. ^{electronic mail address, if available,}

6 (b) The ^{mailing} address and telephone number ^{at} the new location at which the trustee
7 can be contacted.

****NOTE: Do you want provide the option for including an electronic mail address, if available?

8 (c) An explanation of the reasons for the proposed transfer. ✓

9 (d) The date on which the proposed transfer is anticipated to occur. ✓

10 (e) The date, not less than 30 ^{days} after the giving of the notice, by which the
11 qualified beneficiary must notify the trustee of an objection to the proposed transfer.

12 ~~4~~ (5) The authority of a trustee to act under ^{sub. (2)} ~~this section~~ without court approval
13 to transfer a trust's principal place of administration is suspended if a qualified
14 beneficiary commences a judicial proceeding objecting to the proposed transfer on or
15 before the date specified in the notice. The suspension is effective until the judicial
16 proceeding is resolved or withdrawn. ✓

****NOTE: Subsections (3) and (4) of this section imply that a trustee may act without court approval to transfer the principal place of administration, but this authority isn't explicitly granted until it is suspended under this subsection. Would it be appropriate to clearly state that a trustee has the power to transfer the principal place of administration?

17 ~~4~~ (5) (6) In connection with a transfer of a trust's principal place of administration,
18 the trustee may transfer some or all of the trust property to a successor trustee
19 designated in the terms of the trust or appointed pursuant to s. 701.0704. ✓

****NOTE: May the trustee transfer some or all of the trust property to a successor trustee in the absence of a transfer of a trust's principal place of administration? If so, it seems confusing for this subsection to begin with "In connection with a transfer..."

1 (b) (7) Unless otherwise validly designated in the trust instrument, the principal
 2 place of administration of a trust is the trustee's usual place of business or, if the
 3 trustee has no place of business, the trustee's residence. A corporate trustee who has
 4 offices in multiple states and who performs administrative functions for a particular
 5 trust in multiple states may designate the principal place of administration by
 6 providing notice to the qualified beneficiaries. The corporate trustee must have a
 7 nexus to the jurisdiction designated in the trust instrument, including a trust office
 8 and the performance of some administrative functions for that particular trust in
 9 that particular jurisdiction. The transfer of some of the administrative functions of
 10 the corporate trustee to another state or states does not transfer the principal place
 11 of administration as long as the corporate trustee maintains an office and performs
 12 some administrative functions in the jurisdiction designated in the trust instrument
 13 and the corporate trustee does not transfer the place of administration pursuant to
 14 sub. (4).

****NOTE: What is a "trust office"?

15 (c) (8) The principal place of administration in the case of cotrustees is one of the
 16 following:

17 (a) The usual place of business of the corporate trustee, if there is only one
 18 corporate trustee.

19 (b) The usual place of business or residence of any of the cotrustees as agreed
 20 on by the cotrustees.

****NOTE: Is "on," and not "to," the correct preposition here?

21 (b) (9) The law of the trust's principal place of administration shall govern
 22 administrative matters. ✓

23 SECTION 10. 701.0109 of the statutes is created to read:

g. governs

1 **701.0109 Article I, Section 109** ^{← = m} **Methods and waiver of notice.** (1)
 2 Notice to a person under this chapter or the sending of a document to a person under
 3 this chapter must be accomplished in a manner reasonably suitable under the
 4 circumstances and likely to result in receipt of the notice or document. Permissible
 5 methods of notice or for sending a document include 1st class mail, personal delivery,
 6 delivery to the person's last known place of residence or place of business, or a
 7 properly directed electronic message.

****NOTE: The term "electronic message" is broad and vague; it could mean an e-mail, but could also include a text-message, instant message, "tweet", fax, digital voice message, cell phone conversation, etc. Is that your intent? Or do you want to be more specific about what is a "properly directed electronic message"?

8 (2) Notice otherwise required under this chapter or a document otherwise
 9 required to be sent under this chapter, ^{does need to} need not be provided to a person whose identity
 10 or location is unknown to and not reasonably ascertainable by a trustee.

11 (3) Notice under this chapter or the sending of a document under this chapter
 12 may be waived by the person to be notified or sent the document.

****NOTE: How is waiver accomplished or demonstrated?

13 (4) Notice of a judicial proceeding ^{shall} must be given as provided in the applicable
 14 rules of civil procedure.

15 SECTION 11. 701.0110 of the statutes is created to read:

16 **701.0110 Article I, Section 110** ^{← = m} **Others treated as qualified**
 17 **beneficiaries.** (1) A charitable organization that is expressly designated to receive
 18 distributions under the terms of a charitable trust and that is not subject to a right
 19 of substitution by the settlor or by any other party prior to the charitable
 20 organization becoming a distributee or permissible distributee of trust income or
 21 principal has the rights of a qualified beneficiary under this chapter if the charitable

1 organization, on the date ^{on which} the charitable organization's qualification is being
2 determined, satisfies one of the following:

~~***NOTE: The LRB drafting conventions do not permit mid-paragraph subdivision notations. For that reason, I eliminated "(i) and (ii)" from this subsection. Let me know if this creates a problem for applying or interpreting this subsection.~~

~~***NOTE: LRB drafting conventions prohibit the use of semi-colons following a colon and, instead, require that we precede a series that follows a colon with "the following". In the series that follows this colon, can one or more of the following be satisfied? That is, is the phrase "one of the following" appropriate or would "one or more of the following" or "at least one of the following" be better?~~

3 (a) The charitable organization is a distributee or permissible distributee of
4 trust income or principal.

5 (b) The charitable organization would be a distributee or permissible
6 distributee of trust income or principal upon the termination of the interests of other
7 distributees or permissible distributees then receiving or eligible to receive
8 distributions. ✓

9 (c) The charitable organization would be a distributee or permissible
10 distributee of trust income or principal if the trust terminated on that date. ✓

11 (2) A person appointed to enforce a trust created for the care of an animal or
12 another noncharitable purpose as provided in ss) 701.0408 ✓ or 701.0409 ✓ has the rights
13 of a qualified beneficiary under this chapter. ✓

14 (3) The attorney general ✓ of this state has the rights of a qualified beneficiary
15 with respect to a charitable trust having its principal place of administration in this
16 state only when the charitable interest to be represented would qualify under sub.
17 (1) ✓ but no charitable organization has been expressly designated to receive
18 distribution under the terms of a charitable trust.

19 SECTION 12. 701.0111 ✓ of the statutes is created to read:

1

701.0111 Article I, Section 111 - Nonjudicial settlement agreements. (1)

2

In this section, "interested person" means a person whose consent would be required

3

in order to achieve a binding settlement were the settlement to be approved by the

4

court.

****NOTE: LRB drafting conventions generally require the use of the singular form of nouns. Also, note that I separated out the definition for "interested person" from the substantive requirement that the standards applicable to representation will also be applicable to an interested person.

5

(2) The rules of subch. III shall apply to the determination of an interested

6

person under this section, ^{may be represented} as provided in subch. III.

****NOTE: The meaning of this sentence is not clear. Does this mean that someone must determine whether a person is an interested person according to the rules under subch. III? If so, who makes this determination? Also if so, might I suggest: "The rules of representation under subch. III shall be used [by . . .] to determine whether a person is an interested person under this section"? Or does this mean that an interested person will make a determination according to the rules under subch. III?

