

Goes with "/P3" re-draft

FINAL COMMENTS ON THIRD DRAFT OF WISCONSIN TRUST CODE: SUBCHAPTERS I - III

1. Sections 1 – 20, including subchapter I; sections 21 – 26 and sections 140 – 146, including subchapter II; and sections 27 – 33, including subchapter III – we cross checked the changes previously submitted to LRB and those changes were made as requested. We have the following comments and would like to make the following additional changes.

2. 701.0101 PAGE 14 LINE 12

✓ Draft #3 removes the “Article, Section” language from each section of the Wisconsin Trust Code. This is to conform to LRB drafting conventions and is consistent with other uniform acts. We have no objection to this change.

3. 701.0103(7) PAGE 16 LINE 11

Revise the definition of directing party as follows:

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

a court order other than (7)

4. 701.0103(12)(a) PAGE 17 LINE 9

Insert a comma after “medical assistance benefits”.

no

5. 701.0103(16m) PAGE 18 LINE 7 and 701.0103(21m) PAGE 19 LINE 9

✓ We understand that any numeral letter numbering, such as this subsection (16m) will be removed in the next draft, but any further changes made after the next draft that add new sections will include numeral letter numbering.

6. 701.0103(28) PAGE 20 LINE 4

****NOTE: Please confirm that this definition is consistent with proposed s. 701.0818.

We propose the following definition.

(28) "Trust protector" means a person who, in a trust instrument ~~or in a court order~~, is granted a power in a capacity other than as a trustee or a directing party, ~~or under a power of appointment~~, including any of the powers referenced in s. 701.0818(3). *but not in a power of appointment*

7. 701.0108(1)(c) PAGE 23 LINES 19 and 20

✓ Delete the word "any" from these two lines. This will then be consistent with other references to trust protectors and directing parties.

8. 701.0108(4) PAGE 25 LINE 10

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

The language in this section is what we intended.

9. 701.0109(4) PAGE 26 LINE 7

✓ ***NOTE: How is this subsection intended to interact with s. 701.0205, which is renumbered from s. 701.14 (2)?

This subsection is intended to do the same thing that is provided in section 701.0205, which provides more specific direction on how to provide notice. The language used in section 701.0109 is straight from the UTC. We propose this section be revised:

(4) Notice of a judicial proceeding shall be given as provided in s. 701.0205.

10. 701.0111 PAGE 28 FOLLOWING LINE 22

✓ LRB asked if the Study Group wanted to include the amended UTC section on insurable interest of trustee. We considered this amendment and specifically decided not to include it because the Study Group did not want to change existing Wisconsin law on insurable interests.

11. 701.0201(3)(d) PAGE 29 LINE 17

Change this to read:

✓ (d) Reviewing and approving a fee of a trustee, directing party or trust protector.

12. 701.0202(1) PAGE 30 LINES 6-11

✓ We wish to revise this subsection to address the situation where a trust protector or directing party accepts the position while the trust is being administered in another state and then the jurisdiction/situs is changed to Wisconsin. We propose:

~~"(1) By accepting a trusteeship, an appointment as a trust protector, or an appointment as a directing party of a trust having its principal place of~~

administration in this state or by moving the principal place of administration of a trust to this state, ~~a~~ trustee, trust protector, or directing party submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust by accepting the appointment as trustee, trust protector or directing party of a trust having its principal place of administration in this state or by continuing to serve after the principal place of administration is moved to this state."

13. 701.0303(8) PAGES 33 – 34 LINE 24 – 25 and 1 - 3

(8) If there is no one permitted to act under subs. (1) to (6), if all of the people entitled to act under those subsections have declined to act, or if the trustee determines that the otherwise available representation under subs. (1) to (6) might be inadequate and there is not representation by a person having a substantially identical interest under s. 710.0304, the trustee may appoint a representative to act.
****NOTE: Please confirm that this is consistent with your intent.

In our response to Draft #2 we agreed that 701.303(8), which allows a trustee to appoint a representative under certain circumstances, should be limited to circumstances when there is no virtual representation under 701.304. It is not completely clear in the draft above that the “no virtual representation” requirement applies to all three situations or only the last one. We think it is necessary to revise 701.303(8) to make clear that the requirement that there be no virtual representation applies to all three of the alternative situations when a trustee has the power to appoint a representative.

(8) If there is no representation by a person having a substantially identical interest under s. 710.0304, the trustee may appoint a representative to act if there is no one permitted to act under subs. (1) to (6), ~~if~~ all of the people entitled to act under those subsections have declined to act, or ~~if~~ the trustee determines that the otherwise available representation under subs. (1) to (6) might be inadequate. ~~and there is not representation by a person having a substantially identical interest under s. 710.0304, the trustee may appoint a representative to act.~~

UNIFORM TRUST CODE COMMITTEE

PROPOSED FINAL COMMENTS ON SUBCHAPTER IV (SECTIONS 33 - 52): LRB DRAFT #3

1. Section 701.0402(3); PDF page 37, line 21, and 701.0103(28)

A power in a trustee or trust protector to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

****NOTE: Please confirm that the inclusion of "trust protector" in this subsection is consistent with the definition of "trust protector" in s. 701.0103?

We revised the definition of trust protector in s. 701.0103(28) as follows and amended the list of trust protector powers in s. 701.0818(3) to include a power to select a beneficiary from an indefinite class.

Check 0818(3)

(28) "Trust protector" means a person who, in a trust instrument or in a court order, is granted a power in a capacity other than as a trustee or a directing party or under a power of appointment, including any of the powers referenced in s. 701.0818(3).

2. Section 701.0409(3); PDF page 40, line 3

The subcommittee suggests the following change to this section:

A trust authorized by this section may be enforced by a trust protector with the power to enforce the trust as appointed in the trust instrument or, if no person is appointed, by a trust protector with the power to enforce the trust as appointed by a court."

def. of trust instr. incl court order

3. Section 701.0410(3); PDF page 41, lines 14-18

From Adam's email April 29, 2013: 410(3), page 41, line 17 - Remove the comma after the word trust.

The subcommittee suggests moving the serial comma as follows:

A trustee may not be compelled by a modification or termination under this section, under ss. 701.0411 to 701.0416, or by any other statute or legal or equitable doctrine, to make distributions to or for any beneficiary of a trust for an individual with a disability or to terminate the trust, during the lifetime of the individual with a disability.

NO

4. Section 701.0410(4&5); PDF page 41, lines 23-25

From Adam's email April 29, 2013: 410(4) and (5), page 41, lines 23-25 - do these belong in separate sections - 701.0419 and 701.0420? Should 701.410(4) be added to 701.1106 instead? Yes

While recognizing other possible places within the statutes, the subcommittee suggests leaving subs 4 and 5 in their current position. The rationale is that the current location is the first place within the UTC

that reference is made to applicability or non-applicability of the various sections, and that it makes more sense for a reader, lay or practitioner, to refer a subsequent section of the code for clarification, rather than vice-versa. We request that the LRB review sections 701.0410(4) and (5) to confirm its location.

5. Section 701.0411(1); PDF page 42, lines 3 – 7.

The Study Group believes that s. 701.0411(1) should be modified to all a trust to be modified with notice to all beneficiaries and the consent of all beneficiaries except remote contingent beneficiaries. If any beneficiary objects, court approval will be required. If no beneficiary objects, the trust can be modified or terminated with the consent of the settlor and the qualified beneficiaries. The problem is how to define remote contingent beneficiaries. While the Study Group does not request any changes to this section at this time, Phil and Gardner will work on some possible modifications to this section. Phil will report back to Victor and the Study Group by Monday, June 17 with either some modified language or the recommendation that a written revision is too difficult and no changes should be made. Note the current draft is consistent with the UTC and current Wis Stat section 701.12(1), which require the consent of all the beneficiaries.

6. Section 701.0411(7); PDF page 43, lines 11-12

From Adam's email April 29, 2013: 411(7), page 43, lines 10-12 - shouldn't the text of this match the text of 412(4)?

The subcommittee agrees that an interested party other than the trustee may bring action under this section and, accordingly the language in 701.0411(7) should be changed. Other subsections in 701.0411 refer to "all beneficiaries", not just "qualified beneficiaries". Accordingly, that language was retained for proposed sub (7). The following language is suggested:

The party petitioning the court for action under this section trustee shall give notice of a proceeding under this section to the settlor, if living and not under incapacity, a trust protector, and a directing party, and all beneficiaries.

Handwritten notes: "and?" with a circle around "and" and an arrow pointing to "a trust protector"; "to each" with an arrow pointing to "a trust protector"; "to" with an arrow pointing to "a trust protector".

7. Section 701.0412(4); PDF page 44, line 3

The party petitioning the court for action under this section shall give notice of the proceeding to the settlor, if living and not under incapacity, the trustee, any trust protector, and any directing party.

****NOTE: Will the party petitioning the court always know if there is a trust protector or directing party? If not, does this create a problem? The same issue applies to ss. 701.0413 to 701.0416.

Subcommittee response:

Handwritten note: 701.0411 to 701.0416

We proposed to revise s. 701.0813 to create a duty for the trustee to give notice to any party petitioning the court on any matter involving a trust to inform the petitioner of the identity of anyone acting as a trust protector or directing party if such party has not already been identified by the petitioner. This will resolve similar notice issues in sections 701.0413 to 701.0416.

701.0813(5) Unless each trust protector and directing party is identified in any petition received by a trustee, the trustee shall notify the petitioning party of the identity of each trust protector and directing

Handwritten note: "The 8th A trustee shall do all of the following:"
701.0813(2)(e)

Handwritten note: Ins 85-16 with an arrow pointing down towards the 701.0813(2)(e) section.

party upon receipt of any petition to the court for an action regarding the trust. Notice of identity will include the name, address and phone number of each trust protector and directing party serving at the time the petition is filed.

The subcommittee also suggests s. 701.0412(4) be revised:

(4) The party petitioning the court for action under this section shall give notice of the proceeding to the settlor, if living ~~and not under incapacity~~, the trustee, a trust protector, a directing party, and the qualified beneficiaries.

