



State of Wisconsin  
2013 - 2014 LEGISLATURE



LRB-0010/P1  
FFK&TKK:jld:ph

Keep  
as  
"/PI"

DUE TODAY

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

DN

Regen ← LPS - I fixed the catalog; no need to regen.

1 **AN ACT** to repeal 701.01, 701.02, 701.03, 701.04, 701.05, 701.06, 701.07, 701.09  
2 (3), (4) and (5), 701.10, 701.11, 701.115, 701.12, 701.13, 701.14 (title) and (1),  
3 701.14 (4), 701.15, 701.16, 701.17, 701.18, 701.19, 701.23, 701.24 (3), 701.26  
4 and 702.01 (6); to renumber 701.09 (title), 701.09 (2) and 702.01 (intro.); to  
5 renumber and amend 701.065, 701.08, 701.09 (1), 701.105, 701.14 (2), 701.14  
6 (3), 701.22, 701.24 (title), 701.24 (1), 701.24 (2), 701.25, 702.01 (1), 702.01 (2),  
7 702.01 (3), 702.01 (4), 702.01 (5) and 702.15 (3); to amend 223.07 (3), 223.105  
8 (1) (c), 445.125 (1) (a) 2., 700.16 (1) (c), 700.27 (1) (d), (2) (a) 2. and (b), (4) (e),  
9 (5) (b), (7) (a) and (8) (a), 702.03, 702.05, 702.07, 702.08, 702.09 (title), (1) and  
10 (3) (a), (b) and (c), 702.11, 702.13 (title), (1) (intro.), (a), (b) and (c) and (2), 702.15  
11 (intro.), (1) and (2), 702.17 (1), (2), (3) and (5), 702.21, 766.575 (1) (e), 840.01 (1),  
12 853.17 (2), 853.32 (3), 853.61 (2) (a), 854.13 (1) (c), (2) (a) 2. and (d), (4) (e), (5)  
13 (b), (7) (a) and (10) (a), 854.23 (5) (b), 859.18 (5) (a), 859.18 (5) (b), 861.11 (5) (b),  
14 865.08 (6), 867.03 (2g), 879.03 (2) (c) and 879.47; and to create subchapter I  
15 (title) of chapter 701 [precedes 701.0101], 701.0101, 701.0102, 701.0103,

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-0010/P1dn  
FFK:jld:ph

October 8, 2012 3 new  
date

To Senator Risser:

This is a redraft of 2011 LRB-2788/P1 (based on the Uniform Trust Code) that incorporates changes recommended by Victor Schultz on behalf of the study group working on the Uniform Trust Code. In addition to language based on the Uniform Trust Code, this draft includes modifications to ch. 702, which pertains to powers of appointment. This draft also includes a section on trust protectors and a section on decanting trusts, neither of which are part of the Uniform Trust Code. Finally, this draft does not include subch. XI of ch. 701, or changes to ch. 881, both of which were drafted as separate bills. Those bills will be incorporated into this bill at a later date.

Please feel free to contact me with any questions or concerns regarding this draft.

Fern Knepp  
Legislative Attorney  
Phone: (608) 261-6927  
E-mail: fern.knepp@legis.wisconsin.gov

1 ~~701.0104, 701.0105, 701.0106, 701.0107, 701.0108, 701.0109, 701.0110,~~  
2 ~~701.0111, subchapter II (title) of chapter 701 [precedes 701.0201], 701.0201,~~  
3 ~~701.0202, 701.0203, 701.0204, subchapter III (title) of chapter 701 [precedes~~  
4 ~~701.0301], 701.0301, 701.0302, 701.0303, 701.0304, 701.0305, subchapter IV~~  
5 ~~(title) of chapter 701 [precedes 701.0401], 701.0401, 701.0402, 701.0403,~~  
6 ~~701.0404, 701.0405, 701.0406, 701.0407, 701.0408, 701.0409, 701.0410,~~  
7 ~~701.0411, 701.0412, 701.0413, 701.0414, 701.0415, 701.0416, 701.0417,~~  
8 ~~701.0418, subchapter V (title) of chapter 701 [precedes 701.0501], 701.0501,~~  
9 ~~701.0502, 701.0503, 701.0504, 701.0505, 701.0506, 701.0507, subchapter VI~~  
10 ~~(title) of chapter 701 [precedes 701.0601], 701.0601, 701.0602, 701.0603,~~  
11 ~~701.0604, subchapter VII (title) of chapter 701 [precedes 701.0701], 701.0701,~~  
12 ~~701.0702, 701.0703, 701.0704, 701.0705, 701.0706, 701.0707, 701.0708,~~  
13 ~~701.0709, 701.0710, subchapter VIII (title) of chapter 701 [precedes 701.0801],~~  
14 ~~701.0801, 701.0802, 701.0803, 701.0804, 701.0805, 701.0806, 701.0807,~~  
15 ~~701.0808, 701.0809, 701.0810, 701.0811, 701.0812, 701.0813, 701.0814,~~  
16 ~~701.0815, 701.0816, 701.0817, 701.0818, subchapter IX (title) of chapter 701~~  
17 ~~[precedes 701.0901], 701.0901, 701.0902, 701.0903, subchapter X (title) of~~  
18 ~~chapter 701 [precedes 701.1001], 701.1001, 701.1002, 701.1003, 701.1004,~~  
19 ~~701.1005, 701.1006, 701.1007, 701.1008, 701.1009, 701.1010, 701.1011,~~  
20 ~~701.1012, 701.1013, subchapter XII (title) of chapter 701 [precedes 701.1201],~~  
21 ~~701.1203, 701.1204, 701.1206 (3), 702.02 (1), 702.02 (3), 702.05 (5) and 853.34~~  
22 ~~(3) of the statutes, relating to:~~

23 **AN ACT to repeal** 701.01, 701.02, 701.03, 701.04, 701.05, 701.06, 701.07, 701.09  
24 (3), (4) and (5), 701.10, 701.11, 701.115, 701.12, 701.13, 701.14 (title) and (1),

1 701.14 (4), 701.15, 701.16, 701.17, 701.18, 701.19, 701.23, 701.24 (3), 701.26  
2 and 702.01 (6); **to renumber** 701.09 (title), 701.09 (2) and 702.01 (intro.); **to**  
3 **renumber and amend** 701.065, 701.08, 701.09 (1), 701.105, 701.14 (2), 701.14  
4 (3), 701.22, 701.24 (title), 701.24 (1), 701.24 (2), 701.25, 702.01 (1), 702.01 (2),  
5 702.01 (3), 702.01 (4), 702.01 (5) and 702.15 (3); **to amend** 223.07 (3), 223.105  
6 (1) (c), 445.125 (1) (a) 2., 700.16 (1) (c), 700.27 (1) (d), (2) (a) 2. and (b), (4) (e),  
7 (5) (b), (7) (a) and (8) (a), 702.03, 702.05, 702.07, 702.08, 702.09 (title), (1) and  
8 (3) (a), (b) and (c), 702.11, 702.13 (title), (1) (intro.), (a), (b) and (c) and (2), 702.15  
9 (intro.), (1) and (2), 702.17 (1), (2), (3) and (5), 702.21, 766.575 (1) (e), 840.01 (1),  
10 853.17 (2), 853.32 (3), 853.61 (2) (a), 854.13 (1) (c), (2) (a) 2. and (d), (4) (e), (5)  
11 (b), (7) (a) and (10) (a), 854.23 (5) (b), 859.18 (5) (a), 859.18 (5) (b), 861.11 (5) (b),  
12 865.08 (6), 867.03 (2g), 879.03 (2) (e) and 879.47; and **to create** subchapter I  
13 (title) of chapter 701 [precedes 701.0101], 701.0101, 701.0102, 701.0103,  
14 701.0104, 701.0105, 701.0106, 701.0107, 701.0108, 701.0109, 701.0110,  
15 701.0111, subchapter II (title) of chapter 701 [precedes 701.0201], 701.0201,  
16 701.0202, 701.0203, 701.0204, subchapter III (title) of chapter 701 [precedes  
17 701.0301], 701.0301, 701.0302, 701.0303, 701.0304, 701.0305, subchapter IV  
18 (title) of chapter 701 [precedes 701.0401], 701.0401, 701.0402, 701.0403,  
19 701.0404, 701.0405, 701.0406, 701.0407, 701.0408, 701.0409, 701.0410,  
20 701.0411, 701.0412, 701.0413, 701.0414, 701.0415, 701.0416, 701.0417,  
21 701.0418, subchapter V (title) of chapter 701 [precedes 701.0501], 701.0501,  
22 701.0502, 701.0503, 701.0504, 701.0505, 701.0506, 701.0507, subchapter VI  
23 (title) of chapter 701 [precedes 701.0601], 701.0601, 701.0602, 701.0603,  
24 701.0604, subchapter VII (title) of chapter 701 [precedes 701.0701], 701.0701,  
25 701.0702, 701.0703, 701.0704, 701.0705, 701.0706, 701.0707, 701.0708,