7

(3) Except as provided in sub. (4), an interested person may enter into a binding

8

nonjudicial settlement agreement, ^{with respect to any matter involving a trust} which shall have the same effect as if approved

9

by the court, with respect to any matter involving a trust. ^{A binding judicial settlement agreement has the effect of an order of a court and is considered}

10

(4) A nonjudicial settlement agreement is valid only to the extent it includes

11

terms and conditions that could be properly approved by the court or under this

12

chapter or other applicable law.

****NOTE: This section specifies who an interested person is, with respect to a nonjudicial settlement agreement, and when a nonjudicial settlement agreement is valid, but does not provide a definition for a judicial settlement agreement or explain when such an agreement would be necessary or used. Is such a definition or explanation needed?

13

(5) Matters that may be resolved by a nonjudicial settlement agreement

14

^{may resolve any matter involving a trust,} include any of the following:

15

(a) The interpretation or construction of the terms of the trust.

16

(b) The approval of a trustee's report or accounting or waiver of the preparation

17

of a trustee's report or accounting.

****NOTE: To clarify that the list is illustrative, I altered the intro. language to include a general statement of what confirm a settlement agreement may be used for. Please confirm that this language is consistent with your intent.

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

1 (c) Direction to a trustee to perform or refrain from performing a particular act
2 or the grant to a trustee of any necessary power.

3 (d) The resignation or appointment of a trustee.

4 (e) The determination of a trustee's compensation.

5 (f) The transfer of a trust's principal place of administration.

6 (g) The liability or release from liability of a trustee for an action relating to the
7 trust.

8 (h) The criteria for distribution to a beneficiary where the trustee is given
9 discretion.

10 (i) The resolution of disputes arising out of the administration or distribution
11 of the trust.

12 (j) An investment action.

13 (k) Appointment of a directing party, under s. 701.0808, or a trust protector.

14 (L) Appointment of a trust protector under s. 701.0818.

****NOTE: This section cross-references s. 701.0818. However, the drafting materials did not include any material for a section 701.0818. Is this a numbering error? Or is the material for section 818 not yet completed?

15 (m) Any other matter concerning the administration of a trust.

16 (6) Any interested person may request the court to approve a nonjudicial
17 settlement agreement to determine whether the representation as provided in
18 subch. III was adequate and to determine whether the agreement contains terms and
19 conditions the court could have properly approved.

****NOTE: I eliminated two commas from this subsection (following the first appearance of "agreement" and following "adequate"). Okay? Also, why does the sentence end with "terms and conditions the court could have properly approved" (past tense) and not "terms and conditions the court could properly approve" (present tense)?

Insert 20-20

20 SECTION 13. Subchapter II (title) of chapter 701 [precedes 701.0201] of the
21 statutes is created to read:

All caps 21 JUDICIAL PROCEEDINGS center

1

CHAPTER 701

2

SUBCHAPTER II

****NOTE: No title was provided for this subchapter II. Because other subchapters have titles, each subchapter must have a title.

3

SECTION 14. 701.0201 of the statutes is created to read:

4

701.0201 Article II, Section 201 - Role of court in administration of

5

trust. (1) The court may intervene in the administration of a trust to the extent its

6

jurisdiction is invoked by an interested person or as provided by law.

****NOTE: Does "interested person" in this section have the same meaning as under s. 701.0111 (1)? Should a definition be provided for "interested person" in this section?

7

(2) A trust is not subject to continuing judicial supervision unless ordered by

8

the court. Unless ordered by the court upon petition of a settlor, trustee, or qualified beneficiary, a

9

(3) A judicial proceeding involving a trust may relate to any matter involving

10

the trust's administration and may be used to do any of the following:

11

****NOTE: I added "may be used to do any of the following" to this intro; without it, they seemed to be something missing from the intro. Okay

12

(a) Determine the validity of all or any part of a trust.

13

(b) Appoint or remove a trustee.

14

(c) Appoint a representative or guardian ad litem as provided in s. 701.0305,

15

whether or not any other judicial proceeding concerning the trust is pending.

16

(d) Review a trustee's fees.

17

(e) Review and approve interim or final accounts.

18

(f) Ascertain trust beneficiaries.

19

(g) Determine the existence or nonexistence of any immunity, power, privilege, duty, or right.

20

(h) Request trustee instructions.

21

(i) Obtain a declaratory judgment.

Ins 21-8 NOP Please confirm that this is consistent with your intent

I modified this paragraph to refer to singular nouns. Under s. 990.001(1), the singular includes the plural, so this is purely a technical change.

(j) Seek reformation or other equitable relief with respect to a trust.

(k) Determine any question arising in the administration or distribution of any

trust, including questions of construction of trust instruments.

****NOTE: Could this paragraph read "Resolve any question ..." or "Determine the answer to any question..." rather than "Determine any question"?

****NOTE: Rather than "distribution of a trust", should this read "distribution from a trust" or "distribution of trust income or principal" or "distribution under a trust"?

(L) Determine any other matters involving trustees and beneficiaries.

****NOTE: I am confused by the language in this paragraph (L) and in paragraph (k). Section 701.0201 governs the role of the court in the administration of a trust. But it would seem that "questions of construction of trust instruments" and "other matters involving trustees and beneficiaries" are not matters related to the trust's administration, but are more substantive matters related to the meaning and effect of the trust. If the authority granted to a court is more expansive than simply administering the trust, then the use of the words "administration of a trust" and "trust's administration" in subs. (1) and (3) (intro.), respectively, is misleading. Perhaps a better phrase would be "any matter involving the trust..."? Please advise.

SECTION 15. 701.0202 of the statutes is created to read: (B)

701.0202 Article II, Section 202 - Personal Jurisdiction over trustee and

beneficiary. (1) By accepting the trusteeship of a trust having its principal place

of administration in this state or by moving the principal place of administration to

this state, the trustee submits personally to the jurisdiction of the courts of this state

regarding any matter involving the trust.

(2) With respect to their interests in the trust, the beneficiaries of a trust

having its principal place of administration in this state are subject to the

jurisdiction of the courts of this state regarding any matter involving the trust. By

accepting a distribution from such a trust, the recipient submits personally to the

jurisdiction of the courts of this state regarding any matter involving the trust.

(3) Notwithstanding any contractual provision or other agreement between

the trustee and the agent to the contrary, by accepting the delegation of a trust

function from the trustee of a trust administered in this state pursuant to s.

pursuant to s. 701.0807 or 881.01(10), or otherwise;

Yes, the use of the capital (L) is intentional to distinguish it from the number 10

Ins 22-125

having a principal place of administration

1 881.01(10) or otherwise, the agent submits personally to the jurisdiction of the courts
2 of this state regarding any matter involving the trust.

~~****NOTE: What does "or otherwise" mean or refer to in this subsection? Is there any other provision of this chapter or the statutes under which the delegation of a trust function would occur and/or that should be referenced under this subsection?~~

~~****NOTE: This section refers to "a trust administered in this state;" elsewhere, the phrase used is "a trust having its principal place of administration in this state". Is there a difference in these two concepts? For example, a could "a trust administered in this state" be at the same time "a trust having its principal place of administration in another state"? If that is not your intent, I suggest using one phrase consistently.~~

3 (4) This section does not preclude other methods of obtaining jurisdiction over
4 a trustee, beneficiary, or other person receiving property from the trust.