8. The Article 4 Subcommittee suggests the following change:

Amend 701.0413(4) to read:

(4) The party petitioning the court for action under this section shall give notice to the settlor, if living ~~and not under incapacity~~, the trustee, a trust protector, a directing party, the qualified beneficiaries, and any other person with standing to enforce the terms of a charitable trust under s. 701.0405(3).

9. Section 701.0414; PDF page 45, line 11

Self-executing

The only unresolved issues seen by the Article 4 subcommittee are: (i) who will make the calculation; and (ii) how are the results of the calculation communicated to the public and integrated into both the online and printed versions of 701.0414?

The subcommittee defers to the LRB for their input on who should be named to make the calculation; e.g. Attorney General? DFI? WDR? some other agency? Second, how will the results be communicated and integrated into 701.0414? Perhaps a web posting or link on <http://docs.legis.wi.gov/statutes/statutes/701/Title>. We request the LRB suggest how we may want to modify s. 701.0414(3).

Assuming the Wisconsin Trust Code is effective July 1, 2014, the subcommittee is OK with the current language: "The dollar amount specified in sub. (2) shall be adjusted to a revised applicable figure on the fifth anniversary of this subsection (July 1, 2014), and every five years thereafter." If the effective date is later in the year, we may want to consider making the adjustment date January 1 of the year following the fifth anniversary of the effective date of the Code.

10. The Article 4 Subcommittee suggests the following change:

Amend 701.0414(2) to read:

(2) After notice to the settlor, if living ~~and not under incapacity~~, any trust protector, any directing party, and the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than \$100,000 or a revised applicable figure, as determined under sub. (3), may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

11. The Article 4 Subcommittee suggests the following change:

Amend 701.0414(7) to read [and note to LRB that there should be a space after the comma following the word "protector"]:

(7) The party petitioning the court for action under this section shall give notice of the proceeding to the settlor, if living ~~and not under incapacity~~, the trustee, a trust protector, ~~and a directing party~~, and the qualified beneficiaries.

12. The Article 4 Subcommittee suggests the following change:

Amend 701.0415 to read:

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. The party petitioning the court for action under this section shall give notice of the proceeding to the settlor, if living ~~and not under incapacity~~, the trustee, a trust protector, a directing party, and the qualified beneficiaries.

13. The Article 4 Subcommittee suggests the following change:

Amend 701.0416 to read:

To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intent. The court may provide that the modification has retroactive effect. The party petitioning the court for action under this section shall give notice of the proceeding to the settlor, if living ~~and not under incapacity~~, the trustee, a trust protector, a directing party, and the qualified beneficiaries.

14. Section 701.0417; PDF page 47, lines 23 et seq

The subcommittee recommends no change to 701.0417, as the current language is consistent with both the language and intent of the original UTC section 417 and related comment at pages 76-78 of the 2005 Act. That language authorizes extra-judicial administrative action by the trustee after the trustee has provided notice to the qualified beneficiaries. Also note, there is nothing in the original UTC requiring notice to the settlor (living or deceased) or approval of the trustee's combination or division by the court or the beneficiaries.

However, note the following language that has been added to the Wisconsin Trust Code as s. 701.0417(4) and the comment by Liz Heiner that follows:

SECTION 242. 701.22 of the statutes is renumbered 701.0417 (4) and amended to read:

701.0417 (4) In case of a division of trust assets into 2 or more trusts or shares, any distribution or allocation of assets as an equivalent of a dollar amount fixed by formula or otherwise shall be made at current fair market values unless the

Knepp, Fern

From: victor.schultz@bmo.com
Sent: Friday, June 21, 2013 5:07 PM
To: Knepp, Fern
Cc: Wiensch, Adam J.; Halley, Philip J. PJH (5426)
Subject: Re: Wisconsin Trust Code - section 701.0418
Attachments: UTC article 4 - section 701.0418.rtf

Fern - here are the comments and redlined changes to section 701.0418. Adam or Phil, if I missed anything let me know. This came directly from Phil's redlined memo.

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Response to LRB draft #3, section 701.0418

REVISED 04/30/13 PJH/AJW

701.0418 Trustee's power to appoint assets to new trust. (1) DEFINITIONS.

In this section:

(a) "Absolute power" means a power to invade trust assets for the benefit of a beneficiary that is not limited by a specific or ascertainable standard, whether or not the term "absolute" is used in the trust instrument. "Absolute power" includes a power to invade trust assets for the best interests, welfare, comfort, or happiness of a beneficiary.

(b) "First trust" means the trust from which assets are or may be appointed under sub. (2).

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

(2) POWER TO APPOINT.

(a) Except as otherwise provided in this subsection and in subs. (3) and (5), a trustee who has the power to invade the principal of a first trust for the benefit of a beneficiary who is eligible ~~for to receive~~ or entitled to the income of the first trust or entitled to an annuity or unitrust payment from the first trust may exercise the power by appointing part or all of the assets of the first trust in favor of a trustee of a 2nd trust if all of the following apply:

****NOTE: Please review this paragraph by replacing the terms "first trust" and "2nd trust" with the respective definitions. Is this consistent with your intent?

RESPONSE: We have modified the definitions of 1st trust and 2nd trust.

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

2. If the trustee's power to invade income or principal of the first trust is limited by a specific or ascertainable standard, the appointment of assets does not result in the trustee of the 2nd trust or any other person having a power to invade the income or principal of the 2nd trust that is broader than the trustee's power to invade income or principal of the first trust. This subdivision does not apply if the 2nd trust is a trust for an individual with a disability.

3. One of the following applies:

a. The beneficiaries of the first trust are the same as the beneficiaries of the 2nd trust.

1MM

b. If the first trust grants the trustee the absolute power to invade principal, the 2nd trust includes only all or some of the beneficiaries of the first trust.
(b) Paragraph (a) applies to a trustee whether or not the trustee has absolute power to invade principal and whether or not there is a current need to invade principal under the terms of the first trust.

(3) LIMITATIONS ON EXERCISE OF POWER. A trustee may not appoint assets to the 2nd trust pursuant to subs. (2); if any of the following applies:

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

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

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

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

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

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

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

2. The terms of the 2nd trust would impair gifts previously made to the first trust from qualifying for the federal gift tax annual exclusion under section 2503 of the Internal Revenue Code.

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

(f) The appointment of assets to the 2nd trust pursuant to subs. (2), impairs the essential purpose of a trust for an individual with a disability.

pursuant to section = under section

such

limit?

limit?

(4) PERMISSIBLE TERMS OF 2ND TRUST. (a) Subject to subs. (2), (3), and (5), the trustee of the first trust may create the 2nd trust instrument that includes terms that are intended to achieve any purpose, including to do any of the following:

***NOTE: Your instructions suggested that it is not your intent to identify the settlor of the 2nd trust. However, this language in combination with the definition of settlor under s. 701.0103, which defines a settlor as a person who creates a trust, could be interpreted to identify the trustee of the first trust as the settlor of the 2nd trust. Okay?

RESPONSE: We have addressed this issue in subs. (8)

1. Correct a drafting error in the first trust.
2. Clarify potentially ambiguous terms contained in the first trust.
3. Change the age of distribution to a beneficiary of the first trust.
4. Extend the duration of the first trust.
5. Protect a beneficiary of the first trust, including protecting the beneficiary from self-destructive behavior.
6. Allow the trustee of the 2nd trust to transfer trust assets to a community trust. In this subdivision, "community trust" means a master trust that is established and managed by a nonprofit organization that maintains sub-accounts for individual beneficiaries that satisfy the definition of a trust for an individual with a disability.
7. Add or remove a spendthrift trust provision to the first trust.
8. Modify investment provisions contained in the first trust, including those relating to permissible investments, use of investment advisors, directed trust property, or self-dealing transactions.
9. Change a present or future trustee of the first trust, including by defining the method by which a trustee or cotrustee may be appointed or removed and replaced.
10. Appoint a trust protector of the 2nd trust and define the powers of the trust protector.
11. Appoint a directing party of the 2nd trust and define the powers of the directing party.
12. Change the principal place of administration of the first trust.
13. Change the governing law of the first trust.
14. Allow for the division of the first trust into 2 or more trusts.
15. Allow for the merger of the first trust with one or more trusts.

16. Add or modify an exculpatory provision for a trustee, trust protector, or directing party.

17. Obtain desirable tax treatment, as determined by the trustee of the first trust, or to avoid adverse tax consequences, as determined by the trustee of the first trust, including provisions relating to grantor trust status under sections 671 to 679 of the Internal Revenue Code.

18. Modify the power to invade income and principal.

19. Modify or eliminate a general or special power of appointment.

(b) Subject to subs. (2), (3), and (5), the trust instrument of the 2nd trust may include terms granting a beneficiary a general or special power of appointment but only if the trustee of the first trust has the absolute power to invade income and principal.

(c) 1. Notwithstanding par. (a), the trust instrument of the 2nd trust may include terms that are intended to change terms of the first trust that are applicable to a beneficiary who is an individual with a disability only if the purpose of the change is to allow the beneficiary to qualify or continue to be qualified to receive benefits under a government program.

2. Subdivision 1. applies regardless of whether the first trust includes specific or ascertainable standards for distribution.

(d) Notwithstanding par. (a), the trust instrument of the 2nd trust may include a term that adopts or expands an exculpatory provision benefitting a trustee, only if one of the following applies:

1. *Any trustee* ~~The trustees~~ of the first trust who would benefit from the adoption of the term in the 2nd trust abstain from the consideration and adoption of the term and the trustees of the first trust who would not benefit from the adoption of the term adopt the trust instrument of the 2nd trust.

2. A court approves the trust instrument of the 2nd trust.

(5) PROCEDURAL MATTERS.

(a) The trustee shall appoint assets to the 2nd trust pursuant to subs. (2) by an instrument in writing that is signed and acknowledged by the trustee and shall include the written instrument with the records of the first trust and the 2nd trust. A trustee may appoint assets to the 2nd trust pursuant to subs. (2), upon notice, without court approval, under the procedure described in par. (b), or with court approval, under the procedure described in par. (c).

