

1           **SECTION 266.** 702.01 (1) of the statutes is renumbered 702.02 (2) and amended  
2 to read:

3           702.02 (2) “Creating instrument” means the will, trust agreement, or other  
4 document which creates or reserves the power of appointment.

5           **SECTION 267.** 702.01 (2) of the statutes is renumbered 702.02 (4) and amended  
6 to read:

7           702.02 (4) “Donor” means the person who creates or reserves the power;  
8 “donee” means the person in whom the power is created or reserved; and “appointee”  
9 means the person to whom an interest is appointed of appointment.

10           **SECTION 268.** 702.01 (3) of the statutes is renumbered 702.02 (5) and amended  
11 to read:

12           702.02 (5) “General power of appointment” means a power exercisable in favor  
13 of the donee, the donee’s estate, the donee’s creditors, or the creditors of the donee’s  
14 estate, whether or not it is also exercisable in favor of others. A power to appoint to  
15 any person or a power ~~which~~ of appointment that is not expressly restricted as to  
16 appointees may be exercised in favor of the donee or the donee’s creditors if  
17 exercisable during lifetime, and in favor of the donee’s estate or the creditors of the  
18 donee’s estate if exercisable by will.

19           **SECTION 269.** 702.01 (4) of the statutes is renumbered 702.02 (6) and amended  
20 to read:

21           702.02 (6) “Power of appointment” means a power ~~of appointment over to~~  
22 appoint legal or equitable interests in real or personal property. A power of  
23 appointment is ~~a power~~ created or reserved by a person having property subject to  
24 his or her disposition which enables the donee of the power of appointment to  
25 designate, within such limits as may be prescribed, the transferees of the property

1 or the shares or the interests in which it shall be received; ~~it.~~ A power of appointment  
2 does not include a power of sale, a power of attorney, a power of revocation, or a power  
3 exercisable by a trustee ~~or other,~~ a directing party, as defined in s. 701.0103 (7),  
4 another fiduciary in his or her fiduciary capacity, a trust protector, as defined in s.  
5 701.0103 (31).

6 **SECTION 270.** 702.01 (5) of the statutes is renumbered 702.02 (7) and amended  
7 to read:

8 702.02 (7) “Special power of appointment” means a power of appointment  
9 ~~exercisable only in favor of one or more persons not including the donee, the donee’s~~  
10 ~~estate, the donee’s creditors or the creditors of the donee’s estate and, when~~  
11 ~~exercisable in favor of a class, so limited in size by description of the class that in the~~  
12 ~~event of nonexercise of the power a court can make distribution to persons within the~~  
13 ~~class if the donor has failed to provide for this contingency~~ that is not a general power  
14 of appointment.

15 **SECTION 271.** 702.01 (6) of the statutes is repealed.

16 **SECTION 272.** 702.02 (1) of the statutes is created to read:

17 702.02 (1) “Appointee” means the person to whom an interest is appointed.

18 **SECTION 273.** 702.02 (3) of the statutes is created to read:

19 702.02 (3) “Donee” means the person in whom the power of appointment is  
20 created or reserved.

21 **SECTION 274.** 702.03 of the statutes is amended to read:

22 **702.03 Manifestation of intent to exercise powers** a power of  
23 appointment. (1) Unless the person who executed it had a contrary intention, if  
24 a governing creating instrument, ~~as defined in s. 854.01 (2), or an inter vivos~~  
25 ~~governing instrument, as defined in s. 700.27 (1) (e),~~ creates a power of appointment

1 that expressly requires that the power of appointment be exercised by any type of  
2 reference to the power of appointment or its source, the donor's intention in requiring  
3 the reference is presumed to be to prevent an inadvertent exercise of the power of  
4 appointment. Extrinsic evidence, as defined in s. 854.01 (1), may be used to construe  
5 the intent.

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

20 SECTION 275. 702.05 of the statutes is amended to read:

21 **702.05 Exercise of powers a power of appointment.** (1) CAPACITY TO  
22 EXERCISE A POWER OF APPOINTMENT. A power of appointment can be exercised only by  
23 a person who would have the capacity to transfer the property covered by the power  
24 of appointment.