1 701.0709, 701.0710, subchapter VIII (title) of chapter 701 [precedes 701.0801],  
2 701.0801, 701.0802, 701.0803, 701.0804, 701.0805, 701.0806, 701.0807,  
3 701.0808, 701.0809, 701.0810, 701.0811, 701.0812, 701.0813, 701.0814,  
4 701.0815, 701.0816, 701.0817, 701.0818, subchapter IX (title) of chapter 701  
5 [precedes 701.0901], 701.0901, 701.0902, 701.0903, subchapter X (title) of  
6 chapter 701 [precedes 701.1001], 701.1001, 701.1002, 701.1003, 701.1004,  
7 701.1005, 701.1006, 701.1007, 701.1008, 701.1009, 701.1010, 701.1011,  
8 701.1012, 701.1013, subchapter XII (title) of chapter 701 [precedes 701.1201],  
9 701.1203, 701.1204, 701.1206 (3), 702.02 (1), 702.02 (3), 702.05 (5) and 853.34  
10 (3) of the statutes; **to repeal** 701.01, 701.02, 701.03, 701.04, 701.05, 701.06,  
11 701.07, 701.09 (3), (4) and (5), 701.10, 701.11, 701.115, 701.12, 701.13, 701.14  
12 (title) and (1), 701.14 (4), 701.15, 701.16, 701.17, 701.18, 701.19, 701.23, 701.24  
13 (3), 701.26 and 702.01 (6); **to renumber** 701.09 (title), 701.09 (2) and 702.01  
14 (intro.); **to renumber and amend** 701.065, 701.08, 701.09 (1), 701.105, 701.14  
15 (2), 701.14 (3), 701.22, 701.24 (title), 701.24 (1), 701.24 (2), 701.25, 702.01 (1),  
16 702.01 (2), 702.01 (3), 702.01 (4), 702.01 (5) and 702.15 (3); **to amend** 223.07  
17 (3), 223.105 (1) (c), 445.125 (1) (a) 2., 700.16 (1) (c), 700.27 (1) (d), (2) (a) 2. and  
18 (b), (4) (e), (5) (b), (7) (a) and (8) (a), 702.03, 702.05, 702.07, 702.08, 702.09 (title),  
19 (1) and (3) (a), (b) and (c), 702.11, 702.13 (title), (1) (intro.), (a), (b) and (c) and  
20 (2), 702.15 (intro.), (1) and (2), 702.17 (1), (2), (3) and (5), 702.21, 766.575 (1) (e),  
21 840.01 (1), 853.17 (2), 853.32 (3), 853.61 (2) (a), 854.13 (1) (c), (2) (a) 2. and (d),  
22 (4) (e), (5) (b), (7) (a) and (10) (a), 854.23 (5) (b), 859.18 (5) (a), 859.18 (5) (b),  
23 861.11 (5) (b), 865.08 (6), 867.03 (2g), 879.03 (2) (c) and 879.47; **to create**  
24 subchapter I (title) of chapter 701 [precedes 701.0101], 701.0101, 701.0102,  
25 701.0103, 701.0104, 701.0105, 701.0106, 701.0107, 701.0108, 701.0109,

1 ~~701.0110, 701.0111, subchapter II (title) of chapter 701 [precedes 701.0201],~~  
2 ~~701.0201, 701.0202, 701.0203, 701.0204, subchapter III (title) of chapter 701~~  
3 ~~[precedes 701.0301], 701.0301, 701.0302, 701.0303, 701.0304, 701.0305,~~  
4 ~~subchapter IV (title) of chapter 701 [precedes 701.0401], 701.0401, 701.0402,~~  
5 ~~701.0403, 701.0404, 701.0405, 701.0406, 701.0407, 701.0408, 701.0409,~~  
6 ~~701.0410, 701.0411, 701.0412, 701.0413, 701.0414, 701.0415, 701.0416,~~  
7 ~~701.0417, 701.0418, subchapter V (title) of chapter 701 [precedes 701.0501],~~  
8 ~~701.0501, 701.0502, 701.0503, 701.0504, 701.0505, 701.0506, 701.0507,~~  
9 ~~subchapter VI (title) of chapter 701 [precedes 701.0601], 701.0601, 701.0602,~~  
10 ~~701.0603, 701.0604, subchapter VII (title) of chapter 701 [precedes 701.0701],~~  
11 ~~701.0701, 701.0702, 701.0703, 701.0704, 701.0705, 701.0706, 701.0707,~~  
12 ~~701.0708, 701.0709, 701.0710, subchapter VIII (title) of chapter 701 [precedes~~  
13 ~~701.0801], 701.0801, 701.0802, 701.0803, 701.0804, 701.0805, 701.0806,~~  
14 ~~701.0807, 701.0808, 701.0809, 701.0810, 701.0811, 701.0812, 701.0813,~~  
15 ~~701.0814, 701.0815, 701.0816, 701.0817, 701.0818, subchapter IX (title) of~~  
16 ~~chapter 701 [precedes 701.0901], 701.0901, 701.0902, 701.0903, subchapter X~~  
17 ~~(title) of chapter 701 [precedes 701.1001], 701.1001, 701.1002, 701.1003,~~  
18 ~~701.1004, 701.1005, 701.1006, 701.1007, 701.1008, 701.1009, 701.1010,~~  
19 ~~701.1011, 701.1012, 701.1013, subchapter XII (title) of chapter 701 [precedes~~

1 ~~701.1201, 701.1203, 701.1204, 701.1206 (3), 702.02 (1), 702.02 (3), 702.05 (5)~~  
2 ~~and 853.34 (3) of the statutes; relating to:~~ the Wisconsin Trust Code.

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

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

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

3           **SECTION 1.** 223.07 (3) of the statutes is amended to read:  
4           223.07 (3) If the depository institution at which a trust service office is to be  
5 established has exercised trust powers, the trust company bank and the depository  
6 institution shall enter into an agreement respecting those fiduciary powers to which  
7 the trust company bank shall succeed and shall file the agreement with the division.  
8 The trust company bank shall cause a notice of the filing, in a form prescribed by the  
9 division, to be published as a class 1 notice, under ch. 985, in the city, village or town  
10 where the depository institution is located. After filing and publication, the trust  
11 company bank establishing the office shall, as of the date the office first opens for  
12 business, without further authorization of any kind, succeed to and be substituted  
13 for the depository institution as to all fiduciary powers, rights, duties, privileges, and  
14 liabilities of the depository institution in its capacity as fiduciary for all estates,  
15 trusts, guardianships, and other fiduciary relationships of which the depository  
16 institution is then serving as fiduciary, except as may be otherwise specified in the  
17 agreement between the trust company bank and the depository institution. The  
18 trust company bank shall also be deemed named as fiduciary in all writings,  
19 including, ~~but not limited to,~~ wills, trusts, court orders, and similar documents and  
20 instruments naming the depository institution as fiduciary, signed before the date

1 the trust office first opens for business, unless expressly negated by the writing or  
2 otherwise specified in the agreement between the trust company bank and the  
3 depository institution. On the effective date of the substitution, the depository  
4 institution shall be released and absolved from all fiduciary duties and obligations  
5 under such writings and shall discontinue its exercise of trust powers on all matters  
6 not specifically retained by the agreement. This subsection does not effect a  
7 discharge in the manner of s. 701.16 (6) **[missing cross-reference]** or other  
8 applicable statutes and does not absolve a depository institution exercising trust  
9 powers from liabilities arising out of any breach of fiduciary duty or obligation  
10 occurring prior to the date the trust service office first opens for business at the  
11 depository institution. This subsection does not affect the authority, duties, or  
12 obligations of a depository institution with respect to relationships which may be  
13 established without trust powers, including escrow arrangements, whether the  
14 relationships arise before or after the establishment of the trust service office.