(b) 1. If the trustee chooses to proceed without a court order, the trustee shall

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This doesn't make sense

give notice of the manner in which the trustee intends to appoint assets to the 2nd trust pursuant to subs. (2); to all of the following:

- a. The qualified beneficiaries of the first trust.
- b. Any trust protector appointed under the terms of the first trust.
- c. Any directing party appointed under the terms of the first trust.
- d. The settlor of the first trust, if living.

2. To satisfy the trustee's notice obligation under this paragraph, a trustee shall provide each person entitled to receive notice under subd. 1. all of the following:

- a. A copy of the proposed written instrument under which the trustee will appoint assets to the 2nd trust.
- b. The proposed effective date of the appointment.
- c. A copy of the trust instrument of the first trust.
- d. A copy of the trust instrument of the 2nd trust.

3. A trustee may not appoint assets to the 2nd trust until 30 days after the trustee provides notice as required under this paragraph unless every person who is entitled to receive notice under subd. 1. waives the 30-day notice period by delivering a signed written instrument to the trustee. A person's waiver of the 30-day notice period does not constitute that person's consent to the trustee's appointment of assets to the 2nd trust.

4. If a person entitled to receive notice under subd. 1. delivers a written objection to the trustee before the effective date of the appointment of assets to the 2nd trust, the trustee may not appoint the assets to a 2nd trust, as specified in the trustee's notice, without obtaining court approval under par. (c) unless the written objection is withdrawn.

5. If the trustee does not receive a written objection from any person entitled to receive notice under subd. 1., ~~the trustee shall notify each person entitled to receive notice under subd. 1. that the trustee did not receive an objection to the notice and that the trustee will appoint the~~ 1. before the effective date of the appointment of assets from the first trust to the 2nd trust, as provided in the notice. If no written objection has been filed with the trustee (or any written objection filed has been withdrawn) and the trustee proceeds with appointment of assets as described in the notice, the trustee will not be liable thereafter for acting in accordance with the notice or any such written objection is withdrawn, the trustee may appoint the assets to a 2nd trust as specified in the trustee's notice.

[I don't understand the need for a second notice before decanting. Have any other states required it? After struggling with the liability language here I decided it was better to address liability in (7).]

***NOTE: Is this language consistent with your intent?

RESPONSE: See *changes made*.

(c) 1. If a trustee chooses to proceed with a court order, including after receiving a written objection to a proposed appointment of assets, the trustee shall petition a court to approve a proposed appointment of assets to the 2nd trust pursuant to subs. (2). The trustee shall provide notice of the petition to all qualified beneficiaries of the first trust, any trust protector appointed under the first trust, any directing party appointed under the first trust, and to the settlor of the first trust, if living. The trustee shall include in the notice of the petition the proposed effective date of the appointment of assets to the 2nd trust. The trustee shall also provide to each person who is entitled to receive notice under this paragraph a copy of the proposed instrument under which the trustee will appoint assets to a 2nd trust, the proposed effective date of the appointment, a copy of the trust instrument of the first trust, and a copy of the trust instrument of the 2nd trust.

2. If a person who is entitled to receive notice under subd. 1. files an objection with the court, in determining whether to grant or deny a petition under subd. 1., the court shall consider all of the following:

- a. The purpose of the proposed appointment of assets pursuant to subs. (2).
- b. The reasons for any objection made by a person entitled to receive notice under subd. 1.
- c. Changes in circumstances that have occurred since the creation of the first trust.
- d. Whether the appointment of assets pursuant to subs. (2) complies with the requirements of this section.

3. If no person who is entitled to receive notice under subd. 1. files an objection with the court (or any objection that has been filed is withdrawn), the court shall enter an order approving the appointment of assets pursuant to subs. (2) as set forth in the trustee's notice unless the court determines that the appointment of assets does not comply with the requirements of this section.

(6) SUBSEQUENTLY DISCOVERED ASSETS. (a) The appointment of all of the assets comprising the first trust in favor of the trustee of the 2nd trust includes subsequently discovered assets otherwise belonging to the first trust and assets paid to or acquired by the first trust subsequent to the appointment in favor of the 2nd trust.

(b) Except as otherwise provided by the trustee of the first trust, the appointment of part but not all of the assets of the first trust in favor of the 2nd trust does not include

subsequently discovered assets belonging to the first trust and assets paid to or acquired by the first trust subsequent to the appointment in favor of the 2nd trust. ~~Except as otherwise provided by the trustee of the first trust, subsequently discovered assets belonging to the first trust and assets paid to or acquired by the first trust subsequent to the appointment in favor of the 2nd trust, which shall~~ remain the assets of the first trust.

(7) LIABILITY.

See above

(a) This section does not create or imply a duty of a trustee to appoint assets to the 2nd trust pursuant to subs. (2), and a trustee that does not appoint assets to the 2nd trust pursuant to subs. (2), is not liable for the failure to do so.

(b) A trustee who appoints assets to the 2nd trust pursuant to subs. (2), whether under subs. (5)(b) or subs. (5)(c), is not liable to any beneficiary for any loss related to the appointment unless the trustee did not appoint the assets to the 2nd trust pursuant to subs. (2), in good faith.

(8) MISCELLANEOUS PROVISIONS. (a) The appointment of assets to the 2nd trust pursuant to subs. (2), is not an exercise of a general power of appointment.

****NOTE: Is this consistent with your intent?

RESPONSE: Yes.

(b) A trustee may appoint assets to the 2nd trust pursuant to subs. (2), even if the first trust includes a spendthrift clause or a provision that prohibits amendment or revocation of the trust.

Is there something prohibiting this that needs to be withstood?

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

Limit = apply to

(d) The restriction relating to a trustee under sub. (3) (c) does not preclude a cotrustee who does not have a beneficial interest in the first trust from appointing assets to the 2nd trust pursuant to subs. (2), even if the terms of the first trust, applicable law, or other circumstances would otherwise require the majority or unanimous action of the trustees of the first trust.

(e) For purposes of this section, if beneficiaries of a first trust are defined as a class of persons, the class shall include any person who falls within the class of persons after the trustee appoints assets to the 2nd trust.

(f) Notwithstanding the definition of "settlor" in s. 701.0103(13), the appointment of assets pursuant to subs. (2) or the creation of a trust pursuant to subs. (4) shall not cause the Trustee to be deemed the settlor of the 2nd trust.

(g) To the extent a directing party or trust protector has a power to invade principal as described in subs. (2), such directing party or trust protector, as the case may be, may exercise the powers of, and shall be subject to the limitations of, a trustee under this section.

UNIFORM TRUST CODE COMMITTEE

PROPOSED FINAL COMMENTS ON SUBCHAPTER V (SECTIONS 54 - 62): LRB DRAFT #3

1. All of the changes requested by the Study Group to the LRB were made with the exception of Section 701.0502(1); PDF page 58, line 20

✓ The introduction to this subsection was changed. It should read:

(1) A spendthrift provision is valid only if any of the following applies:

2. Section 701.0502(1)(a); PDF page 58, Line 22

✓ In response to the comment made by LRB to section 701.0505 (see comment #3), we suggest the following change:

(a) The beneficiary is other than the settlor and is not treated as the settlor under s. 701.0505(2).

3. Section 701.0505(2); PDF page 63, top of page

***NOTE: Now that this subsection applies to the entire subchapter, please consider whether this location is appropriate. For example, would a person applying s. 701.0502 know to look here to fully understand who may be considered a settlor for purposes of that section?

Subcommittee response:

We think it is appropriate to keep this subsection where it is because it tracks the current Wisconsin statute section 701.06(6)(b). We added a cross reference to s. 701.0502(1)(a) so that a person applying s. 701.0502 would know to look to s. 701.0505.

UNIFORM TRUST CODE COMMITTEE

DRAFT COMMENTS ON SUBCHAPTER VI (SECTIONS 62-68; 80): LRB DRAFT #3

1. 701.0602(4) Page 67 Line 16

In LRB Draft # 2, the last sentence of this section read as follows:

“However, with respect to marital or community property, the trustee shall transfer the property to both spouses as marital or community property unless the **governing instrument** specifically states otherwise.”

The committee’s comments to Draft #2 instructed to change “governing instrument” to “trust instrument.”

Instead of making this change, we note LRB Draft #3 has deleted the entire phrase “unless the governing instrument specifically states otherwise” from Draft #2. We presume this was done because the statutory language is default language and the trust instrument can always override the statutory provision. We approve of this change.

2. 701.0602(6) Page 67 Line 20

We think the word “a” should be inserted before conservator.

3. 701.0603 (1) and (2) Page 68 Lines 6, 8 and 9

As requested, LRB inserted references to “any” directing party or trust protector. However, the Study Group notes in subchapter I that such references have been changed to “a” directing party or “a” trust protector. The Study Group asks that LRB review this to determine if consistent language should be used.

4. 701.0605 Page 69, Lines 10 – 17

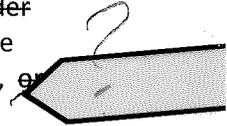
This section adopts existing Wisconsin statute s. 701.065. The Study Group notes that this section will be revised in the current budget bill. The revised language needs to be reviewed to confirm the terminology is consistent with the new Code. The Study Group requests the LRB review the revised s. 701.065 and recommend if any changes are necessary. Section 701.065 deals with creditor claims after the death of a settlor of a revocable trust. The Study Group asks LRB for a recommendation whether this section belongs in subchapter V or subchapter VI.

vs.
“living trust”
vs.
“revocable trust”

5. 701.0606(2) Page 76 and 77 Lines 16 – 25 and 1 – 7

We propose that this subsection be modified to allow property transferred to a revocable trust by will, beneficiary designation or other instrument to be governed by the terms of the trust at the death of the testator or designator, even if the trust is revised or modified after the will, beneficiary designation or other instrument is executed.