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

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

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

23           **SECTION 276.** 702.05 (5) of the statutes is created to read:

24           702.05 (5) PRESUMPTION OF NONEXERCISE OF A POWER OF APPOINTMENT. A personal  
25 representative, trustee, or other fiduciary who holds property subject to a power of

1 appointment may administer that property as if the power of appointment was not  
2 exercised if the personal representative, trustee, or other fiduciary has no notice of  
3 the existence of any of the following within 6 months after the death of the donee of  
4 the power of appointment:

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

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

9 **SECTION 277.** 702.07 of the statutes is amended to read:

10 **702.07 Powers Power of appointment to be construed as exclusive.** The  
11 donee of any power of appointment may appoint the whole or any part of the  
12 appointive assets to any one or more of the permissible appointees and exclude  
13 others, except to the extent that the donor specifies either a minimum share or  
14 amount to be appointed to each permissible appointee or to designated appointees,  
15 or a maximum share or amount appointable to any one or more appointees.

16 **SECTION 278.** 702.08 of the statutes is amended to read:

17 **702.08 Disclaimer of powers a power of appointment.** The donee of any  
18 power of appointment may disclaim all or part of the power of appointment as  
19 provided under s. 700.27 or 854.13.

20 **SECTION 279.** 702.09 (title), (1) and (3) (a), (b) and (c) of the statutes are  
21 amended to read:

22 **702.09 (title) Release of powers a power of appointment.** (1) ~~Except as~~  
23 Unless the creating instrument expressly provides that the power of appointment  
24 cannot be released or expressly restricts the time, manner, or scope of release, the  
25 donee of any power of appointment may do any of the following:

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

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

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

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

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

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

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

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

15 **SECTION 280.** 702.11 of the statutes is amended to read:

16 **702.11 Irrevocability of creation, exercise and release of powers a**  
17 **power of appointment.** The creation, exercise or release of a power of appointment  
18 is irrevocable unless the power to revoke is reserved in the creation, exercise or  
19 release of the power of appointment.

20 **SECTION 281.** 702.13 (title), (1) (intro.), (a), (b) and (c) and (2) of the statutes  
21 are amended to read:

22 **702.13 (title) Recording instruments relating to powers a power of**  
23 **appointment.** (1) (intro.) Any of the following instruments relating to powers a  
24 power of appointment is entitled to be recorded as a conveyance upon compliance  
25 with s. 706.05 (1):

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

2 (b) An instrument expressing consent to exercise;.

3 (c) A disclaimer;.

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

6 SECTION 282. 702.15 (intro.), (1) and (2) of the statutes are amended to read:

7 **702.15 Disposition when a special power of appointment is**  
8 **unexercised.** (intro.) If the donee of a special power of appointment fails to exercise  
9 effectively the special power of appointment, the interests which might have been  
10 appointed under the special power of appointment pass in one of the following ways:

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

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

19 SECTION 283. 702.15 (3) of the statutes is renumbered 702.15 (3) (a) and  
20 amended to read:

21 702.15 (3) (a) ~~If~~ Except as provided in par. (b), if the creating instrument  
22 contains no express gift in default and clearly indicates that the permissible  
23 appointees are to take only if the donee exercises the special power of appointment,  
24 then by reversion to the donor or the donor’s estate. ~~But if~~

1           **(b)** If the creating instrument expressly states that there is no reversion in the  
2 donor, then any language in the creating instrument indicating or stating that the  
3 permissible appointees are to take only if the donee exercises the special power of  
4 appointment is to be disregarded and the interests shall pass in accordance with sub.  
5 (2).

6           **SECTION 284.** 702.17 (1), (2), (3) and (5) of the statutes are amended to read:

7           702.17 (1) GENERAL POLICY. If the donee has either a general power ~~or an~~  
8 ~~unclassified power which is unlimited as to permissible appointees except for~~  
9 ~~exclusion of the donee, the donee's estate, the donee's creditors and the creditors of~~  
10 ~~the donee's estate, or a substantially similar exclusion of appointment~~, any interest  
11 which the donee has power to appoint or has appointed is to be treated as property  
12 of the donee for purposes of satisfying claims of the donee's creditors, as provided in  
13 this section.