\*\*\*\*NOTE: Section 701.16 (6) is repealed in this bill; should some other provision of  
the trust code replace it?

15 **SECTION 2.** 223.105 (1) (c) of the statutes is amended to read:

16 223.105 (1) (c) "Trustee" has the meaning designated in s. 701.01 (8) 701.0103  
17 (28).

\*\*\*\*NOTE: Did you intend the new definition for trustee under s. 701.0103 (28) to  
replace the old definition in chapter 223, or should I insert the old definition, "'Trustee'  
means a person holding in trust title to or holding in trust a power over property" here?

18 **SECTION 3.** 445.125 (1) (a) 2. of the statutes is amended to read:

19 445.125 (1) (a) 2. ~~Notwithstanding s. 701.12 (1), such~~ Such agreements may be  
20 made irrevocable as to the first \$3,000 of the funds paid under the agreement by each  
21 depositor.

22 **SECTION 4.** 700.16 (1) (c) of the statutes is amended to read:

1           700.16 (1) (c) If a future interest or trust is created by exercise of a power of  
2 appointment, the permissible period is computed from the time the power is  
3 exercised if the power is a general power of appointment as defined in s. 702.01 (3)  
4 702.02 (5) even if the general power of appointment is exercisable only by will; ~~in~~.  
5 In the case of other powers of appointment the permissible period is computed from  
6 the time the power of appointment is created but facts at the time the power of  
7 appointment is exercised are considered in determining whether the power of  
8 alienation is suspended beyond a life or lives in being at the time of creation of the  
9 power of appointment plus 30 years.

10           **SECTION 5.** 700.27 (1) (d), (2) (a) 2. and (b), (4) (e), (5) (b), (7) (a) and (8) (a) of  
11 the statutes are amended to read:

12           700.27 (1) (d) “Power of appointment” has the meaning given in s. 702.01 (4)  
13 702.02 (6).

14           (2) (a) 2. A person who is a recipient of property or beneficiary under an inter  
15 vivos governing instrument, donee of a power of appointment created by an inter  
16 vivos governing instrument, appointee under a power of appointment exercised by  
17 an inter vivos governing instrument, taker in default under a power of appointment  
18 created by an inter vivos governing instrument, or person succeeding to disclaimed  
19 property created by an inter vivos governing instrument may disclaim any property,  
20 including contingent or future interests or the right to receive discretionary  
21 distributions, by delivering a written instrument of disclaimer under this section.

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

1 by the inter vivos governing instrument or by the instrument exercising the power  
2 of appointment.

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

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

13 (7) (a) *In general*. Subject to sub. (8), unless the inter vivos governing  
14 instrument provides otherwise, either expressly or as construed from extrinsic  
15 evidence, the disclaimed property devolves as if the disclaimant had died before the  
16 effective date of the transfer under the inter vivos governing instrument. If the  
17 disclaimed interest is a remainder contingent on surviving to the time of  
18 distribution, the disclaimed interest passes as if the disclaimant had died  
19 immediately before the time for distribution. If the disclaimant is an appointee  
20 under a power of appointment exercised by an inter vivos governing instrument, the  
21 disclaimed property devolves as if the disclaimant had died before the effective date  
22 of the exercise of the power of appointment. If the disclaimant is a taker in default  
23 under a power of appointment created by an inter vivos governing instrument, the  
24 disclaimed property devolves as if the disclaimant had predeceased the donee of the  
25 power of appointment.



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  
7 Minors Act under ss. 54.854 to 54.898 or the Uniform Custodial Trust Act under ss.  
8 54.950 to 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 made in connection with a business transaction, including a trust  
12 created under a bond indenture or collateral trust agreement or in connection with  
13 a structured finance transaction, a common law trust under s. 226.14, or a business  
14 trust.

15 (8) A voting trust.

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

18 (10) A trust that is part of an employee benefit arrangement or an individual  
19 retirement account.

20 (11) A trust established under a qualified tuition savings program or  
21 education savings account.

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

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

3           **SECTION 10.** 701.0103 of the statutes is created to read:

4           **701.0103 Article I, Section 103 — Definitions.** In this chapter:

5           (1) “Action,” with respect to an act of a trustee, includes a failure to act.

6           (2) “Ascertainable standard” means a standard relating to an individual’s  
7 health, education, support, or maintenance within the meaning of section 2041 (b)  
8 (1) (A) or 2514 (c) (1) of the Internal Revenue Code.

9           (3) “Beneficiary” means a person that satisfies one of the following:

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

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

13           (4) “Charitable trust” means a trust, or portion of a trust, created for a  
14 charitable purpose described in s. 701.0405 (1).

15           (5) “Conservator” means a person appointed by a court pursuant to s. 54.76.

16           (6) “Directed trust property” means all or any portion of the property of a trust  
17 that is invested or managed by a directing party and for which the excluded trustee  
18 has no investment or management responsibility.

19           (7) “Directing party” means a person other than the settlor who, pursuant to  
20 a trust instrument or an order of the court, is given a power to direct specified acts  
21 of an excluded trustee. “Directing party” does not include a person whose power to  
22 direct specified acts arises by virtue of being a trust protector or pursuant to a general  
23 or limited power of appointment.

24           (8) “Environmental law” means a federal, state, or local law, rule, regulation,  
25 or ordinance relating to protection of the environment.

\*\*\*NOTE: I remain concerned that this definition will not include a law imposing liability or responsibility upon a party to pay for or undertake actions to address environmental destruction that has already harmed the environment. Protection means to prevent from injury or harm, not to correct an injury or harm that has already occurred.

1           **(9)** “Excluded trustee” means a trustee who, pursuant to a trust instrument,  
2 is excluded from exercising specified powers that are given to a directing party, and  
3 who is directed to act in accordance with the exercise of such powers by the directing  
4 party.

\*\*\*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 subs. (7) and (27).

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

8           **(11)** “Incapacity” means the inability to receive and evaluate information  
9 effectively or to communicate decisions to such an extent that the individual lacks  
10 the capacity to manage his or her decisions.

11           **(12)** “Individual with a disability” means an individual who meets one of the  
12 following tests:

13           (a) The individual receives social security, supplemental security income, or  
14 medical assistance benefits on the basis of being an individual with a disability as  
15 defined by such program.

16           (b) The individual has a mental or physical impairment of a type and severity  
17 that would cause the individual to be considered disabled for purposes of  
18 participating in the social security, supplemental security income, or medical  
19 assistance program, if the individual applied to be eligible for one of those programs  
20 based on disability, and if the individual’s education, work record, and engagement

1 in substantial gainful activity were disregarded. The fact that the individual is age  
2 65 or older is not a bar to be considered an individual with a disability.

3 (13) “Interests of the beneficiaries” means the beneficial interests provided in  
4 the terms of a trust.

5 (14) “Internal Revenue Code” means the Internal Revenue Code of 1986, as  
6 amended, or such subsequent federal revenue law as may be in effect from time to  
7 time.

\*\*\*\*NOTE: The drafting instructions directed me to confirm that this definition is  
“consistent with” the definitions for IRC used elsewhere in the statutes. I’m not sure what  
you mean by “consistent with.” The statutes contain a variety of definitions for the IRC.  
See, for example, ss. 16.25 (1) (b), 19.42 (7s), 40.02 (39m), 71.01 (6), and 551.103. Would  
you like me to substitute one of these other definitions?

8 (15) “Jurisdiction,” with respect to a geographic area, includes a state or  
9 country.

10 (16) “Person” means an individual, corporation, business trust, estate, trust,  
11 partnership, limited liability company, association, joint venture, government;  
12 governmental subdivision, agency, or instrumentality; public corporation; or any  
13 other legal or commercial entity.

14 (17) “Power of withdrawal” means a presently exercisable general power of  
15 appointment, as defined under s. 702.02 (5), but does not include any of the following:

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

17 (b) A power exercisable by another person only upon consent of a trustee or of  
18 a person holding an adverse interest.