(2) GOVERNING TERMS. Property transferred or appointed by a will or by a beneficiary designation under an employee benefit plan, life insurance policy, or other instrument permitting designation of a beneficiary to a living revocable trust, ~~the terms of which the testator or designator was the sole holder of a power to modify,~~ shall be administered in accordance with the terms of the trust as the revocable trust ~~they~~ may have been modified prior to the testator's or designator's death, even though the will, or beneficiary designation, or other instrument was not reexecuted or republished after exercise of the power to modify, unless the will, or beneficiary designation, or other instrument expressly provides otherwise. ~~Such property transferred or appointed to a living revocable trust, which is subject to a power of modification requiring action or consent of a person other than the testator or designator, shall be administered in accordance with the terms of the trust instrument as they exist at the execution of the will or beneficiary designation, unless expressly otherwise provided. If the will or beneficiary designation expressly provides that the property shall be administered in accordance with the terms of the trust instrument as they may be modified thereafter, the will or beneficiary designation need not be reexecuted or republished after exercise of the power to modify.~~



UNIFORM TRUST CODE COMMITTEE

PROPOSED FINAL COMMENTS ON SUBCHAPTER VII (SECTIONS 70 - 81): LRB DRAFT #3

1. No additional comments were made by LRB to this subchapter. The Subchapter VII subcommittee notes the following changes made by LRB in draft #3.

2. Section 701.0704(3)(b); PDF page 73, LINE 1

LRB inserted the phrase "under this paragraph" in this subsection. We approve of this change.

3. Section 701.0705(1)(a); PDF page 73 LINES 12 - 14

LRB revised the language to read as follows. Consistent with the changes being proposed to subchapter IV, we suggest the reference to an incapacitated settlor be deleted as shown below.

"(a) Upon at least 30 days' notice to the qualified beneficiaries, the settlor, if living ~~and not incapacitated~~, all cotrustees, a trust protector, and a directing party.

4. Sections 701.0701; 701.0708; and 701.0709

The Subchapter VII subcommittee considered whether the application of these sections could also apply to trust protectors and directing parties if the sections on directing parties and trust protectors incorporated these provisions by reference. The subcommittee concluded that the incorporation by reference generally works for each section, although it may be difficult to show when a trust protector has accepted its duties if no definitive action has been taken. No other state has addressed this issue and this could be a facts and circumstances issue determined by the trustee or the court. The subcommittee does not recommend any further changes to these sections to enhance the incorporation by reference in sections 701.0808 and 701.0818.

UNIFORM TRUST CODE COMMITTEE

PROPOSED FINAL COMMENTS ON SUBCHAPTER VIII (SECTIONS 83 - 100): LRB DRAFT #3

1. Section 701 Subchapter VIII heading; PDF page 77, Line 24

We have added provisions that are not included in the UTC regarding the duties and powers of directing parties and trust protectors. We suggest the heading of this subchapter be changed to:

DUTIES AND POWERS OF TRUSTEES, DIRECTING PARTIES AND TRUST PROTECTORS

2. Section 701.0808; PDF page 82, Line 5

This section has been amended to describe the powers and duties of a directing party. We suggest the section heading be changed to:

701.0808 Powers to direct; directing parties

3. Section 701.0808(2)(b); PDF page 82, Lines 17 – 19

The wording of this section is not succinct. We propose this subsection be revised:

(b) Except as otherwise provided in this chapter, provide information to a directing party. ~~This paragraph does not apply to~~ Notwithstanding the provision of this paragraph, the trustee shall provide information requested by a directing party that is related to a power granted to the directing party.

This should be required elsewhere

4. Section 701.0808(5); PDF page 83, Lines 4 - 7

(5) A directing party is a fiduciary with respect to its powers to direct investment and distribution decisions or to make investment and distribution decisions. As a fiduciary, the directing party has similar fiduciary duties and obligations to the beneficiaries that are applicable to a trustee.

LRB verbally commented that the above provision could be ambiguous because of the reference to "similar fiduciary duties" to a trustee. We agree. The Study Group recommends revising this section to more closely track UTC s. 808(d) and the language proposed for s. 701.0818(2)(b).

(5) A directing party is a fiduciary ^{and} who, as such, is required to act in good faith with regard to the terms of the trust and the interests of the beneficiaries. A directing party is liable for any loss that results from breach of a fiduciary duty.

5. Section 701.0808(6); PDF page 83, Lines 8 – 9

LRB has commented that the application of certain Code sections to the directing party by reference could create some ambiguity. The Study Group has reviewed the statute sections incorporated by reference by replacing the term "trustee" with "directing party" and believes that the wording would

make sense for all of the referenced sections except section 701.1004, which we intend to revise. Thus subsection (6) will need to be revised:

✓ (6) Sections 701.0701, 701.0708, 701.0709, ~~and~~ 701.1001 to 701.1003, and 701.1005 to 701.1010 apply to a directing party as if the directing party was a trustee.

6. Section 701.0808(7); PDF page 83, Lines 10 - 12

We believe this subsection should track the language used in the trust protector section. We suggest the subsection be revised as follows:

4 (7) A ~~party~~ person who accepts an appointment as a directing party ~~under~~ of a trust subject to the laws of having its principal place of administration in this state submits to the jurisdiction of the courts of this state, as provided in s. 701.0202 (1), with respect to matters involving the trust.

7. Section 701.0812; PDF page 84, Line 9

Continuing to serve language?

We believe a comma needs to be inserted in the subsection. The phrase "of the trust" is not necessary and does not track the UTC.

✓ (1) A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee, a directing party, or a trust protector. ~~of the trust.~~

8. Section 701.0813(2)(c)2.; PDF page 85, following Line 10

✓ Once a trust becomes irrevocable, we believe the trustee should also notify the qualified beneficiaries of the identity of any directing parties or trust protectors. We propose a new provision be added as follows and that the succeeding provisions be renumbered accordingly. We considered but concluded it was not necessary to identify the power of a directing party or a trust protector because the qualified beneficiary could review the trust documents to determine the extent of the power.

3. The name, address and telephone number of each directing party and trust protector.

9. Section 701.0813(5); PDF page 86, following Line 6

In order to address the LRB comment on page 44 that a petitioning party might not know who the directing parties or trust protectors are in a trust document, we propose the following subsection be added as subsection (5) and the following subsection be renumbered.

(5) Unless each trust protector and directing party is identified in any petition received by a trustee, the trustee shall notify the petitioning party of the identity of each trust protector and directing party upon receipt of any petition to the court for an action regarding the trust. Notice of identity will include the name, address and phone number of each trust protector and directing party serving at the time the petition is filed.

10. Sections 701.0814 and 701.0819; PDF beginning at page 86 and 100

I included as (2)(e) following the trustee shall

We considered whether section 701.0819 should be incorporated into section 701.0814 or inserted after s. 701.0814 because 701.0819 is a marital deduction tax savings provision. We concluded this would not be appropriate because section 701.0814 deals with tax savings provisions related to a trustee's discretionary powers, not to a trust instrument drafting issue. We concluded s. 701.0819 should remain where drafted.

UNIFORM TRUST CODE COMMITTEE

PROPOSED FINAL COMMENTS ON SUBCHAPTER VIII, Section 701.0819 (SECTION 102): LRB DRAFT #3

1. Section 701.0819; PDF pages 100 – 102

We propose that this section be rewritten as follows:

701.0819 ~~Presumptions about trust contributions~~ Marital deduction transfers.

(1) For purposes of this section, “marital deduction transfer~~gift~~” means a lifetime or testamentary transfer property ~~gift~~ intended to qualify for the marital deduction as indicated by the terms of the trust, ~~regardless of whether the trust instrument is ambiguous~~

****NOTE: If the trust instrument is ambiguous, how does it indicate the required intent? Comment – provision deleted.

(2) In interpreting, construing, or administering a trust instrument, absent a clear expression of intent by the settlor to the contrary, a trustee shall apply the following presumptions, which may only be rebutted by clear and convincing evidence:

(a) The settlor intended to take ~~maximum~~ advantage of the maximum benefit of tax deductions, exemptions, exclusions, and credits.

(b) The settlor intended that any ~~gift~~ transfer made to a spouse outright and free of trust qualify for the gift or estate tax marital deduction and is a marital deduction transfer. ~~gift.~~

(c) If the trust instrument refers to a trust as a marital trust, qualified terminable ~~terminal~~ interest property trust (QTIP), or spousal trust, or refers to qualified terminable interest property, ~~qualified terminal interest property~~, sections 2044, 2056, or 2523 of the Internal Revenue Code, or similar provisions of applicable state law, the settlor intended the trust and the property passing to the trust to qualify for the applicable gift or estate tax marital deduction, and for the ~~gift~~ transfer to qualify for the marital deduction for federal and state gift or estate tax purposes.

****NOTE: The language you provided included the phrase “or refers to qualified terminable interest property, QTIP, or QTIP property.” Because QTIP is defined as qualified terminal interest property in the proposed language, I eliminated QTIP property from this list. Please let me know if I inadvertently eliminated a substantive reference. Comment – many practitioners refer to qualified terminable interest property as “QTIP.” We inserted a QTIP parenthetical to highlight this.

No parents.

(3) If a trust receives a marital deduction transfer~~gift~~, the trust instrument shall be construed to comply with the marital deduction provisions of the Internal Revenue

Code. in every respect.

****NOTE: This provision is written in the passive voice. Who is required to construe the trust instrument as provided in this subsection? The intention is that the tax authorities will construe the trust instrument accordingly, but we cannot state this in the statute.

(4) If a trust receives a marital deduction gift transfer, the trustee has all the powers, duties, and discretionary authority necessary to comply with the marital deduction provisions of the Internal Revenue Code. The trustee shall not take any action or have any power that may limit ~~impair~~ the availability of the marital deduction, but this does not require the trustee to make the election under either section 2056 (b) (7) or 2523 (f) of the Internal Revenue Code.

****NOTE: What does it mean that the trustee shall not have any power that may impair the availability of a deduction? Also, how would the trustee not taking an action or not having a power, require the trustee to make an election for tax purposes?

Comment: We changed "impair" to "limit". This subsection is intended to cover all bases in which a marital deduction defect may occur. A defect may be present in the form of not including required provisions or trustee powers (for example, the power to make property productive of income, or a mandatory income provision) or the trust may include powers that would otherwise disqualify a trust for the marital deduction (for example, the power to distribute income to a third party or to accumulate income.) This section attempts to cure those faults by statute in effect saying that they do not exist under Wisconsin law even though present in the trust agreement. The statute is intended to effectuate the settlor's intent, but not to limit planning such as electing to pay estate tax in certain circumstances and not to qualify for the marital deduction as QTIP property.