5 SECTION 16. 701.0203 of the statutes is created to read:

6 701.0203 Article II, Section 203 - Subject matter jurisdiction. (1) The
7 circuit court assigned to exercise probate jurisdiction shall have exclusive
8 jurisdiction of proceedings in this state brought by a trustee or beneficiary
9 concerning the administration of a trust. Except as otherwise provided in this

10 chapter, and as applicable, the probate procedure described in ch. 879 governing
11 circuit courts shall apply to such proceedings brought by a trustee or beneficiary concerning the administration of a trust.

~~****NOTE: Is it necessary to keep the phrase "governing circuit courts" in the last sentence of this section? I think the sentence could be simplified as follows: "Except as otherwise provided in this chapter, and as applicable, the probate procedure described in ch. 879 shall apply to such proceedings."?~~

NO
In accordance with LRB policies, I removed the false imperatives ("shall have" and "shall apply") in this subsection and eliminated the word "such."

12 (2) This section does not preclude judicial or nonjudicial alternative dispute
13 resolution, including nonjudicial settlement agreements described in s. 701.0111.

14 SECTION 17. 701.0204 of the statutes is created to read:

15 701.0204 Article II, Section 204 - Venue. (1) Except as provided in sub. (2),
16 venue for a judicial proceeding involving a trust is in the county of this state in which
17 the trust's principal place of administration is or will be located and, if the trust is

or

1 a testamentary trust and the decedent's estate is not yet closed, in the county ^{of this state} in
2 which the decedent's estate is being administered. ✓

****NOTE: This section provides that venue is in the county in which the trust's principal place of administration is or will be located and, under certain circumstances, in the county in which the decedent's estate is being administered. Is it your intent that venue shall be in both counties, or that venue can be in either county?

****NOTE: "County" appears twice in this subsection; in the first instance, county is followed by "in this state," but in the second instance, there is no reference to "in this state." (See also s. 701.0204 (2) (a) through (d)). Is it your intent that, where county appears without the phrase "in this state," the county of venue could be a county that is not in this state? If not, I would recommend using a consistent phrase. That said, is it necessary to specify that the county be located "in this state"? Isn't that a given?

3 (2) If a trust has no trustee, venue for a judicial proceeding for the appointment
4 of a trustee is in any of the following: ✓

5 (a) A county of this state in which a beneficiary resides. ✓

6 (b) A county ^{of this state} in which any trust property is located. ✓

7 (c) A county ^{of this state} in which the holder of trust property maintains an office. ✓

8 (d) If the trust is a testamentary trust and the decedent's estate is not yet
9 closed, in the county ^{of this state} in which the decedent's estate is being administered. ✓

10 (3) Venue for a judicial proceeding involving a trust shall be further ^{is also} governed
11 by ss. 801.50 to 801.62, as applicable, and such proceeding shall be regarded as a civil
12 action for that purpose. ✓

****NOTE: What does it mean that venue "shall be further governed by..." I wonder whether, instead of using the word "further" here, I can insert "subject to sub. (3)" in the (intro.) to sub. (1) so that it would read as follows: "Except as provided in sub. (2) and subject to sub. (3)..."?

Ins
24-12
Insert 24-13

13 SECTION 18. Subchapter III (title) of chapter 701 [precedes 701.0301] of the
14 statutes is created to read:

15 CHAPTER 701

16 SUBCHAPTER III

17 REPRESENTATION

1 SECTION 19. 701.0301 of the statutes is created to read:

2 701.0301 Article III, Section 301 - Representation: basic effect. (1)

3 Notice, information, an accounting, or a report given to a person who may represent
4 and bind another person under this subchapter ^{g 15} serve as a substitute for and ^{g has} have the
5 same effect as notice, information, an accounting, or a report given directly to the
6 other person.

7 (2) The consent of a person who may represent and bind another person under
8 this subchapter is binding on the person represented unless the person represented
9 objects to the representation by notifying the trustee or the representative in writing
10 before the consent would otherwise have become effective.

11 (3) Except as provided in ss. 701.0411 and 701.0602, a person who under this
12 subchapter may represent a settlor who lacks capacity may receive notice and may
13 give a binding consent on the settlor's behalf.

****NOTE: Subsection (1) and (2) refer to a person "who may represent and bind another person under this subchapter," and sub. (4) refers to a settlor who "may not represent and bind a beneficiary under this subchapter." In contrast, sub. (3) refers only to a person who "under this subchapter may represent a settlor." Is the word "bind" intentionally omitted from sub. (3)?

14 (4) A settlor may not represent and bind a beneficiary under this subchapter
15 with respect to the termination or modification of a trust under s. 701.0411 (1).

****NOTE: The drafting instructions for s. 701.0301 ((1), (2), (3), and (4) used the phrase "this article." Consistent with LRB drafting conventions, I replaced "this article" with "this subchapter". That said, is it your intent that these provisions governing representation do not apply outside of subchapter III? Or should they apply throughout ch. 701?

16 (5) A trustee is not liable for giving notice, information, an accounting, or a
17 report to a beneficiary who is represented by another person under this section and
18 nothing in this section prohibits the trustee from giving notice, information, an
19 accounting, or a report to the person represented.

Ins.
25-6



17

18

19

****NOTE: This subsection uses the phrase "a beneficiary who is represented by another person under this section" and "nothing in this section prohibits..." Does "this section" refer only to s. 701.0301? Or should it apply to something more?

SECTION 20. 701.0302 of the statutes is created to read:

701.0302 Article III, Section 302-Representation by holder of general testamentary power of appointment. To the extent there is no conflict of interest between a holder of a general testamentary power of appointment and ^aany person represented with respect to the particular question or dispute, the holder may represent and bind ^{of the}a person whose interests, as a permissible appointee, a taker in default, or otherwise, are subject to the power.

****NOTE: I changed "the persons represented" to "any person represented." Okay? Similarly, I converted other plurals in this section to singulars.

SECTION 21. 701.0303 of the statutes is created to read:

701.0303 Article III, Section 303-Representation by fiduciaries and parents. To the extent there is no conflict of interest between a representative and the person represented or among those being represented with respect to a particular question or dispute, all of the following apply:

- (1) A conservator may represent and bind the estate that the conservator controls.
- (2) A guardian of the estate may represent and bind the ward and a guardian of the person may represent and bind the ward if a guardian of the estate of the ward has not been appointed.
- (3) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal.
- (4) A trustee may represent and bind the beneficiaries of the trust, except as to matters relating to the administration or distribution of the trust.

INS
26-177

1 (5) A personal representative of a decedent's estate may represent and bind a
2 person interested in the estate, except as to matters relating to the administration
3 or distribution of the estate.

4 (6) A parent may represent and bind the parent's minor or unborn child. If a
5 disagreement arises between parents seeking to represent the same minor child or
6 unborn child, representation shall be determined as follows:

7 (a) If only one parent is a beneficiary of the trust that is the subject of the
8 representation, that parent is entitled to represent the minor child or unborn child.

9 (b) If both parents are beneficiaries of the trust that is the subject of the
10 representation, the parent who is related to the settlor, other than by reason of being
11 married to the other parent, is entitled to represent the minor child or unborn child.

12 (c) Subject to s. 701.0301 (4), if neither parent is a beneficiary of the trust that
13 is the subject of the representation, the parent who is the settlor of the trust that is
14 the subject of the representation is entitled to represent the minor child or unborn
15 child.