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

24           **(3)** AT DEATH OF THE DONEE. If the donee has at the time of ~~his or her~~ the donee's  
25 ~~death a general power of the kinds specified in sub. (1) appointment~~, whether or not

1 the donee exercises the general power of appointment, any creditor of the donee may  
2 reach any interest which the donee could have appointed or has appointed, to the  
3 extent that the claim of the creditor has been filed and allowed in the donee's estate  
4 but not paid because the assets of the estate are insufficient.

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

11 SECTION 285. 702.21 of the statutes is amended to read:

12 702.21 **Applicability of chapter.** The provisions of this chapter are  
13 applicable to any power of appointment existing on May 16, 1965, as well as a power  
14 of appointment created after such date.

15 SECTION 286. 766.575 (1) (e) of the statutes is amended to read:

16 766.575 (1) (e) "Trustee" has the meaning given under s. 701.01 (8) 701.0103  
17 (28).

18 SECTION 287. 840.01 (1) of the statutes is amended to read:

19 840.01 (1) Except as provided in sub. (2), "interest in real property" includes  
20 estates in, powers of appointment under ch. 702 over, present and future rights to,  
21 title to, and interests in real property, including, without limitation by enumeration,  
22 security interests and liens on land, easements, profits, rights of appointees under  
23 powers of appointment, rights under covenants running with the land, powers of  
24 termination, and homestead rights. The interest may be an interest that was

1 formerly designated legal or equitable. The interest may be surface, subsurface,  
2 suprasurface, riparian, or littoral.

3 **SECTION 288.** 853.17 (2) of the statutes is amended to read:

4 853.17 (2) This section does not prevent the court from requiring the contract  
5 beneficiary to elect under s. 853.15 in order to take property under the will; ~~nor does~~  
6 ~~it apply to naming a testamentary trustee as designated by a life insurance policy~~  
7 ~~under s. 701.09.~~

8 **SECTION 289.** 853.32 (3) of the statutes is amended to read:

9 853.32 (3) TRANSFERS TO LIVING TRUSTS. The validity and implementation of a  
10 will provision that purports to transfer or appoint property to a living trust are  
11 governed by s. ~~701.08~~ 701.0606.

12 **SECTION 290.** 853.34 (3) of the statutes is created to read:

13 853.34 (3) ASSETS TRANSFERRED TO TRUSTS CREATED BY WILL. If a trustee of a trust  
14 created by a testator's will is designated as the beneficiary of a transfer under  
15 another governing instrument, as defined in s. 854.01 (2), at the death of the testator  
16 or at the death of a 3rd party, the transfer of any assets under that other governing  
17 instrument to the trustee does not cause the transferred assets to be included in the  
18 property administered as part of the testator's estate. The transferred assets are not  
19 subject to taxes, debts, or charges enforceable against the testator's estate to any  
20 greater extent than if the proceeds were payable to a beneficiary other than the  
21 testator's estate.

22 **SECTION 291.** 853.61 (2) (a) of the statutes is amended to read:

23 853.61 (2) (a) In addition to any powers conferred upon trustees by law, the  
24 trustee shall have all the powers listed in s. ~~701.16~~ ss. 701.0815 and 701.0816.

1           **SECTION 292.** 854.13 (1) (c), (2) (a) 2. and (d), (4) (e), (5) (b), (7) (a) and (10) (a)  
2 of the statutes are amended to read:

3           854.13 (1) (c) “Power of appointment” has the meaning given in s. 702.01 (4)  
4 702.02 (6).

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

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

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

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

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

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

23           **SECTION 293.** 854.23 (5) (b) of the statutes is amended to read:

24           854.23 (5) (b) Notwithstanding sub. (2), in addition to the protections afforded  
25 a financial institution under ss. ~~701.19 (11)~~ 701.1012 and 710.05 and chs. 112 and

1 705 a financial institution is not liable for having transferred an account to a  
2 beneficiary designated in a governing instrument who, under this chapter, is not  
3 entitled to the account, or for having taken any other action in reliance on the  
4 beneficiary's apparent entitlement under the terms of a governing instrument,  
5 regardless of whether the financial institution received written notice of a claimed  
6 lack of entitlement under this chapter.