The trustee power to correct defects was an argument used in the Clayton, Robertson and Clack cases involving the contingent QTIP election. These cases involved provisions that stated if the QTIP was not elected, the non-elected portion was added to the family trust. IRS asserted that if any amount could be added to the family trust, the entire marital deduction was lost for the marital trust even if the personal representative elected QTIP for all of the remaining marital trust property. Although IRS lost these cases, the estates argued in the cases that the trustees were compelled to elect QTIP due to their fiduciary duty to act in the interests of the beneficiaries and minimize estate taxes. We are attempting to bolster this argument made by the estates and add a statutory argument – when there is a perceived marital deduction flaw, it doesn't exist based on the provisions of this section.

****NOTE: Please confirm that this is the appropriate place for this provision within the chapter. Comment – please keep this provision as s. 701.0819.

Knepp, Fern

From: victor.schultz@bmo.com
Sent: Tuesday, June 18, 2013 1:27 PM
To: Knepp, Fern
Cc: Wiensch, Adam J.; Priebe, Catherine M.; jgovan
Subject: Re: Wisconsin Trust Code
Attachments: UTC article 9 and chapter 881 - comments on third draft.docx

Hi Fern - here our our comments on Article IX and chapter 881. I am reviewing final changes to sections 701.0418 and 701.0818 and will send them to you by Friday.

Victor J. Schultz | Vice President | Estate Planning Specialist - Financial Planning Strategy | BMO Harris Bank N.A. | 111 East Kilbourn Avenue, Suite 200 | Milwaukee, Wisconsin 53202 |
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UNIFORM TRUST CODE COMMITTEE

PROPOSED FINAL COMMENTS ON SUBCHAPTER IX (SECTIONS 106 -108, 288 - 294): LRB DRAFT #3

1. No comments were made by LRB to subchapter IX. All of the changes requested by the Study Group to section 701.0902 were made. We have no additional changes to request to this section.

2. Section 701.0903(1) and (1)(a); PDF page 103, lines 18 - 25

Subsection (a) is really a general duty and the following duties listed on page 104 are specific duties that follow the general duty listed in (a). We propose rewriting this subsection as follows:

(1) Notwithstanding s. 881.01, if a principal purpose of a trust is to hold a life insurance contract or to purchase a life insurance contract from contributions made to the trust, a trustee of the trust does not have a duty to do any of the following with respect to the acquisition, retention, and ownership of a life insurance contract owned by the trust:

(a) Determine whether the life insurance contract is, or remains a proper investment of the trust. This includes taking any of the following actions:

3. Section 701.0903(b) – (f); PDF page 104, lines 1 - 10

These subsections need to be relettered as follows with the following minor changes included:

(a) Investigate the financial strength or changes in the financial strength of the life insurance company maintaining the life insurance contract.

(b) Determine whether to exercise any policy option, right, or privilege available under the life insurance contract.

(c) Diversify the life insurance contract relative to any other life insurance contracts or any other assets of the trust.

(d) Inquire about or investigate the health or financial condition of an insured.

(e) Prevent the lapse of a ~~an underfunded~~ life insurance contract if the trust does not receive contributions or hold other readily marketable ~~trust~~ assets to pay the life insurance contract premiums.

4. Section 701.0903(3); PDF page 104, line 14

Change “any life insurance contract” to “a life insurance contract”.

5. Section 701.0903(4); PDF page 104, line 19

We propose that a notice subsection be added to this section. We propose adding a new subsection (4) and renumbering (4) as (5), as follows:

This section does not apply to a trust that only was executed before unless subsection

(4) With respect to any trust that was executed prior to the effective date of this ^{act}... (LRB inserts date) this section applies if the trustee provides to the qualified beneficiaries a notice that includes a copy of s. 701.0903 and states the trustee is electing to be governed by s. 701.0903.

(5) Subject to sub. (4), this section applies regardless of when a life insurance contract is acquired, retained or otherwise owned by a trustee.

6. Section 881.01(1)(b); PDF page 167, Lines 4 - 9

881.01 (1) (b) "Fiduciary" means a personal representative, trustee, conservator, or guardian of the estate, a directing party, as defined in s. 701.0103 (7), who has the power to direct the trustee's investment decisions, a trust protector, as defined in s. 701.0103 (28), who has power over the investment of trust assets, and any other person to whom a court appoints a power over the investment of the assets of a decedent's estate, a trust, a conservatorship, or a guardianship of the estate.

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

The Study Group has reviewed and approves of this change.

7. Section 881.01(4)(b)3.; PDF page 168, Lines 1 - 4

We request that this subsection be revised as follows:

3. At any time while an asset that is collected by the fiduciary is being retained, a beneficiary may file an application with a court that has jurisdiction over the fiduciary to compel the fiduciary to sell the asset and invest the sale proceeds ~~in other investment~~ in accordance with this section.

✓

UNIFORM TRUST CODE COMMITTEE

PROPOSED FINAL COMMENTS ON SUBCHAPTER X (SECTIONS 109 - 123): LRB DRAFT #3

1. No additional comments were made by LRB to this subchapter. The Subchapter X subcommittee approves of all the changes made by LRB in draft #3, with the following exceptions.

2. Section 701.1001(2)(e); PDF page 105, LINES 14 - 16

A trust protector or directing party would not take possession of trust property and administer the trust. Revise this section to read:

(e) Appoint an additional trustee, a directing party, or a trust protector having duties and authority ordered by the court, including, in the case of an additional trustee, authority to take possession of the trust property and administer the trust. *for the*

3. Section 701.1001(2)(i); PDF page 105 LINE 22

A court cannot recover proceeds. It can only order recovery. Change this subsection to read:

(i) Subject to s. 701.1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and ~~recover~~ order recovery of the property or its proceeds.

4. Section 701.1004(2); PDF page 107 LINE 6

Change the word "may" to "does" in this line.

(2) Subject to sub. (3), if a trustee defends or prosecutes any proceeding in good faith, whether successful or not, the trustee is entitled to receive from the trust the necessary expenses and disbursements, including reasonable attorney fees, incurred. This subsection ~~may~~ does not preclude a court from ordering reimbursement of the trust for such expenses and disbursements from another party as provided in sub. (1).

5. Sections 701.1001 – 701.1010

The Subchapter X subcommittee considered whether the application of these sections could also apply to trust protectors and directing parties if the sections on directing parties and trust protectors incorporated these provisions by reference. The subcommittee concluded that the incorporation by reference generally works for each section, but the wording in section 701.1004 is awkward. We propose revising s. 701.1004 as follows:

701.1004 Attorney fees and costs.

(1) In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

(2) Subject to sub. (3), if a trustee, directing party, or trust protector defends or prosecutes any proceeding in good faith, whether successful or not, the trustee, directing party, or trust protector is entitled to receive from the trust the necessary expenses and disbursements, including reasonable attorney fees, incurred. This subsection may does not preclude a court from ordering reimbursement of the trust for such expenses and disbursements from another party as provided in sub. (1).

(3) (a) Payment of costs or attorney fees incurred in any proceeding from the trust property may be made by the trustee without the approval of any person and without court authorization, unless the court orders otherwise as provided in par. (c).

(b) If a claim or defense based upon a breach of trust is made against a trustee, directing party, or trust protector in a proceeding, the trustee shall provide notice to each qualified beneficiary, directing party, and trust protector of the trust whose share of the trust may be affected by the payment of attorney fees and costs of the intention to pay costs or attorney fees incurred in the proceeding from the trust prior to making payment. The notice shall inform the each such qualified beneficiary, directing party, and trust protector of the right to apply to the court for an order prohibiting the trustee from paying attorney fees or costs from trust property. ~~If a trustee is served with a motion for an order prohibiting the trustee from paying from the trust attorney fees or costs in the proceeding and the trustee pays attorney fees or costs from the trust before an order is entered on the motion, the trustee, directing party, or trust protector and their the trustee's attorney who has have been paid attorney fees or costs from trust property are subject to the remedies in pars. (c) and (d).~~ If a trustee is served with a motion for an order prohibiting the trustee from paying from the trust attorney fees or costs in the proceeding and the trustee pays the attorney fees and costs from the trust before an order is entered on the motion, the trustee, directing party, or trust protector and their respective attorneys who have been paid attorney fees or costs from trust property are subject to the remedies in pars. (c) and (d).

(c) If a claim or defense based upon breach of trust is made against a trustee, directing party, or trust protector in a proceeding, a party must obtain a court order to prohibit the trustee from paying costs or attorney fees from trust property. To obtain an order prohibiting payment of costs or attorney fees from trust property, a party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee, directing party, or trust protector, as the case may be, may proffer evidence to rebut the evidence submitted by a party. The court in its discretion may defer ruling on the motion, pending discovery to be taken by the parties. If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause to allow attorney fees and costs to be paid from the trust, the court

shall enter an order prohibiting the payment of further attorney fees and costs from trust property and shall order attorney fees or costs previously paid from trust property in such proceeding to be refunded. An order entered under this paragraph may not limit a trustee's, directing party's, or trust protector's right to seek an order permitting the payment of some or all of the attorneys fees or costs incurred in the proceeding from trust property, including any fees required to be refunded, after the claim or defense is finally determined by the court. If a claim or defense based upon a breach of trust is withdrawn, dismissed, or resolved without a determination by the court that the trustee committed a breach of trust, after the entry of an order prohibiting payment of attorney fees and costs pursuant to this paragraph, the trustee may pay costs or attorney fees incurred in the proceeding from the trust property without further court authorization.

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

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

(f) Notice under par. (b) is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee, directing party, or trust protector has not has-committed a breach of trust.