16 (d) If neither parent is a beneficiary or settlor of the trust that is the subject
17 of the representation, the parent who is a related to the settlor, other than by reason
18 of being married to the other parent, is entitled to represent the minor child or
19 unborn child.

20 (7) The order in which the representatives are listed in subs. (1) to (6) sets forth
21 the priority each such representative has relative to the others.

22 (8) If there is no one permitted to act under subs. (1) to (6), or if all of the people
23 entitled to act under those subsections have declined to act, the trustees may appoint
24 a representative to act.

or if the trustee determines that the otherwise available representation might be inadequate,

INS
27-24

****NOTE: Section 701.0302 and several provisions in s. 701.0303 are not, by their terms, necessarily limited to trust-related matters. Is that okay?

1 SECTION 22. 701.0304⁴ of the statutes is created to read:

2 701.0304 Article III, Section 304^{← = m} - Representation by person having
3 substantially identical interest. Unless otherwise represented with respect to a
4 particular question or dispute, a minor, incapacitated, or unborn individual or a
5 person whose identity or location is unknown and not reasonably ascertainable may
6 be represented by and bound by another person having a substantially identical
7 interest with respect to the particular question or dispute, but only to the extent
8 there is no conflict of interest between the representative and the person represented
9 with respect to the particular question or dispute.

10 SECTION 23. 701.0305^x of the statutes is created to read:

11 701.0305 Article III, Section 305^{← = m} - Appointment of representative. (1)

12 If the court determines that ^{a person's} an interest is not represented under this[✓] subchapter, or
13 that the otherwise available representation might be inadequate, the court may
14 appoint a representative or guardian ad litem to receive notice, give consent, and
15 otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn
16 individual or a person whose identity or location is unknown. A representative or
17 guardian ad litem may be appointed to represent several persons or interests.

****NOTE: The drafting instructions for this subsection used the phrase "If ... an interest is not represented under this article ..." I substituted "this subsection". Does "article" refer only to article (subchapter) III? Are questions of representation in general applicable only to this article (subchapter) III, or do questions of representation touch on other aspects of Wisconsin trust law in chapter 701?

****NOTE: What happens if a court determines that an interest of an estate is not represented or that the representation of the estate is not adequate? An estate is not a minor, incapacitated, or unborn person, nor is an estate a person whose identity or location is unknown, but it is a person for whom representation can occur. See s. 701.0303 (1). The same question applies to an agent of a principal under s. 701.0303 (3).

INS
28-17

the person who is not represented or whose representation might be inadequate

Insert 29-6

1 (2) A representative or guardian ad litem may act on behalf of the individual
2 represented with respect to any matter arising under this chapter, whether or not
3 a judicial proceeding concerning the trust is pending. ✓

4 (3) In making decisions, a representative or guardian ad litem may consider
5 any general benefit accruing to the living members of the individual's family. ✓

6 SECTION 24. Subchapter IV (title) of chapter 701 [precedes 701.0401] of the
7 statutes is created to read:

8 CHAPTER 701

9 SUBCHAPTER IV

10 CREATION, VALIDITY,

11 MODIFICATION, AND TERMINATION

12 OF TRUST

13 SECTION 25. 701.0401 of the statutes is created to read:

14 701.0401 Article IV, Section 401 - Methods of creating a trust. A trust

15 may be created by any of the following means: ✓

16 (1) ~~A~~ Transfer of property to another person as trustee during the settlor's
17 lifetime, by will, or by other disposition taking effect upon the settlor's death. ✓

18 (2) ~~A~~ Declaration by an owner of property that the owner holds identifiable
19 property as trustee or declaration by any person who intends to create a trust with
20 the expectation that property of the person or others will be transferred to the trust. ✓

21 (3) ~~A~~ Exercise of a power of appointment in favor of a trustee. ✓

22 (4) A court pursuant to its statutory or equitable powers. ✓

23 (5) A guardian or conservator acting with authority of the court, a
24 representative payee, an agent or an attorney in fact under a power of attorney that
25 expressly grants authority to create the trust. ✓

1 (6) ^{2 Amy} ~~Such~~ ^{other means} ~~authorized~~ ⁱⁿ ~~by statute, regulation, common law, or other~~ ^{manner}
2 provision having the effect of law. ✓

3 SECTION 26. 701.0402 of the statutes is created to read:

4 701.0402 Article IV, Section 402-Requirements for creation. (1) A trust
5 is created only if all of the following are satisfied: ✓

6 (a) The settlor of the trust has capacity as defined in sub. (4) to create the trust,
7 unless the trust is created by court order or by an agent, guardian, conservator, or
8 representative payee with authority to act. ✓

9 (b) The settlor under s. 701.0401 indicates an intention to create the trust, or
10 a statute, regulation, common law, other provision having the effect of law, judgment,
11 or decree creates or authorizes the creation of a trust. ✓

12 (c) The trust has a definite beneficiary or is one of the following: ✓

- 13 1. A charitable trust.
- 14 2. A trust for the care of an animal, as provided in s. 701.0408. ✓
- 15 3. A trust for a noncharitable purpose, as provided in s. 701.0409. ✓

- 16 (d) The trustee has duties to perform. ✓
- 17 (e) The same person is not the sole trustee and sole beneficiary. ✓

18 (2) A beneficiary is definite if the beneficiary can be ascertained ~~now~~ ^{at the time} or in the ~~future.~~ ^{the trust is created}

19 ^{CS} A statute is regarded as speaking in the present, as of the
20 ~~NOTE:~~ ^{NOTE:} time it is read or applied. Therefore, the term "now" would have a different
21 instrument to select a beneficiary from an indefinite class is valid. If the power is ^{meaning}
22 not exercised within a reasonable time, the power fails and the property subject to ^{everytime the}
23 the power passes to the persons who would have taken the property had the power ^{statute}
24 not been conferred. ^{was}
^{read or}
^{applied.}
^{Please}
^{confirm}
^{that I}
^{have retained}
^{your intent.}

* * * * * Note: What is the purpose of the cross-reference to s. 701.0401? It y
seems unnecessary.

1 (4) Capacity required to create a trust is the same as the capacity to make a
2 will. ✓

3 SECTION 27. 701.0403 of the statutes is created to read:

4 701.0403 Article IV, Section 403 - Trusts created in other jurisdictions. ✓

5 A trust not created by will is validly created if its creation complies with the law of
6 the jurisdiction in which the trust instrument was executed, or the law of the
7 jurisdiction in which, at the time of creation, any of the following was satisfied: ✓

8 (1) The settlor was domiciled, had a place of abode, or was a national. ✓

9 (2) A trustee was domiciled or had a place of business. ✓

10 (3) Any trust property was located. ✓

11 SECTION 28. 701.0404 of the statutes is created to read:

12 701.0404 Article IV, Section 404 - Trust purposes. A trust may be created

13 only to the extent its purposes are lawful and possible to achieve. A trust and its
14 terms must be for the benefit of its beneficiaries or for a noncharitable but otherwise
15 valid purpose as described in s. 701.0409. ✓

16 SECTION 29. 701.0405 of the statutes is created to read:

17 701.0405 Article IV, Section 405 - Charitable purposes; enforcement. ✓

18 (1) A charitable trust may be created for the relief of poverty, the advancement of
19 education or religion, the promotion of health or governmental or municipal
20 purposes, or other purposes the achievement of which is beneficial to the community.