7 **SECTION 294.** 859.18 (5) (a) of the statutes is amended to read:

8 859.18 (5) (a) The availability of a trust described under s. ~~701.07 (3)~~ 701.0505  
9 (1) is subject to s. ~~701.07 (3)~~ 701.0505 (1).

10 **SECTION 295.** 859.18 (5) (b) of the statutes is amended to read:

11 859.18 (5) (b) The availability of a spendthrift trust described under s. ~~701.06~~  
12 subch. V of ch. 701 is subject to s. ~~701.06 subch. V of ch. 701~~.

13 **SECTION 296.** 861.015 (2) of the statutes is amended to read:

14 861.015 (2) For purposes of this section, property subject to a directive is valued  
15 by its clear market value on the date of the decedent's death. Satisfaction of the  
16 nonholding spouse's marital property interest in the property subject to the directive  
17 shall be based on that value, plus any income from the property subject to the  
18 directive after the death of the decedent and before satisfaction. For purposes of  
19 determining the income from the property subject to a directive, such property shall  
20 be treated as a legacy or devise of property other than money under s. ~~701.20~~  
21 701.1115.

22 **SECTION 297.** 861.11 (5) (b) of the statutes is amended to read:

23 861.11 (5) (b) Notwithstanding sub. (2), in addition to the protections afforded  
24 a financial institution under ss. ~~701.19 (11)~~ 701.1012 and 710.05 and chs. 112 and  
25 705 a financial institution is not liable for having transferred an account included

1 in the augmented deferred marital property estate under s. 861.03 to a beneficiary  
2 designated in a governing instrument, or for having taken any other action in  
3 reliance on the beneficiary's apparent entitlement under the terms of a governing  
4 instrument, regardless of whether the financial institution received written notice  
5 of an intent to file, or the filing of, a petition for the deferred marital property elective  
6 share amount.

7 **SECTION 298.** 865.08 (6) of the statutes is amended to read:

8 865.08 (6) If the will of the decedent provides for a testamentary trust, letters  
9 of trust shall be issued by the probate registrar to the trustee upon admission of the  
10 will to informal probate at the same time that letters are granted to the personal  
11 representative. The probate registrar shall determine if bond shall be required and,  
12 if so, the amount thereof, and for such purpose the probate registrar shall have the  
13 authority granted to the court by, and shall proceed pursuant to s. ~~701.16 (2)~~  
14 701.0702. Thereafter, the trustee shall continue to be interested in the estate, and  
15 beneficiaries of the testamentary trust shall cease to be interested in the estate  
16 except under s. 851.21 (3). The trust shall be administered under supervision of the  
17 court under ch. 701.

18 **SECTION 299.** 867.03 (2g) (a) of the statutes, as affected by 2013 Wisconsin Act  
19 20, is amended to read:

20 867.03 (2g) (a) By accepting the decedent's property under this section the heir,  
21 trustee, or guardian assumes a duty to apply the property transferred for the  
22 payment of obligations according to priorities established under s. 859.25 and to  
23 distribute any balance to those persons designated in the appropriate governing  
24 instrument, as defined in s. 854.01, of the decedent or if there is no governing  
25 instrument, according to the rules of intestate succession under ch. 852, subject to

1 par. (b). An heir or guardian may publish a notice to creditors in the same manner  
2 and with the same effect as a trustee under s. ~~701.065~~ 701.0605. This paragraph does  
3 not prohibit any appropriate person from requesting administration of the  
4 decedent's estate under s. 856.07 or ch. 865.

5 **SECTION 300.** 879.03 (2) (c) of the statutes is amended to read:

6 879.03 (2) (c) The attorney general where a charitable trust, as defined in s.  
7 ~~701.01 (2)~~ 701.0103 (4), is involved, and in all cases mentioned in s. 852.01 (3).