(4) A provision of a trust instrument drafted or caused to be drafted by a trustee, directing party, or trust protector that modifies the application of this section in a manner favorable to ~~thesuch~~ trustee, directing party, or trust protector and potentially detrimental to a beneficiary is invalid with respect to ~~thesuch~~ trustee, directing party, or trust protector unless ~~thesuch~~ trustee, directing party, or trust protector proves that the provision was fair under the circumstances existing at the time the trust instrument was signed and that the existence and contents of the provision were adequately communicated to the settlor.

6. Sections 701.1012 and 701.1013

We considered whether these sections need to be revised to address the possibility that a directing party or trust protector may deal with a third party regarding the administration of the trust. We decided no changes are necessary to these sections.

UNIFORM TRUST CODE COMMITTEE

PROPOSED FINAL COMMENTS ON SUBCHAPTER XI (SECTIONS 127 – 134 and 152 – 240): LRB DRAFT #3

1. Section 701.1101; PDF page 116, Lines 22 - 25

We suggest the wording of the scope be changed as follows:

701.1101 Short title and scope. *This subchapter may be cited as the Wisconsin Uniform Principal and Income Act. ~~In addition to a trust described in s. 701.0102,~~ Subject to s. 701.1206(2), this subchapter applies to a trust described in s. 701.0102 and an estate that is administered in this state. ~~as provided under s. 701.1206 (2).~~*

2. Section 701.1102(1g); PDF page 117, Line 4

701.1102 (1g) "Asset" means property, as defined in s. 701.0103 (18).

****NOTE: I assumed that the intention of providing a definition for asset was to make the usage of asset in this subchapter consistent with usage of property in the remainder of the chapter. I did not include the suggested language because in many places in the subchapter the term assets is modified to indicate whether that reference is to a trust or unitrust. For example, with the suggested definition the phrase "trust assets" translates to "trust property of a trust or estate." Please let me know if this definition is not consistent with your intent.

This definition is consistent with our intent.

3. Section 701.1102(7); PDF page 123, Lines 6 - 9

We suggest the reference in the last line be to "subchapter".

✓ **701.1102 (7)** "Net income" means the total receipts allocated to income during an accounting period, minus the disbursements made from income during the period, plus or minus transfers under this subchapter ~~section subch. XI~~ to or from income during the period.

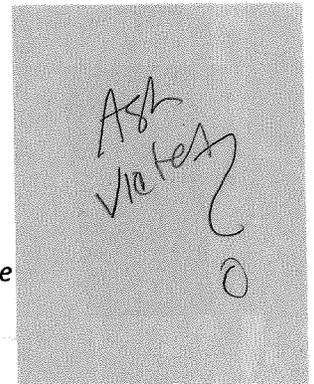
4. Section 701.1102(9); PDF page 123, Line 12

The definition of "remainder beneficiary" should refer to s. 701.0103(19)(b) and (c). The term "remainder beneficiary" is only used in s. 701.1102(1m) and (8).

5. Section 701.1107(1) and (2)(a); PDF page 132, Line 4 and following line 8 (not shown in the PDF)

Change the reference from "governing instrument" to "trust instrument".

6. Section 701.1108; PDF page 133, Line 2



Refer to a will or trust instrument.

701.1108 Power to treat capital gains as part of a distribution. Unless prohibited by the ~~governing instrument~~ will or trust instrument, a trustee fiduciary may cause

IS
this
done?

7. Section 701.1123(3)(a)1.; PDF page 141; Lines 10 and 15

Delete the reference to "or funds" in lines 10 and 15. Victor will have this language reviewed by EB legal counsel to confirm the terminology is correct.

8. Section 701.1123(4); PDF page 118; Lines 4 - 21

We should define the term "marital deduction trust" and make reference to the trustee of a marital deduction trust.

701.1123 (4) (a) For purposes of this subsection, "marital deduction trust trustee" means ~~a trustee of~~ a trust for which an election to qualify for a marital deduction under section 2056 (b) (7) or 2523 (f) of the Internal Revenue Code has been made, or a trust that qualified for the marital deduction under section 2056 (b) (5) or 2523 (e) of the Internal Revenue Code.

(b) Notwithstanding sub. (3), a trustee of a marital deduction trust shall determine plan income for an accounting period as if the plan were a trust subject to this subchapter. If the trustee of a marital deduction trust cannot determine the plan income, the plan income is 4 percent of the total present value of the trust's income in the plan on the first day of the accounting period, based on reasonable actuarial assumptions as determined by the trustee of the marital deduction trust.

(c) Notwithstanding subs. (2) and (3), a trustee of a marital deduction trust shall allocate a payment from a plan to income to the extent of the plan income and distribute that amount to the surviving spouse. The trustee of the marital deduction trust shall allocate the balance of the payment to principal. Upon the request of the surviving spouse, the trustee of the marital deduction trust shall allocate principal to income to the extent the plan income exceeds payments made from the plan to the trust during the accounting period.

(d) Upon the request of the surviving spouse of the settlor, a trustee of a marital deduction trust shall demand that a person administering a plan distribute the plan income to the trust.

UNIFORM TRUST CODE COMMITTEE

PROPOSED FINAL COMMENTS ON SUBCHAPTER XII (SECTIONS 124 - 126, 135 - 142, 145 - 151, 243 - 249, 272 - 287, and 295) (SECTIONS 127 - 134 and 152 - 240 are covered by subchapter XI, 143 - 144 by subchapter II, 241 - 242 by subchapter IV, 250 - 271 by chapter 702 and 288 - 294 by chapter 881 subcommittees): LRB DRAFT #3

1. The sections of subchapter XII are scattered throughout the bill. We note that the following sections will be included in the subchapter. Since section 701.1202 has been moved, we presume the other sections will be renumbered in the next draft.

- 701.1201 – Private Foundations, see p. 114
- 701.1202 – Moved to s. 701.0819
- 1202 • 701.1203 – Electronic records and signatures, see p. 119
- 1203 • 701.1204 – Uniformity, see p. 120
- 1204 • 701.1205 – Applicability to transfer on death provisions, see p. 151
- 1205 • 701.1206 – Applicability, see p. 120 and p. 150

2. Section 701.1206(1); PDF page 150, LINES 1 - 8

The Study Group needs to approve the language of this subsection and respond to the LRB comment:

701.1206 (1) Except as otherwise provided in sub. ~~(3)~~ (2) and ~~s. 701.19 (9) (a), ss. 701.01 to 701.19, 701.21, 701.22, and 701.23~~ are ss. 701.0602, and 701.0813, and 701.0903(4), this chapter is applicable to a trust existing on July 1, 1971 the effective date of this subsection [LRB inserts date], as well as a trust created after such date, and shall govern trustees acting under such trusts. If application of any provision of ~~ss. 701.01 to 701.19, 701.21, 701.22, and 701.23~~ this chapter to a trust in existence on August 1, 1971 the effective date of this subsection [LRB inserts date], is unconstitutional, it shall not affect application of the provision to a trust created after that date.

****NOTE: Your drafting instructions provided conflicting information regarding the inclusion of certain applicability language, specifically provisions related to judicial proceedings. Please confirm that the initial applicability provisions included in this bill are consistent with your intent. As drafted, s. 701.1206 (1) provides that, except for subch. XI and certain sections, the chapter applies to any trust that exists on the effective date of the bill and any trust created after that date (and to any trustee acting under such a trust). Section 701.1206 (2) provides that subch. XI applies to a trust or estate existing on the effective date of the bill and to a trust or estate created after that date. Section 701.1206 (3) provides that ch. 701 applies to a judicial proceeding that is commenced before, on, or after the effective date of the bill unless the court finds that the application of a certain provision will substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of parties. Okay?
Comment – with the exception of adding a reference to s. 701.0903(4), this is Okay.

3. Section 701.1206(2); PDF page 150 - 151 LINES 11 - 18 and 1-2

The Study Group needs to approve the language in this subsection:

701.1206 **(2)** ~~Section 701.20~~ Subchapter XI of this chapter applies to every a trust or decedent's estate existing on ~~May 17, 2005~~ the effective date of this subsection [LRB inserts date], and to every a trust or decedent's estate created or coming into existence after that date, except as otherwise expressly provided in ~~s. 701.20~~ subch. XI or by the decedent's will or the terms of the trust. With respect to a trust or decedent's estate existing on ~~May 17, 2005, s. 701.20 (5) to (30)~~ the effective date of this subsection [LRB inserts date], ss. 701.1110 to 701.1135 shall apply at the beginning of the trust's or estate's first accounting period, as defined in s. ~~701.20~~ 701.1125 (2) (a), that begins on or after ~~May 17, 2005~~ the effective date of this subsection [LRB inserts date].

Comment – this is Okay.

4. Section 701.1206(3); PDF page 120, LINES 5 - 15

The Study Group needs to approve the language in this subsection. Do we want to exclude ss. 701.1206(1) and 701.0813 from this provision?

701.1206 **(3)** (a) Except as provided in par. (b), this chapter applies to a judicial proceeding concerning a trust commenced before, on, or after the effective date of this paragraph [LRB inserts date].

(b) If a court finds that application of a particular provision of this chapter to a judicial proceeding commenced before the effective date of this paragraph [LRB inserts date], will substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, the particular provision of this chapter does not apply to that judicial proceeding and the court shall apply ch. 701, 2011 stats., as the court finds to be necessary to prevent interference with the effective conduct of the judicial proceeding and to avoid prejudicing the rights of the parties.

Comment – this is Okay.

5. Current Wis. Stat. section 701.26; PDF page 151, LINE 5

Note that the current Wisconsin statute on disclaimers by a trustee has been deleted and the ability to disclaim will be governed solely by s. 854.13, which permits disclaimers by a trustee (see PDF pages 162 - 163.)

Comment – this is Okay.

6. Section 879.47(2); PDF pages 122 and 166, LINES 3 – 6 and 6 – 14

We note that this section has been revised to allow corporate trustees to submit accounts to court in the format they usually use to submit accounts to beneficiaries. This is okay as shown below.