21 (2) If the terms of a charitable trust do not indicate a particular charitable
22 purpose or beneficiary, or designate persons or procedures for selecting charitable
23 purposes or beneficiaries, the court may select one or more charitable purposes or
24 beneficiaries. The selection must be consistent with the settlor's intention to the
25 extent it can be ascertained. ✓

1 (3) The settlor of a charitable trust or his or her designees, whether identified
 2 within or without the terms of the trust, or a charitable entity named in the
 3 governing ^{trust} instrument, or the attorney general, or a cotrustee, or such other person
 4 the court determines to have sufficient interest, among others, may maintain a
 5 proceeding to enforce the trust.

le
 ****NOTE: This subsection uses the phrase "governing instrument". Is a governing instrument different from a "trust instrument"? If so, how? If not, can I substitute "trust instrument" for "governing instrument"?
 ****NOTE: Are the words "among others" necessary in this subsection? They seem to minimize the significance of or even eliminate the need for the other more specific persons designated to enforce a trust. Can this broader "among others" category of persons be assumed to be covered by "such other person the court determines to have sufficient interest"?

6 SECTION 30. 701.0406 of the statutes is created to read:

7 **701.0406 Article IV, Section 406 - Creation of trust induced by fraud,**
 8 **duress, or undue influence.** A trust is void, in whole or in part, to the extent its
 9 creation was induced by fraud, duress, or undue influence.

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

10 SECTION 31. 701.0407 of the statutes is created to read:

11 **701.0407 Article IV, Section 407 - Evidence of oral trust.** Except as
 12 required by a statute other than this chapter, a trust ~~shall~~ ^{does} not be evidenced by a trust
 13 instrument, but the creation of an oral trust and its terms may be established only
 14 by clear and convincing evidence. ^{I am not aware of any specific cases}

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

15 SECTION 32. 701.0408 of the statutes is created to read:

16 **701.0408 Article IV, Section 408 - Trust for care of animal.** (1) A trust
 17 may be created to provide for the care of an animal alive during the settlor's lifetime.
 18 The trust terminates upon the death of the animal or, if the trust was created to

NO
 4 The phrase "in whole or in part" is superfluous in this context. I recommend removing it and retaining the UTC language.

1 provide for the care of more than one animal alive during the settlor's lifetime, upon
2 the death of the last surviving animal. ✓

3 (2) A trust authorized by this section ✓ may be enforced by a person appointed
4 in the terms of the trust or, if no person is so appointed, ✓ by a person appointed by the
5 court. A person having an interest in the welfare of the animal may request the court
6 to appoint a person to enforce the trust or to remove a person appointed under this
7 subsection. ✓

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

8 (3) Property of a trust authorized by this section ✓ may be applied only to its
9 intended use, except to the extent the court determines that the value of the trust
10 property exceeds the amount required for the intended use. Except as otherwise
11 provided in the terms of the trust, property not required for the intended use must
12 be distributed to the settlor, if then living, otherwise to the settlor's successors in
13 interest. ✓

14 SECTION 33. 701.0409^x of the statutes is created to read:

15 **701.0409 Article IV, Section 409** ^{← = m} **Noncharitable trust without**
16 **ascertainable beneficiary.** Except as otherwise provided in s. 701.0408 or by
17 another statute, the following rules apply: ✓

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

18 (1) A trust may be created for a noncharitable purpose without a definite or
19 definitely ascertainable beneficiary or for a noncharitable but otherwise valid
20 purpose to be selected by the trustee. ✓

1 (2) A trust may be created for maintaining, keeping in repair, and preserving
 2 any grave, tomb, monument, gravestone, or any cemetery. Any cemetery company,
 3 association, or corporation ^{authority Under ss 157.061(2)} may receive property in trust for any of the purposes
 4 specified in this subsection and apply the income from the trust to the purpose stated
 5 in the creating ^{trust} instrument.

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

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

6 (3) A trust authorized by this section may be enforced by a person appointed
 7 in the terms of the trust or, if no person is so appointed, by a person appointed by the
 8 court.

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

9 (4) Property of a trust authorized by this section may be applied only to its
 10 intended use, except to the extent the court determines that the value of the trust
 11 property exceeds the amount required for the intended use. Except as otherwise
 12 provided in the terms of the trust, property not required for the intended use must
 13 be distributed to the settlor, if then living, otherwise to the settlor's successors in
 14 interest.

15 SECTION 34. 701.0410 of the statutes is created to read:

16 **701.0410 Article IV, Section 410 - Modification or termination of trust;**
 17 **proceedings for approval or disapproval.** (1) In addition to the methods of
 18 termination prescribed by ss. 701.0411 to 701.0414, a trust terminates to the extent
 19 the trust is revoked or expires pursuant to its terms, no purpose of the trust remains

1 to be achieved, or the purposes of the trust have become unlawful or impossible to
2 achieve.

3 (2) A proceeding to approve or disapprove a proposed modification or
4 termination under ss. 701.0411 to 701.0416, or a proposed trust combination or
5 division under s. 701.0417, may be commenced by a trustee or beneficiary, and a
6 proceeding to approve or disapprove a proposed modification or termination under
7 s. 701.0411 may be commenced by the settlor. The settlor of a charitable trust may
8 maintain a proceeding to modify the trust under s. 701.0413. A trustee has no
9 standing to oppose a proposed modification or termination commenced under s.
10 701.0411 (1).

11 (3) A trustee may not be compelled by a modification or termination under this
12 section, under ss. 701.0411 to 701.0416, or by any other statute or legal or equitable
13 doctrine to make distributions to or for any beneficiary of a trust for a disabled
14 individual or to terminate the trust, during the lifetime of such disabled individual.
15 A court may modify the terms of a trust for a disabled individual with retroactive
16 effect or reform the terms of such trust to achieve the settlor's objective or, if because
17 of circumstances not anticipated by the settlor, to otherwise further the purposes of
18 the trust so that it does not result in the disabled individual's ineligibility for public
19 assistance.

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

20 (4) Sections 701.0410 to 701.0418 are not applicable to a conversion of a trust
21 to a unitrust under s. 701.20 (4g).

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

22 (5) Sections 701.0410 to 701.0418 are subject to s. 445.125 (1) (a) 2. to 4.

NOTE

Did you intentionally use "public assistance" in this paragraph, as compared to "medical assistance" in the definition of "trust for an individual with a disability" or "a government program" in s. 706.0418(4)?

Handwritten notes on the right margin: "can", "with a disability", "the", "with a disability", "with a disability", "of the individual with a disability", "Principal and Income Act", "This bill", "706.0418(4)".

1 SECTION 35. 701.0411 of the statutes is created to read:

2 701.0411 Article IV, Section 411 ^{← = m} Modification or termination of

3 noncharitable irrevocable trust by consent. (1) A noncharitable irrevocable
4 trust may be modified or terminated, with or without court approval, upon consent
5 of the settlor and all beneficiaries, even if the modification or termination is
6 inconsistent with a material purpose of the trust. A settlor's power to consent to a
7 trust's modification or termination may be exercised by any of the following:

8 (a) By an agent of the settlor under a power of attorney only to the extent
9 expressly authorized by the power of attorney or the terms of the trust.

10 (b) By the settlor's guardian with the approval of the court supervising the
11 guardianship if an agent is not so authorized.

12 (c) By the settlor's conservator with the approval of the court supervising the
13 conservatorship if an agent is not so authorized and a guardian has not been
14 appointed.