19 (18) “Property” means anything that may be the subject of ownership, whether  
20 real or personal or legal or equitable, or any interest therein.

21 (19) “Qualified beneficiary” means a beneficiary who, on the date on which the  
22 beneficiary’s qualification is determined, satisfies any of the following:

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

\*\*\*\*NOTE: Because the terms “income” and “principal” are defined only for purposes of subchapter XI, I did not remove the word “trust” from par. (a), (b), or (c).

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

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

9 (20) “Revocable,” as applied to a trust, means a trust that can be revoked by  
10 the settlor without the consent of the trustee or a person holding an adverse interest,  
11 regardless of whether the settlor is incapacitated.

12 (21) “Settlor” means a person, including a testator, who creates, or contributes  
13 property to, a trust. If more than one person creates or contributes property to a  
14 trust, each person is a settlor of the portion of the trust property attributable to that  
15 person’s contribution except to the extent another person has the power to revoke the  
16 trust or withdraw that portion.

17 (22) “Spendthrift provision” means a term of a trust that restrains either or  
18 both of a voluntary or involuntary transfer of a beneficiary’s interest.

19 (23) “State” means a state of the United States, the District of Columbia,  
20 Puerto Rico, the United States Virgin Islands, any territory or insular possession  
21 subject to the jurisdiction of the United States, and an Indian tribe, band, or nation  
22 recognized by federal law or formally acknowledged by a state.

\*\*\*\*NOTE: In the previous draft, I indicated that this definition is problematic in that it defines a “state” to be both a place and a group of people (Indian tribe or band). I don’t believe this concern has been resolved. 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), where a trustee may transfer a trust's principal place of administration to an Indian tribe or band?

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

4 (25) "Trustee" includes an original, additional, and successor trustee, and a  
5 cotrustee.

6 (26) "Trust for an individual with a disability" means a trust that is established  
7 for the benefit of an individual with a disability of any age, if the assets of the trust  
8 would not be counted as resources of the individual with a disability for purposes of  
9 eligibility for medical assistance under subch. IV of ch. 49, if he or she applied for  
10 medical assistance and was otherwise eligible.

11 (27) "Trust instrument" means an instrument executed by a settlor or created  
12 by an order of the court that contains terms of a trust, including any amendments  
13 to the trust or modifications to the trust under s. 701.0111 or subch. IV.

14 (28) "Trust protector" means a person or committee of persons, other than the  
15 settlor, who is expressly granted in the trust instrument one or more powers over the  
16 trust other than a power to direct the trustee's investment decisions, distribution  
17 decisions, or other decisions that are required to be made by the trustee in carrying  
18 out the trustee's duties in administering the trust.

\*\*\*\*NOTE: This definition is broad enough that it seems to overlap the definitions of directing party, and trustee. Is every trustee a trust protector? Is a person who has a power to direct the discretionary decisions of a trustee a trust protector and a directing party? To what extent do you intend for the definition of a directing party and a trust protector to overlap? Also s. 701.0808 (7) states that a trust protector is not a directing party and is subject to s. 701.0818. This statement is inconsistent with the definitions and with s. 701.0818 (16), which subjects a trust protector to 701.0808. If it is your intention that a trust protector cannot be a directing party, I recommend putting that in the definition. I think it would be useful if you would provide me with a narrative of each title (a trust protector, a directing party, and a trustee) and how each does or does not overlap with the other.

X It seems that every directing party would be a person whose power arises by virtue of being a trust protector, i.e., the power is granted in the trust instrument.

\*\*\*NOTE: Based on s. 701.0818 (15), it appears that it is your intent that a trust protector may be granted the powers to direct the trustee's investment decisions, distributions decisions, or other decisions related to the trustee's duties but that for purposes of exercising those powers he or she is not acting as a trust protector. Is this correct? If so, I think this definition is somewhat confusing as it could be interpreted to mean that if a person has one of those powers, he or she is not a trust protector.

1           **SECTION 11.** 701.0104 of the statutes is created to read:

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

4           (a) The person has actual knowledge of the fact.

5           (b) The person has received a notice or notification of the fact.

6           (c) The person has reason to know the fact from all the facts and circumstances  
7 known to the person at the time in question.

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

19           **SECTION 12.** 701.0105 of the statutes is created to read:

20           **701.0105 Article I, Section 105 — Default and mandatory rules.** (1)

21 Except as otherwise provided in sub. (2), this chapter governs the duties and powers  
22 of a trustee, relations among trustees, and the rights and interests of a beneficiary.

\*\*\*\*NOTE: I altered the introductory phrase to avoid any ambiguity between subs. (1) and (2). Subsection (2) states that the terms of the trust prevail over the chapter, including sub. (1).

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

3           (a) The requirements for creating a trust.

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

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

9           (d) The power of a court to modify or terminate a trust under ss. 701.0410 to  
10 701.0416.

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

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

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

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

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

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

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

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

1 (m) The jurisdiction of the court under ss. 701.0807 (4), 701.0808 (6), and  
2 701.0818 (15).

3 **SECTION 13.** 701.0106 of the statutes is created to read:

4 **701.0106 Article I, Section 106 — Common law of trusts; principles of**  
5 **equity.** The common law of trusts and principles of equity supplement this chapter,  
6 except to the extent modified by this chapter or another statute of this state.

7 **SECTION 14.** 701.0107 of the statutes is created to read:

8 **701.0107 Article I, Section 107 — Governing law.** The meaning and effect  
9 of the terms of a trust are determined by one of the following:

10 (1) The law of the jurisdiction designated in the trust instrument.

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

13 **SECTION 15.** 701.0108 of the statutes is created to read:

14 **701.0108 Article I, Section 108 — Principal place of administration. (1)**

15 The principal place of administration of a trust is determined by any of the following:

16 (a) The designation in the trust instrument if one of the following applies:

17 1. A trustee's usual place of business is located in the jurisdiction designated  
18 in the trust instrument.

19 2. A trustee is a resident of the jurisdiction designated in the trust instrument.

20 3. All or part of the administration of the trust occurs in the jurisdiction  
21 designated in the trust instrument.

22 4. The trust instrument designates the jurisdiction where the settlor is  
23 domiciled at the time the trust instrument is executed.

1 (b) If the principal place of administration is not validly designated in the trust  
2 instrument, the trustee's usual place of business or, if the trustee has no place of  
3 business, the trustee's residence.

\*\*\*\*NOTE: To be consistent with par. (a), is the principal place of administration the jurisdiction where the trustee's usual place of business is located or the jurisdiction where the trustee's residence is located?

4 (c) If a corporate trustee is designated as the trustee of a trust and the corporate  
5 trustee has offices in multiple states and performs administrative functions for the  
6 trust in multiple states, the corporate trustee may designate the principal place of  
7 administration of the trust by providing notice to the qualified beneficiaries. The  
8 notice is valid and controlling if the corporate trustee has a connection to the  
9 jurisdiction designated in the notice, including an office where trustee services are  
10 performed and the actual performance of some administrative functions for that  
11 particular trust in that particular jurisdiction. The subsequent transfer of some of  
12 the administrative functions of the corporate trustee to another state or states does  
13 not transfer the principal place of administration as long as the corporate trustee  
14 continues to maintain an office and perform some administrative functions in the  
15 jurisdiction designated in the notice and the corporate trustee does not transfer the  
16 principal place of administration pursuant to sub. (3).

17 (d) If there are cotrustees, one of the following:

18 1. If there is only one corporate trustee, the usual place of business of the  
19 corporate trustee.

\*\*\*\*NOTE: Again, should this include a reference to the jurisdiction where the usual place of business is located?

20 2. The usual place of business or the residence of any of the cotrustees as agreed  
21 to by all of the cotrustees with notice to the qualified beneficiaries.

\*\*\*\*NOTE: What happens if there are cotrustees and neither subd. 1. or 2. applies, i.e. the cotrustees can't agree?

1           **(2)** Without precluding the right of the court to approve or disapprove a transfer  
2 and subject to sub. (4), a trustee may transfer a trust's principal place of  
3 administration to another state or to a jurisdiction outside of the United States.

\*\*\*\*NOTE: 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?

\*\*\*\*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 paragraph under sub. (1) that says something like  
X "the trustee under sub. (2)."