879.47 **(1)** The attorney for any person desiring to file any paper in court is

responsible for the preparation of the paper. Except as provided in ~~s. 701.16 (4) (d)~~ sub. (2), all papers shall be legibly written on substantial paper and shall state the title of the proceeding in which they are filed and the character of the paper. Either uniform forms or computer-generated forms, if the forms exactly recreate the original forms in wording, format and substance, shall be used. If papers are not so written or if uniform forms or computer-generated forms that exactly recreate the original forms in wording, format and substance are not used, the court may refuse to receive and file them. The court shall show on all papers the date of their filing.

879.47 (2) ~~Notwithstanding s. 879.47, trustees~~ Trustees and cotrustees may submit to courts accounts in the format that they normally use for accounts submitted to beneficiaries under this subsection, if all of the information required by the court is included.

7. Section 853.34(3); PDF page 161; LINES 10 – 18

The following subsection is consistent with our intent, but several typos need to be corrected as shown below:

853.34 (3) ASSETS TRANSFERRED TO TRUSTS CREATED BY WILL. If a trustee of a trust created by a testator's will is designated as the beneficiary of a transfer under another governing instrument, as defined in s. 854.01 (2), at the death of the testator or at the death of a 3rd party, the transfer of any assets under that other governing instrument to the trustee ~~does~~ does not cause the transferred assets to be included in the property administered as part of the testator's estate. The transferred assets are not ~~be~~ subject to taxes, debts, or charges enforceable against the testator's estate to any greater extent than if the proceeds were payable to a beneficiary other than the testator's estate.

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

8. Section 854.13; PDF pages 162 – 163

The Study Group asked if the references to "governing instrument" should be changed to "creating instrument" as they apply to powers of appointment. This change is not necessary since the term "governing instrument" is redefined in chapter 854.

9. Effective date of Act; PDF page 168, LINES 12 – 13

We agree with your suggestion and request that LRB insert an effective date as of the first day of the seventh month after publication.

SECTION 295. Effective date.

(1) This act takes effect on January 1, 2014.

****NOTE: This date is a place holder. Keep in mind that this date will not achieve your goal of giving practitioners 6 months to absorb the new law if the bill does not pass

Updated 6/4/2013

before July 1, 2013. To avoid the issue of when the bill may pass, you could structure the effective date as the first day of the 7th month after publication. This structure would ensure 6 months between publication and the effective date.

POWERS OF APPOINTMENT – Chapter 702 – Revised per UTC 3

Comment: Please change the highlighted section from “power” to “power of appointment”.

700.16

(1)

(a) A future interest or trust is void if it suspends the power of alienation for longer than the permissible period. The permissible period is a life or lives in being plus a period of 30 years.

(b) If the settlor of a living trust has an unlimited power to revoke, the permissible period is computed from termination of such power.

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

700.27 Disclaimer of transfers during life.

(1) Definitions. In this section:

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

(b) "Extrinsic evidence" has the meaning given in s. 854.01 (1).

(c) "Inter vivos governing instrument":

1. Means a gratuitous deed, inter vivos trust instrument, insurance policy, contract, inter vivos instrument that creates or exercises a power of appointment, or any other dispositive, appointive, or nominative instrument that transfers property other than a governing instrument as defined in s. 854.01 (2).

2. Includes an inter vivos gift that is not subject to a written instrument.

(d) "Power of appointment" has the meaning given in s. ~~702.01 (4)~~ 702.02 (6).

(2) Right to disclaim.

(a) In general.

1. In this paragraph, "person" includes a person who is unborn or whose identity is unascertained.

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

(b) Partial disclaimer. Property transferred under an inter vivos governing instrument may be disclaimed in whole or in part, except that a partial disclaimer of property passing by an inter

vivos governing instrument or by the exercise of a power of appointment may not be made if partial disclaimer is expressly prohibited by the inter vivos governing instrument or by the instrument exercising the power: of appointment.

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

(d) Disclaimer by a guardian or conservator. A guardian of the estate or a conservator appointed under ch. 880, 2003 stats., or ch. 54 may disclaim on behalf of his or her ward, with court approval, if the ward is entitled to disclaim under this section.

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

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

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

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

(g) After death. A person's right to disclaim survives the person's death and may be exercised by the person's personal representative or special administrator upon receiving approval from the court having jurisdiction of the person's estate after hearing upon notice to all persons interested in the disclaimed property, if the personal representative or special administrator has not taken any action that would bar the right to disclaim under sub. (9).

(h) Disclaimers of transfers at death. A person who is a recipient of property under a governing instrument, as defined in s. 854.01 (2), may disclaim the property as provided in s. 854.13.

(3) Instrument of disclaimer. The instrument of disclaimer must meet the provisions of subs. (4) and (5) and s. 854.13 (3) (a) to (c).

(4) Time for effective disclaimer.

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

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

(c) Future right to income or principal. Notwithstanding pars. (a) and (b), an instrument disclaiming the future right to receive discretionary or mandatory distributions of income or principal from any source may be executed and delivered at any time.

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

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

(5) Delivery and filing of disclaimer.

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

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

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

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

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

(7) Devolution.

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

(b) Devolution to issue of the disclaimants. Unless the inter vivos governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, if, by law or under the inter vivos governing instrument, the issue of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time the disclaimed interest would have taken effect in possession or enjoyment, the disclaimed interest passes only to the issue of the disclaimant who survive when the disclaimed interest takes effect in possession or enjoyment.

(c) Disclaimer of a devisable future interest.

1. In this paragraph, "devisable future interest" is a future interest that can be passed under the will of the person who holds the future interest.

2. If the disclaimed interest is a devisable future interest under the law governing the transfer, then the disclaimed interest devolves as if it were a nondevisable future interest.

governing trust instrument expressly provided that another value may be used. If the governing-trust instrument requires or permits a different value to be used, all assets property available for distribution, including cash, shall, unless otherwise expressly provided, be so distributed that the assets-property, including cash, distributed as such an equivalent will be fairly representative of the net appreciation or depreciation in the value of the available property on the date or dates of distribution. A provision in the governing-trust instrument that the trustee may fix values for purposes of distribution or allocation does not of itself constitute authorization to fix a value other than current fair market value.

Page 149, line 10-21, Section 242 - The language above tracks current s.701.22. We find the 2nd sentence incomprehensible. We suggest the following language be used.

(4) In case of a division of a trust into 2 or more trusts, any distribution or allocation of assets as an equivalent of a dollar amount fixed by formula or otherwise shall be made at current fair market values unless the trust instrument provides that another value may be used. If the trust instrument requires or permits a different value to be used, all property available for distribution, including cash, shall be distributed so that the property, including cash, is fairly representative of the net appreciation or depreciation in the value of the available property on the date or dates of distribution. A provision in the trust instrument that the trustee may fix values for purposes of distribution or allocation does not of itself constitute authorization to fix a value other than current fair market value.

See
p. 149 ✓

(8) Acceleration of subsequent interests when preceding interest is disclaimed.

(a) Subsequent interest not held by disclaimant. Unless the inter vivos governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, upon the disclaimer of a preceding interest, a subsequent interest not held by the disclaimant and limited to take effect in possession or enjoyment after the termination of the interest that is disclaimed accelerates to take effect as if the disclaimant had died immediately before the time when the disclaimed interest would have taken effect in possession or enjoyment or, if the disclaimant is an appointee under a power of appointment and that power of appointment has been exercised by a power of appointment, as if the disclaimant had died before the effective date of the exercise of the power of appointment.

(b) Subsequent interest held by disclaimant. Unless the inter vivos governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, upon the disclaimer of a preceding interest, a subsequent interest held by the disclaimant does not accelerate.

(9) Bar. Actions that bar disclaimer are as provided in s. 854.13 (11g).

(10) Effect of disclaimer or waiver. The effect of the disclaimer on the disclaimant and any successors in interest is as provided in s. 854.13 (11p).

(11) Nonexclusiveness of remedy.

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

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

(12) Construction of effective date. In this section, the effective date of a transfer under an inter vivos governing instrument is the date on which the transfer is a completed gift for federal gift tax purposes.

Comment: Please revise the definitions of general power of appointment, power of appointment and special power of appointment as shown in the highlighted sections

702.01—02 Definitions. As used in this chapter, unless the context indicates otherwise:

(1) "Appointee" means the person to whom an interest is appointed.

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

(3) "Donee" means the person in whom the power of appointment is created or reserved.

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

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

(6) "Power of appointment" means a power of appointment over to appoint legal or equitable interests in real or personal property. A power of appointment is a power created or reserved by a person having property subject to his or her disposition which enables the donee of the power of

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2nd sentence
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appointment to designate, within such limits as may be prescribed, the transferees of the property or the shares or the interests in which it shall be received; ~~it.~~ A power of appointment does not include a power of sale, a power of attorney, a power of revocation or a power exercisable by a trustee, a directing party as defined in s. 701.0103 (7), another fiduciary in his or her fiduciary capacity, or a trust protector as defined in s. 701.0103(28).

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

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

Comment: Change the term "power" to "power of appointment as shown in the highlighted sections.

702.03 Manifestation of intent to exercise powers~~a power of appointment.~~

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

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

702.05 Exercise of powers~~a power of appointment.~~

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

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

the power of appointment is to appoint interests in land, it can be exercised only by an instrument executed with sufficient formalities for that purpose.

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

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

(5) PRESUMPTION OF NONEXERCISE OF A POWER OF APPOINTMENT. A personal representative, trustee, or other fiduciary who holds property subject to a power of appointment may administer that property as if the power of appointment was not exercised if the personal representative, trustee, or other fiduciary has no notice of the existence of any of the following within 6 months after the death of the donee of the power of appointment:

(a) A document purporting to be a will of the donee of the power of appointment if the power of appointment is exercisable by a will.

(b) Some other documentation of the donee purporting to exercise the power of appointment if the power of appointment is exercisable other than by a will.

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

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

702.09 Release of powers a power of appointment.

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

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

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

1. As to the whole or any part of the property which is subject thereto;

2. As to any one or more persons or objects, or classes of persons or objects, in whose favor such power of appointment is exercisable;

3. So as to limit in any other respect the extent to or manner in which the power of appointment may be exercised.

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

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

(a) Delivery to any person specified in the creating instrument;

(b) Delivery to a trustee or to one of several trustees of the property to which the power of appointment relates, or filing with the court having jurisdiction over the trust;

(c) Delivery to any person, other than the donee, who could be adversely affected by an exercise of the power of appointment.