15 (2) (a) A noncharitable irrevocable trust may be terminated upon consent of all
16 of the beneficiaries if the court concludes that continuance of the trust is not
17 necessary to achieve any material purpose of the trust.

18 (b) A noncharitable irrevocable trust may be modified upon consent of all of the
19 beneficiaries if the court concludes that modification is not inconsistent with a
20 material purpose of the trust.

21 (3) (a) Except as provided in par. (b), a spendthrift provision in the terms of the
22 trust is not presumed to constitute a material purpose of the trust.

23 (b) A court may not compel a beneficiary to consent to a modification or
24 termination to satisfy a creditor of the beneficiary.

→ ~~***~~ NOTE: It is not clear to me how par. (b) is an exception to the presumption that a spendthrift provision is not a material purpose of the trust. Should par. (b) be its own ^{subsec from}

NOTE: This subsection is written in the passive voice. Who is required to notify the settlor of the proceeding? This language is repeated in ss. 701.0412 to 701.0416.

move

(4) Upon termination of a trust under sub. (1) or (2), the trustee shall distribute the trust property as agreed by the beneficiaries.

(5) If not all of the beneficiaries consent to a proposed modification or termination of the trust under sub. (1) or (2), the modification or termination may be approved by the court if the court is satisfied that all of the following apply:

(a) If all of the beneficiaries had consented, the trust could have been modified or terminated under this section.

(b) The interests of a beneficiary who does not consent will be adequately protected.

(6) The settlor, if living and not under incapacity, shall receive notice of a proceeding under this section.

SECTION 36. 701.0412 of the statutes is created to read:

701.0412 Article IV, Section 412 - Modification or termination because of unanticipated circumstances or inability to administer trust effectively.

(1) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification shall be made in accordance with the settlor's probable intention.

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

(2) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

Insert Sub. (1) from p 39, ln. 3
38-5

1 (3) Upon termination of a trust under this section, the trustee shall distribute
2 the trust property in a manner consistent with the purposes of the trust. ✓

3 (4) The settlor, if living and not under incapacity, shall receive notice of a
4 proceeding under this section. ✓

5 SECTION 37. 701.0413 of the statutes is created to read: (2) B

6 701.0413 Article IV, Section 413 - Cy pres. (1) Except as provided in sub.

7 (2), if a particular charitable purpose becomes unlawful, impracticable, impossible
8 to achieve, or wasteful, all of the following apply: ✓

9 (a) The trust does not fail, in whole or in part. ✓

10 (b) The trust property does not revert to the settlor or the settlor's successors
11 in interest. ✓

12 (c) The court may apply ^{the doctrine} cy pres to modify or terminate the trust by directing
13 that the trust property be applied or distributed, in whole or in part, in a manner
14 consistent with the settlor's charitable purposes. In determining the alternative
15 plan for disposition of the property under this paragraph, ✓ the court shall take into
16 account current and future community needs in the general field of charity within
17 which the original charitable purpose falls, other charitable interests of the settlor,
18 the amount of principal and income available under the trust, and other relevant
19 factors. A person with standing to enforce the terms of a charitable trust under s.
20 701.0405 ✓ has standing to commence a proceeding under this paragraph, ✓ and every
21 person with standing shall receive notice of a proceeding hereunder. The attorney
22 general is a necessary party in all proceedings under this paragraph. ✓

23 (3) (2) A provision in the terms of a charitable trust that would result in
24 distribution of the trust property to a noncharitable beneficiary prevails over the
25 power of the court under sub. (1) to apply ^{the doctrine} cy pres to modify or terminate the trust only

INSERT
38-5
move to p. 38, line 6

1 if, when the provision takes effect, the trust property is to revert to the settlor and
2 the settlor is still living.

3 (1) (3) The purpose of this subsection is to broaden the power of the courts to make
4 charitable gifts more effective. In any situation not expressly covered the court shall
5 liberally apply the cy pres doctrine.

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

6 (4) The settlor, if living and not under incapacity, shall receive notice of a
7 proceeding under this section.

8 SECTION 38. 701.0414 of the statutes is created to read:

9 701.0414 Article IV, Section 414 - Modification or termination of
10 uneconomic trust. (1) In this section:

11 (a) "Adjustment reference number" means the consumer price index for all
12 urban consumers, as published by the United States bureau of labor statistics, in
13 effect on January 1 of the year in which an adjustment is to be made in accordance
14 with sub. (3).

15 (b) "Base reference number" means the consumer price index for all urban
16 consumers, as published by the United States bureau of labor statistics, in effect on
17 January 1 of the base year.

18 (c) "Base year" means the year 2012.

19 (2) Except as provided in sub. (6), after notice to the qualified beneficiaries, the
20 trustee of a trust consisting of trust property having a total value less than \$100,000
21 or a revised applicable figure, as determined under sub. (3), may terminate the trust

in which this paragraph takes effect... [LRB insert date]

b. Round the product under subd. 1.a. to the nearest \$1,000

1 if the trustee concludes that the value of the trust property is insufficient to justify
2 the cost of administration.

3 (3) The dollar amount specified in sub. (2) shall be adjusted to a revised
4 applicable figure on the 5th anniversary of the effective date of this subsection
5 [LRB inserts date], and every 5 years thereafter. The revised applicable figure shall
6 be determined as follows:

7 (a) Calculate the percentage change between the base reference number and
8 the adjustment reference number for the year in which the adjustment is being
9 made.

10 (b) 1. If the percentage change determined in par. (a) is a positive number,
11 determine the revised applicable figure as follows:

12 a. Multiply \$100,000 by the percentage change determined in par. (a),
13 expressed as a decimal.

14 *9 C* (b) Add the product ^{value determined} under subd. 1. (a) to \$100,000.

15 2. If the percentage change determined in par. (a) is a negative number,
16 determine the revised applicable figure as follows:

17 a. Multiply \$100,000 by the absolute value of the percentage change
18 determined in par. (a), expressed as a decimal.

19 *9 C* (b) Subtract the product ^{value determined} under subd. 2. (a) from \$100,000.

20 (4) Except as provided in sub. (6), the court may modify or terminate a trust
21 or remove the trustee and appoint a different trustee if it determines that the value
22 of the trust property is insufficient to justify the cost of administration even if the
23 trust property has a total value in excess of the amount described in sub. (2).

24 (5) Upon termination of a trust under this section, the trustee shall distribute
25 the trust property in a manner consistent with the purposes of the trust.

b. Round the product under subd. 2(a) to the nearest \$1,000

1 (6) This section does not apply to an easement for conservation or preservation.

2 (7) The settlor, if living and not under incapacity, shall receive notice of a
3 proceeding under this section.

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

4 SECTION 39. 701.0415 of the statutes is created to read:

5 **701.0415 Article IV, Section 415 - Reformation to correct mistakes.** The
6 court may reform the terms of a trust, even if unambiguous, to conform the terms to
7 the settlor's intent if it is proved by clear and convincing evidence that both the
8 settlor's intent and the terms of the trust were affected by a mistake of fact or law,
9 whether in expression or inducement. The settlor, if living and not under incapacity,
10 shall receive notice of a proceeding under this section.