4           **(3)** The trustee shall notify the qualified beneficiaries of a proposed transfer  
5 of a trust's principal place of administration not less than 30 days before initiating  
6 the transfer. The trustee shall include in the notice of proposed transfer all of the  
7 following:

8           (a) The name of the jurisdiction to which the principal place of administration  
9 is to be transferred.

10          (b) The mailing address, electronic mail address, if available, and telephone  
11 number at the new location at which the trustee can be contacted.

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

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

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

16           **(4)** The authority of a trustee to act under sub. (2) without court approval to  
17 transfer a trust's principal place of administration is suspended if a qualified  
18 beneficiary commences a judicial proceeding objecting to the proposed transfer on or  
19 before the date specified in the notice. The suspension is effective until the judicial  
20 proceeding is resolved or withdrawn.

1           (5) In connection with a transfer of a trust's principal place of administration,  
2 the trustee may transfer some or all of the trust property to a successor trustee  
3 designated in the terms of the trust or appointed pursuant to s. 701.0704.

4           (6) The law of the trust's principal place of administration governs  
5 administrative matters.

6           **SECTION 16.** 701.0109 of the statutes is created to read:

7           **701.0109 Article I, Section 109 — Methods and waiver of notice. (1)**

8 Notice to a person under this chapter or the sending of a document to a person under  
9 this chapter <sup>shall</sup> ~~must~~ be accomplished in a manner reasonably suitable under the  
10 circumstances and likely to result in receipt of the notice or document. Permissible  
11 methods of notice or for sending a document include 1st class mail, personal delivery,  
12 delivery to the person's last known place of residence or place of business, or a  
13 properly directed electronic message.

14           (2) Notice otherwise required under this chapter or a document otherwise  
15 required to be sent under this chapter does not need to be provided to a person whose  
16 identity or location is unknown to and not reasonably ascertainable by a trustee.

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

19           (4) Notice of a judicial proceeding shall be given as provided in the applicable  
20 rules of civil procedure.

21           **SECTION 17.** 701.0110 of the statutes is created to read:

22           **701.0110 Article I, Section 110 — Others treated as qualified**  
23 **beneficiaries. (1)** A charitable organization that is expressly designated to receive  
24 distributions under the terms of a charitable trust and that is not subject to a right  
25 of substitution by the settlor or by any other party prior to the charitable

1 organization becoming a distributee or permissible distributee of trust income or  
2 principal has the rights of a qualified beneficiary under this chapter if the charitable  
3 organization, on the date on which the charitable organization's qualification is  
4 being determined, satisfies one of the following:

5 (a) The charitable organization is a distributee or permissible distributee of  
6 trust income or principal.

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

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

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

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

21 **SECTION 18.** 701.0111 of the statutes is created to read:

22 **701.0111 Article I, Section 111 — Nonjudicial settlement agreements.**

23 (1) In this section, "interested person" means a person whose consent would be  
24 required in order to achieve a binding settlement were the settlement to be approved  
25 by the court.

1           (2) An interested person may be represented under this section as provided in  
2 subch. III.

3           (3) Except as provided in sub. (4), an interested person may enter into a binding  
4 nonjudicial settlement agreement with respect to any matter involving a trust. A  
5 binding judicial settlement agreement has the effect of an order of a court and is  
6 considered part of the trust instrument.

7           (4) A nonjudicial settlement agreement is valid only to the extent it includes  
8 terms and conditions that could be properly approved by the court or under this  
9 chapter or other applicable law.

10          (5) A nonjudicial settlement agreement may resolve any matter involving a  
11 trust, including any of the following:

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

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

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

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

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

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

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

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

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

1 (i) The resolution of disputes arising out of the administration or distribution  
2 of the trust.

3 (j) An investment action.

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

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

8 (6) Any interested person may request the court to approve a nonjudicial  
9 settlement agreement, to determine whether the representation as provided in  
10 subch. III was adequate, or to determine whether the agreement contains terms and  
11 conditions the court could have properly approved.

12 **SECTION 19.** 701.02 of the statutes is repealed.

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

15 **CHAPTER 701**

16 **SUBCHAPTER II**

17 **JUDICIAL PROCEEDINGS**

18 **SECTION 21.** 701.0201 of the statutes is created to read:

19 **701.0201 Article II, Section 201 — Role of court in administration of**  
20 **trust. (1)** The court may intervene in the administration of a trust to the extent its  
21 jurisdiction is invoked by an interested person or as provided by law.

22 **(2)** Unless ordered by the court upon petition of a settlor, trustee, or qualified  
23 beneficiary, a trust is not subject to continuing judicial supervision.

\*\*\*\*NOTE: Is the purpose of adding the language “upon petition of a settlor, trustee,  
or qualified beneficiary,” to prevent a court from sua sponte ordering continuing judicial  
supervision of a trust? In other words, in addition to following the UTC position that

judicial supervision is not required, is it your intention to narrow the circumstances under which a court may order judicial supervision, i.e. require a petition?

1           **(3)** A judicial proceeding involving a trust or the trust’s administration may  
2 involve any of the following:

      \*\*\*NOTE: Please confirm that this is consistent with your intent.

- 3           (a) Determining the validity of all or any part of a trust.
- 4           (b) Appointing or removing a trustee.
- 5           (c) Appointing a representative or guardian ad litem as provided in s. 701.0305,
- 6 whether or not any other judicial proceeding concerning the trust is pending.
- 7           (d) Reviewing a trustee’s fees.
- 8           (e) Approving interim or final accounts.
- 9           (f) Ascertaining trust beneficiaries.
- 10          (g) Determining the existence or nonexistence of any immunity, power,
- 11 privilege, duty, or right.
- 12          (h) Requesting trustee instructions.
- 13          (i) Obtaining a declaratory judgment.
- 14          (j) Seeking reformation or other equitable relief with respect to a trust.
- 15          (k) Resolving a question arising in the administration of a trust, including a
- 16 question of construction of a trust instrument.

      \*\*\*NOTE: 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.

(17) (L) Determining any other matters involving trustees and beneficiaries.

      \*\*\*NOTE: Yes, the use of the capital (L) is intentional to distinguish it from the number 1.

18           **SECTION 22.** 701.0202 of the statutes is created to read:

19           **701.0202 Article II, Section 202 — Personal jurisdiction.** (1) By  
20 accepting the trusteeship of a trust having its principal place of administration in

1 this state or by moving the principal place of administration to this state, the trustee  
2 submits personally to the jurisdiction of the courts of this state regarding any matter  
3 involving the trust.

4 (2) With respect to a beneficiary's interest in a trust, the beneficiary of a trust  
5 having its principal place of administration in this state is subject to the jurisdiction  
6 of the courts of this state regarding any matter involving the trust. By accepting a  
7 distribution from a trust having its principal place of administration in this state,  
8 a recipient submits personally to the jurisdiction of the courts of this state regarding  
9 any matter involving the trust.

\*\*\*NOTE: In accordance with LRB drafting conventions, I converted the plurals in  
this paragraph to singulars and replaced "such a trust" with "a trust having its principal  
place of administration in this state." Okay?

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

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

18 **SECTION 23.** 701.0203 of the statutes is created to read:

19 **701.0203 Article II, Section 203 — Subject matter jurisdiction.** (1) The  
20 circuit court assigned to exercise probate jurisdiction has exclusive jurisdiction of  
21 proceedings in this state brought by a trustee or beneficiary concerning the  
22 administration of a trust. Except as otherwise provided in this chapter, and as

1 applicable, the probate procedure described in ch. 879 applies to a proceeding  
2 brought by a trustee or beneficiary concerning the administration of a trust.

\*\*\*NOTE: In accordance with LRB policy, I removed the false imperatives ("shall have" and "shall apply") in this subsection and eliminated the word "such."

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

5 SECTION 24. 701.0204 of the statutes is created to read:

6 701.0204 Article II, Section 204 — Venue. (1) Except as provided in sub.  
7 (2), venue for a judicial proceeding involving a trust may be in the county of this state  
8 in which the trust's principal place of administration is or will be located or, if the  
9 trust is a testamentary trust and the decedent's estate is not yet closed, in the county  
10 of this state in which the decedent's estate is being administered.