8 **SECTION 301.** 879.47 of the statutes is renumbered 879.47 (1) and amended to  
9 read:

10 879.47 (1) The attorney for any person desiring to file any paper in court is  
11 responsible for the preparation of the paper. Except as provided in s. ~~701.16 (4) (d)~~  
12 sub. (2), all papers shall be legibly written on substantial paper and shall state the  
13 title of the proceeding in which they are filed and the character of the paper. Either  
14 uniform forms or computer-generated forms, if the forms exactly recreate the  
15 original forms in wording, format and substance, shall be used. If papers are not so  
16 written or if uniform forms or computer-generated forms that exactly recreate the  
17 original forms in wording, format and substance are not used, the court may refuse  
18 to receive and file them. The court shall show on all papers the date of their filing.

19 **SECTION 302.** 881.01 (1) (title) of the statutes is repealed and recreated to read:

20 881.01 (1) (title) DEFINITIONS.

21 **SECTION 303.** 881.01 (1) (a) of the statutes is renumbered 881.01 (1) (a) (intro.)  
22 and amended to read:

23 881.01 (1) (a) (intro.) “Beneficiary,” ~~with respect to a guardianship of the~~  
24 ~~estate,”~~ means any of the following:

1           3. With respect to guardianship of the estate, a ward for whom a guardian of  
2 the estate has been appointed and, ~~with respect to a conservator~~, means.

3           4. With respect to a conservatorship, a person for whose estate a conservator  
4 has been appointed.

5           **SECTION 304.** 881.01 (1) (a) 1. and 2. of the statutes are created to read:

6           881.01 (1) (a) 1. With respect to a will, a beneficiary, as defined in s. 851.03.

7           2. With respect to a trust, a beneficiary, as defined in s. 701.0103 (3).

8           **SECTION 305.** 881.01 (1) (b) of the statutes is amended to read:

9           881.01 (1) (b) “Fiduciary” means a personal representative, trustee,  
10 conservator, ~~or guardian of the estate~~, a directing party, as defined in s. 701.0103 (7),  
11 who has the power to direct the trustee’s investment decisions, a trust protector, as  
12 defined in s. 701.0103 (31), who has a power over the investment of trust assets, and  
13 any other person to whom a court appoints a power over the investment of the assets  
14 of a decedent’s estate, a trust, a conservatorship, or a guardianship of the estate.

15           **SECTION 306.** 881.01 (4) of the statutes is renumbered 881.01 (4) (a) and  
16 amended to read:

17           881.01 (4) (a) *General rule.* A fiduciary shall diversify investments unless the  
18 fiduciary reasonably determines that, because of special circumstances, the  
19 purposes of the estate, trust, conservatorship, or guardianship are better served  
20 without diversifying.

21           **SECTION 307.** 881.01 (4) (b) of the statutes is created to read:

22           881.01 (4) (b) *Special rule for assets collected by a fiduciary.* 1. For purposes  
23 of this paragraph, an “asset that is collected by the fiduciary” means an asset that  
24 the fiduciary did not exercise discretion over to acquire or purchase.



2013-2014 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-0010/P3  
FFK:.....

21-1  
INS 19-14

1 (b) Without considering the existence or exercise of a<sup>✓</sup> power of appointment,  
2 other than a power of appointment that has been irrevocably exercised and notice of  
3 the exercise has been given to the trustee, would be any of the following:

4 1. A distributee or permissible distributee of trust income or principal if the  
5 interests of the distributees described in par. (a)<sup>✓</sup> terminated on that date without  
6 causing the trust to terminate.

7 2. A distributee or permissible distributee of trust income or principal if the  
8 trust terminated on that date.<sup>✓</sup>

END INS 19-14

21-1

"/P3" → "/1"

**Knepp, Fern**

**From:** victor.schultz@bmo.com  
**Sent:** Wednesday, September 18, 2013 5:21 PM  
**To:** Knepp, Fern  
**Subject:** RE: Wisconsin UTC, 702.17(3)

My initial reaction is that this looks good. I will read and confirm this tomorrow morning.