(d) Recording in the office of register of deeds in the county where the property is located.

702.11 Irrevocability of creation, exercise and release of powers a power of appointment.

The creation, exercise or release of a power of appointment is irrevocable unless the power to revoke is reserved in the creation, exercise or release of the power of appointment.

702.13 Recording instruments relating to powers a power of appointment.

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

(a) An instrument, other than a will, exercising a power of appointment.

(b) An instrument expressing consent to exercise;

(c) A disclaimer;

(d) A release.

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

702.15 Disposition when a special power of appointment is unexercised. (intro.) If the donee of a special power of appointment fails to exercise effectively the special power of appointment, the interests which might have been appointed under the special power of appointment pass in one of the following ways:

(1) If the creating instrument contains an express gift in default, then in accordance with the terms of such gift;

(2) If the creating instrument contains no express gift in default and does not clearly indicate that the permissible appointees are to take only if the donee exercises the special power of appointment, then to the permissible appointees equally, but if the power is to appoint among a class such as "relatives," "issue," or "heirs," then to those persons who would have taken had there been an express gift to the described class;

(3) (a) Except as provided in par. (b), if the creating instrument contains no express gift in default and clearly indicates that the permissible appointees are to take only if the donee exercises the special power of appointment, then by reversion to the donor or the donor's estate. But if

(b) If the creating instrument expressly states that there is no reversion in the donor, then any language in the creating instrument indicating or stating that the permissible appointees are to take only if the donee exercises the special power of appointment is to be disregarded and the interests shall pass in accordance with sub. (2).

Comment: Please revise (2) as shown in the highlighted section. We decided not to adopt subsections (2d) and (2m). We decided to keep (3) as currently written in the statute.

702.17 Rights of creditors of the donee.

(1) GENERAL POLICY. If the donee has either a general power or an unclassified power which is unlimited as to permissible appointees except for exclusion of the donee, the donee's estate, the donee's creditors and the creditors of the donee's estate, or a substantially similar exclusion a general power of appointment, any interest which the donee has power to appoint or has appointed is to be treated as property of the donee for purposes of satisfying claims of the donee's creditors, as provided in this section.

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

~~(2d) CREDITORS OF THE DONEE; SPECIAL POWER OF APPOINTMENT. Notwithstanding sub. (1), property covered by a special power of appointment or general power of appointment that is exercisable solely for the support, maintenance, health, and education of the donee within the meaning of section 2041 (b) (1) (A) or 2514 (c) (1) of the Internal Revenue Code is not subject to the payment of the claims of creditors of the donee, the donee's estate, or the expenses of administering the donee's estate.~~

~~(2m) CREDITORS OF THE DONEE; GENERAL POWER OF APPOINTMENT NOT PRESENTLY EXERCISABLE. Notwithstanding sub. (1), property covered by a general power of appointment that is not presently exercisable when it is created is subject to the payment of the claims of the creditors of the donee, the donee's estate, and the expenses of administering the donee's estate only if any of the following applies:~~

~~(a) The power of appointment was created by the donee in favor of the donee.~~

~~(b) The power of appointment becomes exercisable in accordance with the terms of the creating instrument, except in the case of a testamentary general power of appointment.~~

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

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

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

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

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

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

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

854.13 Disclaimer of transfers at death.

(1) Definitions. In this section:

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

(c) "Power of appointment" has the meaning given in s. ~~702.01(4)~~. 702.02(6).

(2) Right to disclaim.

(a) In general.

1. In this paragraph, "person" includes a person who is unborn or whose identity is unascertained.

2. A person who is an heir, recipient of property, or beneficiary under a governing instrument, donee of a power of appointment created by a governing instrument, appointee under a power of appointment exercised by a governing instrument, taker in default under a power of appointment created by a governing instrument, or person succeeding to disclaimed property may disclaim any property, including contingent or future interests or the right to receive discretionary distributions, by delivering a written instrument of disclaimer under this section.

(b) Joint tenants. Upon the death of a joint tenant, a surviving joint tenant may disclaim any property that would otherwise accrue to him or her by right of survivorship and that is the subject of the joint tenancy by delivering a written instrument of disclaimer under this section.

(c) Survivorship marital property. Upon the death of a spouse, the surviving spouse may disclaim the decedent spouse's interest in survivorship marital property.

(d) Partial disclaimer. Property may be disclaimed in whole or in part, except that a partial disclaimer of property passing by a governing instrument or by the exercise of a power of appointment may not be made if partial disclaimer is expressly prohibited by the governing instrument or by the instrument exercising the power- of appointment.

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

(f) Disclaimer by guardian or conservator. A guardian of the estate or a conservator appointed under ch. 54 or ch. 880, 2003 stats., may disclaim on behalf of his or her ward, with court approval, if the ward is entitled to disclaim under this section.

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

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

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

(h) After death. A person's right to disclaim survives the person's death and may be exercised by the person's personal representative or special administrator upon receiving approval from the court having jurisdiction of the person's estate after hearing upon notice to all persons interested in the disclaimed property, if the personal representative or special administrator has not taken any action that would bar the right to disclaim under sub. (11g).

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

(3) Instrument of disclaimer. The instrument of disclaimer shall do all of the following:

- (a) Describe the property disclaimed.
- (b) Declare the disclaimer and the extent of the disclaimer.
- (c) Be signed by the disclaimant.
- (d) Be delivered within the time and in the manner provided under subs. (4) and (5).

(4) Time for effective disclaimer.

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

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

(c) Future right to income or principal. Notwithstanding pars. (a) and (b), an instrument disclaiming the future right to receive discretionary or mandatory distributions of income or principal from any source may be executed and delivered at any time.

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

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

(5) Delivery and filing of disclaimer.

(a) Delivery. In addition to any requirements imposed by the governing instrument, the instrument of disclaimer is effective only if, within the time specified under sub. (4), it is delivered to and received by any of the following:

1. The transferor of the property disclaimed, if living.
2. The personal representative or special administrator of the deceased transferor of the property.
3. The holder of legal title to the property.

(b) Delivery to trustee. If the trustee of any trust to which the interest or power of appointment relates does not receive the instrument of disclaimer under par. (a), a copy shall also be delivered to the trustee.

(c) Filing. When delivery is made to the personal representative or special administrator of a deceased transferor, a copy of the instrument of disclaimer shall be filed in the probate court having jurisdiction.

(d) Failure to deliver or file. Failure to deliver a copy of the instrument of disclaimer to the trustee under par. (b) or to file a copy in the probate court under par. (c), within the time specified under sub. (4), does not affect the validity of any disclaimer.

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

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

(7) Devolution.

(a) In general. Subject to pars. (bm) and (c) and subs. (8), (9), and (10), unless the governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, the disclaimed property devolves as if the disclaimant had died before the decedent. If the disclaimed interest is a remainder contingent on surviving to the time of distribution, the disclaimed interest passes as if the disclaimant had died immediately before the time for distribution. If the disclaimant is an appointee under a power of appointment exercised by a governing instrument, the disclaimed property devolves as if the disclaimant had died before the effective date of the exercise of the power of appointment. If the disclaimant is a taker in default under a power of appointment created by a governing instrument, the disclaimed property devolves as if the disclaimant had predeceased the donee of the power of appointment.

(bm) Devolution to issue of the disclaimants. Unless the governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, if, by law or under the governing instrument, the issue of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time the disclaimed interest would have taken effect in possession or enjoyment, the disclaimed interest passes only to the issue of the disclaimant who survive when the disclaimed interest takes effect in possession or enjoyment.

(c) Disclaimer of a devisable future interest.

1. In this paragraph, "devisable future interest" is a future interest that can be passed under the will of the person who holds the future interest.

2. If the disclaimed interest is a devisable future interest under the law governing the transfer, then the disclaimed interest devolves as if it were a nondevisable future interest.

(8) Devolution of disclaimed interest in joint tenancy. Unless the decedent provided otherwise in a governing instrument, either expressly or as construed from extrinsic evidence, a disclaimed interest in a joint tenancy passes to the decedent's probate estate.

(9) Devolution of disclaimed interest in survivorship marital property. Unless the decedent provided otherwise in a governing instrument, either expressly or as construed from extrinsic evidence, a disclaimed interest in survivorship marital property passes to the decedent's probate estate.

(10) Acceleration of subsequent interests when preceding interest is disclaimed.

(a) Subsequent interest not held by disclaimant. Unless the governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, upon the disclaimer of a preceding interest, a subsequent interest not held by the disclaimant and limited to take effect in possession or enjoyment after the termination of the interest that is disclaimed accelerates to take effect as if the disclaimant had died immediately before the time when the disclaimed interest would have taken effect in possession or enjoyment or, if the disclaimant is an appointee under a power ~~exercised by a~~of appointment and that power of appointment has been exercised, as if the disclaimant had died before the effective date of the exercise of the power of appointment.

(b) Subsequent interest held by the disclaimant. Unless the governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, upon the disclaimer of a preceding interest, a subsequent interest held by the disclaimant does not accelerate.

(11g) Bar. Bars to a person's right to disclaim property include, but are not limited to, any of the following:

(a) The person's assignment, conveyance, encumbrance, pledge, or transfer of the property or a contract for the assignment, conveyance, encumbrance, pledge, or transfer of the property.

(b) The person's written waiver of the right to disclaim.

(c) The person's acceptance of the property or benefit of the property.

(11p) Effect of disclaimer or waiver. The disclaimer or the written waiver of the right to disclaim is binding upon the disclaimant or person waiving and all persons claiming through or under him or her.

(12) Nonexclusiveness of remedy.

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

(b) Any disclaimer that meets the requirements of section 2518 of the Internal Revenue Code, or the requirements of any other federal law relating to disclaimers, constitutes an effective disclaimer under this section or s. 700.27.

(13) Construction of effective date. In this section, the effective date of a transfer under a revocable governing instrument is the date on which the person with the power to revoke the transfer no longer has that power or the power to transfer the legal or equitable ownership of the property that is the subject of the transfer.