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

- 13 (a) A county of this state in which a beneficiary resides.
- 14 (b) A county of this state in which any trust property is located.
- 15 (c) A county of this state in which the holder of trust property maintains an  
16 office.
- 17 (d) If the trust is a testamentary trust and the decedent's estate is not yet  
18 closed, in the county of this state in which the decedent's estate is being  
19 administered.

20 (3) Venue for a judicial proceeding involving a trust is also governed by ss.  
21 801.50 to 801.62, as applicable, and such proceeding ~~shall be~~<sup>is</sup> regarded as a civil  
22 action for that purpose.

\*\*\*NOTE: I replaced "shall be further" with "is also," which I believe reflects your intent and removes the false imperative. This section is stating the law rather than directing an actor to do something.



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

3           (5) A trustee is not liable for giving notice, information, an accounting, or a  
4 report to a beneficiary who is represented by another person under this subchapter  
5 and nothing in this subchapter prohibits the trustee from giving notice, information,  
6 an accounting, or a report to the person represented.

7           **SECTION 28.** 701.0302 of the statutes is created to read:

8           **701.0302 Article III, Section 302 — Representation by holder of general**  
9 **testamentary power of appointment.** To the extent there is no conflict of interest  
10 between a holder of a general testamentary power of appointment and a person  
11 represented with respect to the particular question or dispute, the holder may  
12 represent and bind the person whose interests, as a permissible appointee, a taker  
13 in default, or otherwise, are subject to the power.

14           **SECTION 29.** 701.0303 of the statutes is created to read:

15           **701.0303 Article III, Section 303 — Representation by fiduciaries and**  
16 **parents.** To the extent there is no conflict of interest between a representative and  
17 the person represented or among those being represented with respect to a particular  
18 question or dispute, all of the following apply:

19           (1) A conservator may represent and bind the estate that the conservator  
20 controls.

21           (2) A guardian of the estate may represent and bind the ward and a guardian  
22 of the person may represent and bind the ward if a guardian of the estate of the ward  
23 has not been appointed.

\*\*\*\*NOTE: Under s. 54.20, there are certain powers that a guardian of the estate may not exercise without court approval. Is this subsection intended to allow a guardian of the estate to represent a ward on an issue that would otherwise require court approval

or is it intended to only allow a guardian of the estate to represent a ward for matters which the guardian is authorized to act? If the answer is the latter, I recommend adding similar language to sub. (3), i.e., "having authority to act." If the answer is that the intent is to override the restrictions in ch. 54, I recommend adding "notwithstanding s. 54.20" phrase. A similar issue exists for guardians of the person. Specifically, please see s. 54.25 (2) (d) 2. L.

1           (3) An agent having authority to act with respect to the particular question or  
2 dispute may represent and bind the principal.

3           (4) A trustee may represent and bind the beneficiaries of the trust, except as  
4 to matters relating to the administration or distribution of the trust.

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

8           (6) A parent may represent and bind the parent's minor or unborn child. If a  
9 disagreement arises between parents seeking to represent the same minor child or  
10 unborn child, representation <sup>✓</sup> shall be <sup>IS</sup> determined as follows:

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

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

16           (c) Subject to s. 701.0301 (4), if neither parent is a beneficiary of the trust that  
17 is the subject of the representation, the parent who is the settlor of the trust that is  
18 the subject of the representation is entitled to represent the minor child or unborn  
19 child.

20           (d) If neither parent is a beneficiary or settlor of the trust that is the subject  
21 of the representation, the parent who is a related to the settlor, other than by reason

1 of being married to the other parent, is entitled to represent the minor child or  
2 unborn child.

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

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

\*\*\*NOTE: By adding language that allows the trustee to appoint a representative to act if the trustee determines that the otherwise available representation might be inadequate, you are basically giving the trustee the discretion to trump the remainder of the section if the trustee believes the representation “might be inadequate.” Is this consistent with your intent?

9 **SECTION 30.** 701.0304 of the statutes is created to read:

10 **701.0304 Article III, Section 304 — Representation by person having**  
11 **substantially identical interest.** Unless otherwise represented with respect to a  
12 particular question or dispute, a minor, incapacitated, or unborn individual or a  
13 person whose identity or location is unknown and not reasonably ascertainable may  
14 be represented by and bound by another person having a substantially identical  
15 interest with respect to the particular question or dispute, but only to the extent  
16 there is no conflict of interest between the representative and the person represented  
17 with respect to the particular question or dispute.

18 **SECTION 31.** 701.0305 of the statutes is created to read:

19 **701.0305 Article III, Section 305 — Appointment of representative. (1)**  
20 If the court determines that a person’s interest is not represented under this  
21 subchapter, or that the otherwise available representation might be inadequate, the  
22 court may appoint a representative or guardian ad litem to receive notice, give

1 consent, and otherwise represent, bind, and act on behalf of the person who is not  
2 represented or whose representation might be inadequate. A representative or  
3 guardian ad litem may be appointed to represent several persons or interests.

\*\*\*\*NOTE: I added “a person’s” before interest in the first sentence of this subsection to be consistent with the directive that the court may appoint a representative or GAL for a *person* who is not represented or whose representation is adequate. Please confirm that this is consistent with your intent.

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

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

9 **SECTION 32.** 701.04 of the statutes is repealed.

10 **SECTION 33.** Subchapter IV (title) of chapter 701 [precedes 701.0401] of the  
11 statutes is created to read:

12 **CHAPTER 701**

13 **SUBCHAPTER IV**

14 **CREATION, VALIDITY,**

15 **MODIFICATION, AND TERMINATION**

16 **OF TRUST**

17 **SECTION 34.** 701.0401 of the statutes is created to read:

18 **701.0401 Article IV, Section 401 — Methods of creating a trust.** A trust  
19 may be created by any of the following:

20 (1) A transfer of property to another person as trustee during the settlor’s  
21 lifetime, by will, or by other disposition taking effect upon the settlor’s death.

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

4           (3) An exercise of a power of appointment in favor of a trustee.

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

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

9           (6) Any other manner authorized by statute, regulation, common law, or other  
10 provision having the effect of law.

11           **SECTION 35.** 701.0402 of the statutes is created to read:

12           **701.0402 Article IV, Section 402 — Requirements for creation.** (1) A  
13 trust is created only if all of the following are satisfied:

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

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

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

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

21           1. A charitable trust.

22           2. A trust for the care of an animal, as provided in s. 701.0408.

23           3. A trust for a noncharitable purpose, as provided in s. 701.0409.

1 (d) The trustee has duties to perform.

2 (e) The same person is not the sole trustee and sole beneficiary.

3 (2) A beneficiary is definite if the beneficiary can be ascertained at the time the  
4 trust is created or in the future.

X <sup>15</sup>  
\*\*\*\*NOTE: A statute regarded as speaking in the present, as of the time it is read  
or applied. Therefore, the term "now" would have a different meaning every time the  
statute was read or applied. Please confirm that I have retained your intent.

5 (3) A power in a trustee, trust protector, or other person designated in the trust  
6 instrument to select a beneficiary from an indefinite class is valid. If the power is  
7 not exercised within a reasonable time, the power fails and the property subject to  
8 the power passes to the persons who would have taken the property had the power  
9 not been conferred.

10 (4) Capacity required to create a trust is the same as the capacity to make a  
11 will.

12 SECTION 36. 701.0403 of the statutes is created to read:

13 **701.0403 Article IV, Section 403 — Trusts created in other**  
14 **jurisdictions.** A trust not created by will is validly created if its creation complies  
15 with the law of the jurisdiction in which the trust instrument was executed, or the  
16 law of the jurisdiction in which, at the time of creation, any of the following was  
17 satisfied:

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

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

20 (3) Any trust property was located.

21 SECTION 37. 701.0404 of the statutes is created to read:

22 **701.0404 Article IV, Section 404 — Trust purposes.** A trust may be created  
23 only to the extent its purposes are lawful and possible to achieve. A trust and its

1 terms must be for the benefit of its beneficiaries or for a noncharitable, but otherwise  
2 valid, purpose as described in s. 701.0409.