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

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From: "Knepp, Fern" <Fern.Knepp@legis.wisconsin.gov>  
To: Victor Schultz/MICorporation,  
Date: 09/18/2013 04:17 PM  
Subject: RE: Wisconsin UTC, 702.17(3)

A few quick questions:

- In the analysis, on page 8, do you think it is important to mention that interested persons can also appoint a directed party or trust protector? Also, on p7, the second paragraph under subchapter 6, last line, would it be ok to say "When the settlor dies, the trust is no longer revocable and the trustee owes its duties to the beneficiaries" instead of "...the duties of the trustee shift to the beneficiary?" Upon rereading the paragraph, I thought the last phrase could be easily misread.
- At p10, replacing the last sentence of the paragraph on powers of appointment:  
"In general, upon the death of the donee, a creditor can reach property that is subject to a general power of appointment, whether or not the donee exercised the general power of appointment. However, under the bill, a creditor may not reach property subject to a general power of appointment that the donee has not exercised at the time of the donee's death if the donee or the donee's spouse is the donor of the general power of appointment."  
Does this sound ok for the description of the changes to powers of appointment?
- In looking at 702.17 (3) (b) again, I was wondering if it would be ok to make the provision more active? It would read:  
If the donee fails to exercise a general power of appointment, in whole or in part, that the donee has at the time of the donee's death and neither the donee nor the donee's spouse is the donor of the power, a creditor of the donee may not reach an interest subject to the power, to the extent the power was not exercised.

Finally, here is some language we discussed in our phone conversation:

- 701.0409 (3) A trust authorized by this section may be enforced by a trust protector with the power to enforce the trust. If there is not a trust protector with the power to enforce the trust, a court may appoint a trust protector with the power to enforce the trust under s. 701.0808.
- 701.0408 (8) (g) To the extent a directing party or trust protector has the power to invade the principal of a first trust, as described in sub.(2), this section applies to the directing party or trust protector as if the directing party or trust protector is a trustee.

Any thoughts or comments?

Thanks,  
Fern

**From:** victor.schultz@bmo.com [mailto:victor.schultz@bmo.com]  
**Sent:** Wednesday, September 18, 2013 10:21 AM  
**To:** Knepp, Fern  
**Cc:** rsn@wbb-law.com; Wiensch, Adam J.  
**Subject:** RE: Wisconsin UTC, 702.17(3)

WBA indicated to me they would approve this revised language. Please proceed with inserting the revised language in the draft. This may also require a revision to the LRB analysis. Let me know if you need any help with that language. I assume this completes the information that you need from us to finalize your draft #5 and send it to editing. We look forward to receiving what we hope to be the final draft by the end of the week or early next week.

Randy and Adam - I will communicate this revised language to the Study Group.

---

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Phone (414) 287-7019 / Cell (262) 844-8756 / Toll free 800-342-2265  
email: [victor.schultz@bmo.com](mailto:victor.schultz@bmo.com)

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From: "Knepp, Fern" <Fern.Knepp@legis.wisconsin.gov>  
To: Victor Schultz/MICorporation,  
Date: 09/18/2013 08:22 AM  
Subject: RE: Wisconsin UTC, 702.17(3)

Yes, that works for me. Do you want me to go ahead with the draft or are you still running this by the banking group?

**From:** victor.schultz@bmo.com [mailto:victor.schultz@bmo.com]  
**Sent:** Tuesday, September 17, 2013 5:24 PM  
**To:** Knepp, Fern  
**Cc:** rsn@wbb-law.com; Wiensch, Adam J.  
**Subject:** RE: Wisconsin UTC, 702.17(3)

Fern, here is what we are proposing. Does this work for you?

702.17 (3) At death of the donee. (a) If Except as provided in par.(b), if the donee has at the time of his or her the donee's death a general power of appointment the kinds specified in sub. (1), 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 or filed with and allowed by the trustee of a revocable trust but not paid because the assets of the estate or revocable trust are insufficient.

(b) If the donee fails to exercise a general power of appointment, in whole or in part, that the donee has at the time of the donee's death and neither the donee nor the donee's spouse is the donor of the power, the interest subject to the power, to the extent the power was not exercised, may not be reached by a creditor of the donee.