11 SECTION 40. 701.0416 of the statutes is created to read:

12 **701.0416 Article IV, Section 416 - Modification to achieve settlor's tax**
13 **objectives.** To achieve the settlor's tax objectives, the court may modify the terms
14 of a trust in a manner that is not contrary to the settlor's probable intent. The court
15 may provide that the modification has retroactive effect. The settlor, if living and not
16 under incapacity, shall receive notice of a proceeding under this section.

17 SECTION 41. 701.0417 of the statutes is created to read:

18 **701.0417 Article IV, Section 417 - Combination and division of trusts.**

19 (1) After notice to the qualified beneficiaries, a trustee may do any of the following
20 if the result does not impair rights of any beneficiary or adversely affect achievement
21 of any trust purposes:

- 22 (a) Combine 2 or more trusts into a single trust.
- 23 (b) Divide a trust into 2 or more separate trusts.

(CS) NOTE:
→ How does this interact with a trustee's ability to divide or merge a first trust under s. 701.0418? Is this a different power that does not require the power to invade trust principal?

1 (2) Subject to the terms of the trust, the trustee may take into consideration
 2 differences in federal tax attributes and other pertinent factors in administering the
 3 trust property of any separate account or trust, in making applicable tax elections,
 4 and in making distributions. A separate trust created by severance under sub. (1)
 5 (b) must be treated as a separate trust for all purposes from the date on which the
 6 severance is effective. The effective date of the severance may be retroactive to a date
 7 before the date on which the trustee exercises such power.

8 (3) If a trustee combines 2 or more trusts into a single trust, the trustee shall
 9 identify which trust is deemed to be the surviving trust.

10 SECTION 42. 701.0418 of the statutes is created to read:

11 **701.0418 Article IV, Section 418 - Trustee's power to appoint assets to**

12 **new trust. (1) DEFINITIONS.** In this section:

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

18 (b) "First trust" means the trust whose principal is appointed pursuant to the
 19 power granted under sub. (2).

****NOTE: This definition for "first trust" uses the phrase "principal is appointed
 pursuant to the power granted under sub. (2)," but in sub. (2), there is no reference to
 appointing principal. Instead, in sub. (2) (intro.), there is a reference to invad[ing]
principal and appointing assets, and in sub. (2) (b) (intro.) and (c) 2., there is a reference
 to invad[ing] principal. As a result, the definition for "first trust" is not clear.

20 (c) "Second trust" means the trust or trusts to which principal is appointed
 21 under sub. (2).

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*** NOTE! Is there a reason not to use the defined term "ascertainable standard" in this paragraph instead of "ascertainable purpose"? Using a different term for the same meaning may create ambiguity.

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

****NOTE: This definition for "standard" uses the phrase, "authority other than absolute power [to invade...]", whereas the definition for "absolute power" uses the phrase "a power to invade..." For consistency's sake, may I substitute "power" in the definition for "standard" so that it would read as follows: "Standard . . . means power other than absolute power [to invade...]"?

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

****NOTE: This subsection begins "Except as otherwise provided in this section..." Is there a way to narrow down where the exceptions to this subsection occur? I note, for example, that sub. (6) (f) is an exception. Are there any others? If not, it may be clearer for the reader if this subsection opened with "Except as provided in sub. (6) (f), . . ."

****NOTE: What is a unitrust payment?

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

****NOTE: What is a unitrust interest?

15 (b) Results in the trustee of the 2nd trust having the power to invade the income
16 or principal of the 2nd trust under a standard that is no less restrictive than the
17 standard set forth in the first trust. This paragraph does not apply to a term of a 2nd
18 trust described under sub. (4) (a) 10. or 11.

NOTE: Please carefully review the relationship between this paragraph (b) and proposed s. 701.0418 (4) (a) 10. and 11.

(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 power to invade principal of the first trust grants the trustee absolute power and the trustee has full discretion to determine who among a class of beneficiaries may receive distributions, the beneficiaries of the 2nd trust may include less than all of the beneficiaries of the first trust.

NOTE: This subdivision reads "[I]f the power to invade principal of the first trust grants the trustee absolute power..." How can "the power to invade principal" grant anything? Wouldn't it be the trust instrument that grants absolute power? Could this be re-written to read: [I]f the first trust grants the trustee absolute power and the trustee has full discretion. . .?"

(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" or words of similar import.

NOTE: What does "decanting" mean in this paragraph? Without a definition for decanting, it is difficult to know what "words of similar import" would be or what that phrase means.

(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 2nd 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.

(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.

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

****NOTE: Is "disqualification" the appropriate word here?

5 2. Subdivision 1. does not apply if the 2nd trust includes terms described in sub.
6 (4) (a) 10. or 11. and the trustee's only beneficial interest in the first trust is as a
7 remainder beneficiary.

8 (d) Where the exercise of such power would impair the withdrawal rights of a
9 beneficiary of the first trust where such withdrawal rights were granted to such
10 beneficiary in a manner designed to allow contributions subject to such withdrawal
11 rights to qualify for the gift tax annual exclusion or if the terms of the 2nd trust would
12 prevent additions to the 2nd trust from qualifying for the gift tax annual exclusion
13 if the terms of the first trust would allow additions to so qualify.

****NOTE: What is "the gift tax annual exclusion"? I think there needs to be a
reference to state or federal (or both?) law here.

14 (e) Where the exercise of such power would violate any perpetuities period
15 governing the first trust or impair a trustee's power of alienation with respect to trust
16 assets.

****NOTE: What is a "perpetuities period"? Should this be defined?

****NOTE: What is the trustee's "power of alienation"?

17 (f) Where the assets of the first trust are subject to a presently exercisable
18 power of withdrawal held by a trust beneficiary who is the only trust beneficiary to
19 whom, or for the benefit of whom, the trustee has authority to make distributions.

20 (g) Where the exercise of such power would impair the essential purpose of a
21 trust for an individual with a disability.

1 (4) PERMISSIBLE TERMS OF 2ND TRUST. (a) Except as provided in par. (b), the trust
2 instrument of the 2nd trust may provide for terms intended to achieve purposes
3 including the following:

****NOTE: The intro. to this list of additional purposes is awkward. I eliminated the
parenthetical material indicating that the list is not exclusive; the use of the phrase
"including the following purposes" is expansive, not restrictive, and will accomplish what
the parenthetical material was intended to accomplish. However, I'm not sure I
understand why the intro. reads "the trust instrument of the second trust may provide
for terms intended to achieve purposes including the following:?" Could the intro., simply
read "the trust instrument of the second trust may include terms intended to achieve
purposes including the following:?"

- 4 1. Correct a drafting error.
- 5 2. Clarify potentially ambiguous terms of the first trust.
- 6 3. Change the age of distribution to a beneficiary.
- 7 4. Extend the trust's duration.
- 8 5. Make distributions of income mandatory rather than discretionary.
- 9 6. In the case of a first trust over which the trustee has absolute power with
10 respect to invasion of income or principal, add standards governing invasion of
11 income or principal.

- 12 7. Grant general or special powers of appointment.

****NOTE: What is a power of appointment? How is a "special power" different than
a "general power" of appointment?

- 13 8. Include as beneficiaries one or more persons who are or will become members
14 of a class described in the first trust.

- 15 9. Add provisions to protect the interests of one or more beneficiaries, including
16 provisions to protect beneficiaries from self-destructive behavior.

- 17 10. Change the terms of the trust applicable to a beneficiary who is an
18 individual with a disability, regardless of whether the first trust includes standards
19 for distribution, where the purpose of such change is to allow such beneficiary to
20 qualify or continue to be qualified to receive benefits under a government program.