3 **SECTION 38.** 701.0405 of the statutes is created to read:

4 **701.0405 Article IV, Section 405 — Charitable purposes; enforcement.**

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

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

13 (3) The settlor of a charitable trust or his or her designees, whether identified  
14 within or without the terms of the trust, or a charitable entity named in the trust  
15 instrument, or the attorney general, or a cotrustee, or such other person the court  
16 determines to have sufficient interest may maintain a proceeding to enforce the  
17 trust.

18 **SECTION 39.** 701.0406 of the statutes is created to read:

19 **701.0406 Article IV, Section 406 — Creation of trust induced by fraud,**  
20 **duress, or undue influence.** A trust is void, in whole or in part, to the extent its  
21 creation was induced by fraud, duress, or undue influence.

\*\*\*NOTE: The phrase "in whole or in part" is superfluous in this context. I  
recommend removing it and retaining the UTC language.

22 **SECTION 40.** 701.0407 of the statutes is created to read:

1           **701.0407 Article IV, Section 407 — Evidence of oral trust.** Except as  
2 required by a statute other than this chapter, a trust does not need to be evidenced  
3 by a trust instrument, but the creation of an oral trust and its terms may be  
4 established only by clear and convincing evidence.

\*\*\*\*NOTE: I am not aware of any specific cites.

5           **SECTION 41.** 701.0408 of the statutes is created to read:

6           **701.0408 Article IV, Section 408 — Trust for care of animal.** (1) A trust  
7 may be created to provide for the care of an animal alive during the settlor's lifetime.  
8 The trust terminates upon the death of the animal or, if the trust was created to  
9 provide for the care of more than one animal alive during the settlor's lifetime, upon  
10 the death of the last surviving animal.

11           (2) A trust authorized by this section may be enforced by a person appointed  
12 in the terms of the trust or, if no person is so appointed, by a person appointed by the  
13 court. A person having an interest in the welfare of the animal may request the court  
14 to appoint a person to enforce the trust or to remove a person appointed under this  
15 subsection.

16           (3) Property of a trust authorized by this section may be applied only to its  
17 intended use, except to the extent the court determines that the value of the trust  
18 property exceeds the amount required for the intended use. Except as otherwise  
19 provided in the terms of the trust, property not required for the intended use must  
20 be distributed to the settlor, if then living, otherwise to the settlor's successors in  
21 interest.

22           **SECTION 42.** 701.0409 of the statutes is created to read:

move  
CS  
\*\*\*\*NOTE: I removed "Except as otherwise provided in the terms of the trust," to avoid any ambiguity with the general default rule under s 701.0105. I made a similar change in s. 701.0409 (4).

1           **701.0409 Article IV, Section 409 — Noncharitable trust without**  
2           **ascertainable beneficiary.** Except as otherwise provided in s. 701.0408 or by  
3 another statute, the following rules apply:

4           (1) A trust may be created for a noncharitable purpose without a definite or  
5 definitely ascertainable beneficiary or for a noncharitable but otherwise valid  
6 purpose to be selected by the trustee.

7           (2) A trust may be created for maintaining, keeping in repair, and preserving  
8 any grave, tomb, monument, gravestone, or any cemetery. Any cemetery authority  
9 under s. 157.061 (2) may receive property in trust for any of the purposes specified  
10 in this subsection and apply the income from the trust to the purpose stated in the  
11 trust instrument.

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

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

21           **SECTION 43.** 701.0410 of the statutes is created to read:

22           **701.0410 Article IV, Section 410 — Modification or termination of trust;**  
23 **proceedings for approval or disapproval.** (1) In addition to the methods of  
24 termination prescribed by ss. 701.0411 to 701.0414, a trust terminates to the extent  
25 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 an individual  
14 with a disability or to terminate the trust, during the lifetime of the individual with  
15 a disability. A court may modify the terms of a trust for an individual with a disability  
16 with retroactive effect or reform the terms of such trust to achieve the settlor's  
17 objective or, if because of circumstances not anticipated by the settlor, to otherwise  
18 further the purposes of the trust so that it does not result in the ineligibility of the  
19 individual with the disability for public assistance.

\*\*\*\*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. 701.0418 (4) (c)?

20 (4) Sections 701.0410 to 701.0418 are not applicable to a conversion of a trust  
21 to a unitrust under s. 701.1106.

\*\*\*\*NOTE: Section 701.1106 is created in 2011 LRB-4340/P1, the Principal and  
Income Act. This bill will be incorporated at a later time.

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

1           **SECTION 44.** 701.0411 of the statutes is created to read:

2           **701.0411 Article IV, Section 411 — 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 subsection?

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

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

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

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

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

\*\*\*\*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.

12 SECTION 45. 701.0412 of the statutes is created to read:

13 701.0412 Article IV, Section 412 — Modification or termination  
14 because of unanticipated circumstances or inability to administer trust  
15 effectively. (1) The court may modify the administrative or dispositive terms of a  
16 trust or terminate the trust if, because of circumstances not anticipated by the  
17 settlor, modification or termination will further the purposes of the trust. To the  
18 extent practicable, the <sup>✓ court shall make the</sup> modification shall be made in accordance with the settlor's  
19 probable intention.

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

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 46.** 701.0413 of the statutes is created to read:

6           **701.0413 Article IV, Section 413 — Cy pres.** (1) The purpose of this section  
7 is to broaden the power of the courts to make charitable gifts more effective. In any  
8 situation not expressly covered the court shall liberally apply the cy pres doctrine.

9           (2) Except as provided in sub. (3), if a particular charitable purpose becomes  
10 unlawful, impracticable, impossible to achieve, or wasteful, all of the following apply:

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

12           (b) The trust property does not revert to the settlor or the settlor's successors  
13 in interest.

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

1           (3) A provision in the terms of a charitable trust that would result in  
2 distribution of the trust property to a noncharitable beneficiary prevails over the  
3 power of the court under sub. (2) to apply the cy pres doctrine to modify or terminate  
4 the trust only if, when the provision takes effect, the trust property is to revert to the  
5 settlor and the settlor is still living.

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

8           **SECTION 47.** 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 in which this paragraph takes effect ... [LRB  
19 inserts date].

20           (2) After notice to the qualified beneficiaries, the trustee of a trust consisting  
21 of trust property having a total value less than \$100,000 or a revised applicable  
22 figure, as determined under sub. (3), may terminate the trust if the trustee concludes  
23 that the value of the trust property is insufficient to justify the cost of administration.

24           (3) The dollar amount specified in sub. (2) shall be adjusted to a revised  
25 applicable figure on the 5th anniversary of the effective date of this subsection ...

1 [LRB inserts date], and every 5 years thereafter. The revised applicable figure shall  
2 be determined as follows:

3 (a) Calculate the percentage change between the base reference number and  
4 the adjustment reference number for the year in which the adjustment is being  
5 made.

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

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

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

11 c. Add the value determined under subd. 1. b. to \$100,000.

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

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

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

17 c. Subtract the value determined under subd. 2. b. from \$100,000.

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

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

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

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

3           **SECTION 48.** 701.0415 of the statutes is created to read:

4           **701.0415 Article IV, Section 415 — Reformation to correct mistakes.**

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

10          **SECTION 49.** 701.0416 of the statutes is created to read:

11          **701.0416 Article IV, Section 416 — Modification to achieve settlor's tax**

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

16          **SECTION 50.** 701.0417 of the statutes is created to read:

17          **701.0417 Article IV, Section 417 — Combination and division of trusts.**

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

21           (a) Combine 2 or more trusts into a single trust.

22           (b) Divide a trust into 2 or more separate trusts.

      \*\*\*\*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?

SECTION 50

NOTE: I replaced "must be treated" with "is treated" to avoid the passive voice. I assumed this is actually a statement of law, rather than a directive. Okay?

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 <sup>is</sup> 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 51. 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 a  
 14 beneficiary that is not limited by a specific or ascertainable standard, whether or not  
 15 the term "absolute" is used in the trust instrument. "Absolute power" includes a  
 16 power to invade trust assets for the best interests, welfare, comfort, or happiness of  
 17 a beneficiary.

\*\*\*\*NOTE: I replaced ascertainable purpose with ascertainable standard to incorporate the definition in s. 701.0103. Please let me know if this is not consistent with your intent.

18 (b) "First trust" means the trust from which assets are appointed under sub.  
 19 (2).