---

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## Knepp, Fern

---

**From:** Knepp, Fern  
**Sent:** Tuesday, September 17, 2013 1:56 PM  
**To:** 'victor.schultz@bmo.com'  
**Subject:** RE: Wisconsin UTC, latest LRB draft p. 52, lines 15, 16, and 17 (701.0418(3)(c))

Is the following consistent with your intent:

- (3) A trustee may not appoint assets to a 2<sup>nd</sup> trust under sub. (2) if any of the following apply:
- (c) The trustee has a beneficial interest in the first trust, unless all of the following apply:
1. The 2<sup>nd</sup> trust is a trust for an individual with a disability.
  2. The trustee's beneficial interest in the first trust is only as a remainder beneficiary.
  3. The trustee's beneficial interest in the 2<sup>nd</sup> trust is not greater than the trustee's beneficial interest in the first trust.

**From:** victor.schultz@bmo.com [mailto:victor.schultz@bmo.com]  
**Sent:** Monday, September 16, 2013 10:51 AM  
**To:** Knepp, Fern  
**Cc:** Halley, Philip J. PJH (5426); Wiensch, Adam J.  
**Subject:** Fw: Wisconsin UTC, latest LRB draft p. 52, lines 15, 16, and 17 (701.0418(3)(c))

Hi Fern - I know you were revising section 701.0418(3)(c) - here is some suggested language from Phil Halley. Let me know if you have any questions.

(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 and whose beneficial interest in the 2nd trust is no greater than that provided for in the first trust.

---

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Phone (414) 287-7019 / Cell (262) 844-8756 / Toll free 800-342-2265  
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----- Forwarded by Victor Schultz/MICorporation on 09/16/2013 10:48 AM -----

**From:** "Halley, Philip J. PJH (5426)" <PHALLEY@whdlaw.com>  
**To:** "'awiensch@foley.com' (awiensch@foley.com)" <awiensch@foley.com>, Victor Schultz/MICorporation,  
**Date:** 09/15/2013 01:16 PM  
**Subject:** Wisconsin UTC, latest LRB draft p. 52, lines 15, 16, and 17 (701.0418(3)(c))

---

Victor and Adam -

Per the discussion at our most recent meeting, following up on my comment on the subsection below, please see the change I suggested at the meeting, followed by what I think is a more refined version of the same idea:

p. 52, lines 15, 16, and 17 (701.0418(3)(c))

CURRENT

(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.

Proposed modification discussed at meeting:

(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 and in 2nd trust is as a remainder beneficiary.

A more refined version (the objective of which is to avoid potential tax problems and perhaps an implied authorization for self-dealing):

(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 and whose beneficial interest in the 2nd trust is no greater than that provided for in the first trust.

Please let me know if you have any questions or comments.

Phil

	<b>Philip J. Halley</b>
	Attorney
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	(414) 223-5000
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## Knepp, Fern

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**Sent:** Monday, September 16, 2013 10:51 AM  
**To:** Knepp, Fern  
**Cc:** Halley, Philip J. PJH (5426); Wiensch, Adam J.  
**Subject:** Fw: Wisconsin UTC, latest LRB draft p. 52, lines 15, 16, and 17 (701.0418(3)(c))

Hi Fern - I know you were revising section 701.0418(3)(c) - here is some suggested language from Phil Halley. Let me know if you have any questions.

(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 and whose beneficial interest in the 2nd trust is no greater than that provided for in the first trust.

---

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**Date:** 09/15/2013 01:16 PM  
**Subject:** Wisconsin UTC, latest LRB draft p. 52, lines 15, 16, and 17 (701.0418(3)(c))

---

Victor and Adam -

Per the discussion at our most recent meeting, following up on my comment on the subsection below, please see the change I suggested at the meeting, followed by what I think is a more refined version of the same idea:

p. 52, lines 15, 16, and 17 (701.0418(3)(c))

CURRENT

(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.

Proposed modification discussed at meeting:

(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 and in 2nd trust is as a remainder beneficiary.