1 11. Provide for transfer of trust assets to a community trust. In this
2 subdivision, "community trust" means a master trust that is established and
3 managed by a nonprofit organization that maintains sub-accounts for individual
4 beneficiaries that meet the definition of a trust for an individual with a disability.

****NOTE: I don't know that this an adequate definition for "community trust".
What does "master trust" mean? What are "sub-accounts"? Must the sub-accounts
"meet the definition of a trust for an individual with a disability"? Perhaps "separate
accounts for individual beneficiaries" or "individual accounts for individual beneficiaries"
would be more clear? Or are all of the resources pooled such that only individual
accounting is maintained for individual beneficiaries? Should "nonprofit organization"
be defined with reference to the Internal Revenue Code? That is, does nonprofit
organization necessarily mean tax-exempt?

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

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

10 14. Provide for appointment of a trust protector and define the powers of such
11 trust protector.

12 15. Change the trust situs.

****NOTE: What is the "trust situs"? Is it different than the "principal place of
administration" or "designated jurisdiction"?

13 16. Change the law governing the trust.

****NOTE: I'm not sure what "law" this provision refers to and, more specifically,
how the trust can change that law. Could you please clarify?

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

15 18. Add or modify trustee or trust protector exculpatory provisions.

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

1 20. Include provisions to obtain desirable tax treatment or to avoid adverse tax
2 consequences, including provisions relating to grantor trust status under section 671
3 et seq. of the Internal Revenue Code.

4 (b) 1. The trust instrument of the 2nd trust may not provide for terms that
5 impair vested property rights of a beneficiary of the first trust.

6 2. If any term of the 2nd trust would reduce the potential liability of a trustee,
7 including a term that adopts or expands an exculpatory provision relating to
8 trustees, a trustee of the first trust who would benefit from the adoption of such term
9 in the 2nd trust must abstain from the consideration of and the adoption of such
10 term, and such term may be considered and adopted only by such other trustees of
11 the first trust who would not benefit from such term.

12 (5) PROCEDURAL MATTERS. (a) A trustee's exercise of a power to invade principal
13 under sub. (2) shall be by an instrument in writing, signed and acknowledged by the
14 trustee, and filed with the records of the first trust.

15 (b) The trustee shall give notice to all qualified beneficiaries of the first trust
16 at least 30 days prior to the effective date of the trustee's exercise of the trustee's
17 power to invade principal pursuant to sub. (2) of the manner in which the trustee
18 intends to exercise the power. A copy of the proposed instrument exercising the
19 power shall satisfy the trustee's notice obligation under this paragraph. If all
20 qualified beneficiaries waive the notice period by signed written instrument
21 delivered to the trustee, the trustee's power to invade principal shall be exercisable
22 immediately, but waiver of the notice period shall not constitute consent to the
23 exercise of the power by a beneficiary waiving notice. The trustee's notice under this
24 paragraph shall not limit the right of any beneficiary to object to the exercise of the

1 trustee's power to invade principal except as provided in other applicable provisions
2 of this chapter.

****NOTE: The last sentence of this paragraph ends "except as provided in other applicable provisions of this chapter." I have two questions: 1) Instead of "provided", could this phrase read "except as permitted in other applicable provisions..."? 2) Is the word "applicable" necessary? This paragraph can't make a separate provision applicable when it isn't already applicable, can it?

3 (c) 1. The trustee may, at the trustee's option, petition a court to approve a
4 proposed exercise of the power under sub. (2) by giving notice to all qualified
5 beneficiaries of the first trust. Such notice shall include the proposed effective date
6 of the exercise of the power and the manner in which the trustee intends to exercise
7 the power. A copy of the proposed instrument exercising the power, including the
8 effective date, shall satisfy the trustee's notice obligation under this paragraph.

****NOTE: The manner in which the first sentence of this paragraph is written authorizes the trustee to "petition the court . . . by giving notice to all qualified beneficiaries..." when, I believe, what is intended is for the trustee to give notice to all beneficiaries if the trustee chooses to petition the court to approve a proposed exercise of the power under sub. (2). Correct? If so, I will restructure the sentence.

****NOTE: Also, is the procedure under this par. (c) in lieu of or in addition to the procedure under par. (b)? If in lieu of, I think the paragraph should say that.

****NOTE: Finally, I renumbered the last several paragraphs of this subsection (relating to the petition) into subdivisions of paragraph (c), and broke some of the subdivisions into smaller, more discrete concepts. Let me know if any of these changes are problematic.

9 2. In determining whether to grant or deny a petition under subd. 1., the court
10 shall consider the following factors:

- 11 a. The purpose of the proposed exercise of the power under sub. (2).
12 b. If applicable, the reasons for any objection made by a beneficiary.
13 c. Any changes in circumstances occurring since the creation of the first trust.
14 d. The probable intent of the settlor in creating the first trust and whether the
15 proposed exercise of the power under sub. (2) will further such intent.

****NOTE: In some places in this proposed s. 701.418, the phrase "power under sub. (2)" is used, and in other places the phrase "power to invade principal under sub. (2)" is used. Should one phrase be used to avoid confusion (that, for example, there are two types

of power that may be exercised - one to invade principal and one other power...) or for the sake of consistency? Or are there, in fact, different types of power that may be exercised under sub. (2)?

1 3. The court may consider extrinsic evidence in considering the factors under
2 subd. 2.

****NOTE: What does "extrinsic" mean in this subdivision? (How) are the factors under subd. 2. not extrinsic?

3 4. In the case of a trust with respect to which the trustee has absolute power
4 to invade principal, the fact that a beneficiary of the first trust will not be a
5 beneficiary of the 2nd trust or will have a lesser beneficial interest shall not be a
6 sufficient basis alone to deny a trustee's petition.

7 5. The court may, in its discretion, grant or deny the petition in whole or in part.

****NOTE: I placed this subdivision in active tense (previously, the sentence read "The determination of the court to grant or deny the petition in whole or in part shall be a matter of discretion with the court."). Okay?

8 6. The settlor, if living, shall receive notice of the proposed exercise of the power
9 under sub. (2) and of a petition filed under subd. 1.

****NOTE: This subdivision is written in the passive tense; who provides notice to the settlor?

****NOTE: Also, as drafted, the "notice to settlor" provision in this subd. 6. only applies to cases under par. (c), and not to cases under par. (b). Is that intentional?

10 (6) MISCELLANEOUS PROVISIONS. (a) This section applies to a trust governed by
11 the laws of this state, including a trust whose situs is transferred to this state.

****NOTE: What is the "trust situs"? Is it different than the "principal place of administration" or "designated jurisdiction"?

****NOTE: Also, is this paragraph (a) necessary? Wouldn't it be a given that a law of this state applies to trusts governed by the laws of this state? Are there other sections of the chapter that do not apply to trusts governed by the laws of this state?

12 (b) The exercise of the power under sub. (2) is deemed to be the exercise of a
13 special, as opposed to a general, power of appointment.

****NOTE: Is it necessary to retain the phrase "as opposed to a general" in this paragraph? I'm not sure it adds anything. Is "special power of appointment" a term of art? If the power of appointment is identified by the word "special", can it simultaneously be anything but special? That is, are "special" powers of appointment and "general" powers of appointment not mutually exclusive?