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

\*\*\*\*NOTE: "Standard" was only used twice in the draft and in those instances the usage seemed somewhat ambiguous because it was not clear that the term was being used "with reference to the basis upon which a decision is made by a trustee." I attempted to incorporate the meaning of "standard" into the two provisions that used the term. Please

review subs. (2) and (4) (a) 8. and confirm that I have retained the intended meaning of “standard” and that those subsections are consistent with your intent.

1           (2) POWER TO APPOINT. (a) Except as otherwise provided in subs. (3) and (5), a  
2 trustee who has the power to invade the principal of the trust for the benefit of a  
3 beneficiary who is eligible for or entitled to the income of the trust or entitled to an  
4 annuity or unitrust payment from the trust may exercise the power by appointing  
5 part or all of the assets of the trust in favor of a trustee of a different trust if all of  
6 the following apply:

      \*\*\*\*NOTE: I removed the terms “first trust” and “second trust” from this paragraph because the definitions, both which include “appointed under sub. (2)” do not work when inserted in place of the terms. Also, it is LRB policy to be as specific as possible when using the phrase, “except as otherwise provided.” Please let me know if additional provisions should be added to the list.

7           1. The appointment of assets does not reduce any fixed income, annuity, or  
8 unitrust interest of a beneficiary.

9           2. If the trustee’s power to invade income or principal of the first trust is limited  
10 by a specific or ascertainable standard, the appointment of assets does not result in  
11 the trustee of the 2nd trust having a power to invade the income or principal of the  
12 2nd trust that is broader than the trustee’s power to invade income or principal of  
13 the first trust. This paragraph does not apply if the 2nd trust is a trust for an  
14 individual with a disability.

      \*\*\*\*NOTE: The definition of “standard” as a “power” did not work in this paragraph. Because par. (a) applies to a trustee, I modified the exception to also apply to a trustee. Please let me know if my modifications are not consistent with your intent.

15           3. One of the following applies:

16           a. All of the beneficiaries of the first trust are beneficiaries of the 2nd trust.

17           b. If the first trust grants the trustee the absolute power to invade principal,  
18 some of the beneficiaries of the 2nd trust are beneficiaries of the 2nd trust.

      \*\*\*\*NOTE: This paragraph doesn’t address whether the 2nd trust may include additional beneficiaries. Under subd. 3. a., is it your intent that the trust could include additional beneficiaries as long as it is also in favor of the beneficiaries of the first trust?

1 (b) Paragraph (a) applies to a trustee whether or not the trustee has absolute  
2 power to invade principal and whether or not there is a current need to invade  
3 principal under the terms of the first trust.

4 (c) This subsection does not apply to a trustee of a trust described in s. 445.125.

\*\*\*\*NOTE: How is this supposed to interact with s. 701.0410 (5), which says s.  
701.0418 is subject to s. 445.125 (1) (a) 2. and 4.?

5 (3) LIMITATIONS ON EXERCISE OF POWER. A trustee may not appoint assets to a 2nd  
6 trust, as described in sub. (2), if any of the following applies:

\*\*\*\*NOTE: Throughout this section, I replaced the phrase “exercise the power under  
sub. (2)” with “appoint assets to a 2nd trust, as described in sub. (2)” because the power  
under sub. (2) is really the power to invade the principal of the first trust. It is my  
assumption that when you used the phrase “the power under sub. (2),” you are generally  
referring to the trustee’s ability to exercise that power by appointing assets to a 2nd trust.  
There may be other ways to achieve the same goal, for example you could consider  
creating a defined term for the power or ability to appoint assets to a 2nd trust. Another  
option would be to rewrite sub. (2) so that it actually grants a trustee the power to appoint  
assets, as opposed to the current language, which allows the trustee to exercise the power  
to invade principal by appointing assets to a 2nd trust.

7 (a) The trust instrument creating the first trust expressly prohibits the trustee  
8 from appointing assets of the first trust to a 2nd trust by reference to this section or  
9 by using the term “decanting.”

10 (b) A contribution to the first trust qualified for a marital or charitable  
11 deduction for federal income, gift, or estate tax purposes under the Internal Revenue  
12 Code and one of the following applies:

13 1. The 2nd trust contains a provision that, if included in the first trust, would  
14 have prevented the first trust from qualifying for the deduction or would have  
15 reduced the amount of the deduction.

16 2. The 2nd trust does not contain a provision that was contained in the first  
17 trust that, if omitted from the first trust, would have prevented the first trust from  
18 qualifying for the deduction or would have reduced the amount of the deduction.

1 (c) The trustee has a beneficial interest in the first trust unless the 2nd trust  
2 is a trust for an individual with a disability and the trustee's only beneficial interest  
3 in the first trust is as a remainder beneficiary.

\*\*\*\*NOTE: Subdivision 1. b. did not follow the introductory language for this paragraph. I moved the substance to the miscellaneous provisions.

4 (d) The appointment of assets to a 2nd trust would impair currently exercisable  
5 withdrawal rights of a beneficiary of the first trust and one of the following applies:

6 1. The withdrawal rights were granted to the beneficiary in a manner designed  
7 to allow contributions subject to the withdrawal rights to qualify for the federal gift  
8 tax annual exclusion.

9 2. The terms of the 2nd trust would impair gifts previously made to the first  
10 trust from qualifying for the federal gift tax annual exclusion.

\*\*\*\*NOTE: I think it would add clarity to add a federal citation to the gift tax reference. Even if the meaning is clear today, federal tax law could change making the description ambiguous. Also, what is intended by "impair"? Are trying to get at more than "prevent"? I think the word "impair" could be ambiguous in this context.

11 (e) The appointment of assets to the 2nd trust would violate a rule against  
12 perpetuities applicable to the first trust or suspends a trustee's power of alienation  
13 over assets of the first trust in a manner that would cause all or a portion of the 2nd  
14 trust to be void.

15 (f) The appointment of assets to the 2nd trust, as described in sub. (2), impairs  
16 the essential purpose of a trust for an individual with a disability.

17 (4) PERMISSIBLE TERMS OF 2ND TRUST. (a) Subject to the limitations of this  
18 section, the 2nd trust instrument may include terms that are intended to achieve any  
19 purpose, including to do any of the following:

\*\*\*\*NOTE: What is "Subject to the limitation of the section" intended to refer to? Again, it is preferable to be as specific as possible. Also, it would be preferable to structure the introductory language to identify the actor who creates the trust instrument. For example, "the settlor of the 2nd trust may provide terms in the trust instrument of the 2nd trust that are intended to achieve any purpose..."

\*\*\*\*NOTE: Your proposed language included purposes that were subject to certain conditions. For example, “If the trustee of the first trust has the absolute power to invade income and principal, modify the terms governing invasion.” This is problematic because this is an illustrative list of the general statement that the 2nd trust can include terms intended to achieve any purpose. For purposes of this draft, I moved purposes that included conditions into separate paragraphs. See pars. (b), (c), and (d). Please let me know if this structure is not consistent with your intent.

- 1           1. Correct a drafting error in the first trust.
- 2           2. Clarify potentially ambiguous terms contained in the first trust.
- 3           3. Change the age of distribution to a beneficiary of the first trust.
- 4           4. Extend the duration of the first trust.

\*\*\*\*NOTE: I assumed that “the trust” meant the first trust. Please let me know if this is not correct.

- 5           5. Protect the interests of a beneficiary of the first trust, including protecting
- 6           the beneficiary from self-destructive behavior.
- 7           6. Allow the trustee of the 2nd trust to transfer trust assets to a community
- 8           trust. In this subdivision, “community trust” means a master trust that is
- 9           established and managed by a nonprofit organization that maintains sub-accounts
- 10          for individual beneficiaries that satisfy the definition of a trust for an individual with
- 11          a disability.

\*\*\*\*NOTE: Is there a reason to use the term “community trust?” If not, you could just insert the definition into the first sentence.

- 12          7. Add or remove a spendthrift trust provision to the first trust.
- 13          8. Modify investment provisions contained in the first trust, including those
- 14          relating to permissible investments, use of investment advisors, directed trust
- 15          property, or self-dealing transactions.
- 16          9. Change a present or future trustee of the first trust, including by defining
- 17          the method by which a trustee or cotrustee may be appointed or removed and
- 18          replaced.