A more refined version (the objective of which is to avoid potential tax problems and perhaps an implied authorization for self-dealing):

(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 and whose beneficial interest in the 2nd trust is no greater than that provided for in the first trust.

Please let me know if you have any questions or comments.

Phil

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PAGE 104 LINE 4

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

PAGE 104 LINE 14

(4) If a trust receives a marital deduction 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 may not take any action or have any power that may impair the availability of the marital deduction, but this does not require the trustee to make the election under section 2056 (b) (7), 2056A (a) (3), or 2523 (f) of the Internal Revenue Code.

Deleted: either

Deleted:

PAGE 120 LINE 21

(a) "Marital deduction trust" means a trust for which an election to qualify for a marital deduction under section 2056 (b) (7), 2056A (a) (3) or 2523 (f) of the Internal Revenue Code has been made or a trust that qualified for the marital deduction under other provisions of section 2056 or 2523 of the Internal Revenue Code.

Deleted: (b) (5)

Deleted: (e)

## Knepp, Fern

---

**From:** victor.schultz@bmo.com  
**Sent:** Thursday, September 12, 2013 5:15 PM  
**To:** Knepp, Fern  
**Cc:** Wiensch, Adam J.  
**Subject:** Requested changes to Wisconsin Trust Code draft #4

Fern, this confirms our telephone conversations where we asked you to consider the following changes when updating draft #4 and converting it to bill ready form. You indicated we may be able to get a draft that is bill ready as soon as next Wednesday, Sept 18.

You will notice in the list of changes that Fern is going to draft new language for issue ## 7, 12 and 17. Adam was going to provide relevant IRC statute cites for issue ## 33 and 35.

1. LRB analysis - pp. 4 - 10 - please consider the changes emailed to you via PDF.
2. Page 14 response to comment - your change to s. 445.125(4)(bn) is ok.
3. Page 22, revise definition of trust protector - "Trust protector" means a person who, in a trust instrument or court order, is granted a power, other than a power of appointment, in a capacity other than as a trustee or a directing party.
4. Page 24, response to comment - your change to s. 701.0105(2)(e) is ok.
5. Page 26, response to comment - your changes to s. 701.0108(1) and (2) are ok.
6. Page 30, line 23 - delete the word "necessary".
7. Pages 42 - 43, s. 701.0409(3) - please revise this section to update the intent that a trust authorized by this section either be enforced by a trust protector with the power to enforce the trust or by a person appointed by the court. (Fern to come up with proposed language.)
8. Page 44, line 5 - replace "a government program" with "public assistance". In response to your comment, the elder law attorneys stated their is a distinction between public assistance and the definition of a trust for an individual with a disability.
9. Page 45, response to comment - your changes are consistent with our intent.
10. Page 50, lines 1 and 2 - change "any" to "each".
11. Page 51, line 13 - insert "or any other person" after 2nd trust.
12. Page 52, s. 701.0418(3)(c), lines 15 - 17 - we wish to modify this section to say that a trustee may not appoint assets to a 2nd trust if the trustee has a beneficial interest in the first trust unless the 2nd trust is for an individual with a disability and the trustee's only beneficial interest in the first or 2nd trust is as a remainder beneficiary. (Fern to draft proposed language.)  
OK
13. Page 53, line 15 - delete "the interests of".
14. Page 53, lines 24 and 25 - delete "directed trust property,"
15. Page 55 - lines 2 and 3 - change "benefits under a government program." to "public assistance."
16. Page 58, lines 17 - 18 - Delete the sentence: "This paragraph applies regardless of whether the trustee proceeds under sub. (5)(b) or (c)."

17. Page 59, s. 701.0418(8)(g) and related comment - we intend that the decanting statute section apply to directing parties and to trust protectors as if they were the trustee only to the extent that the directing party or trust protector has a power to invade trust principal as described in s. 701.0418(2). (Fern to draft proposed language revising this subsection.)

18. Page 64, lines 2 and 3 - change "named in the initial trust instrument" to "designated in the trust instrument".

19. Page 68 - response to comment - your change is ok.

\* 20. Pages 71, 73 and 79 - we see a reference to s. 701.0604 and 701.0606, but no reference to 701.0605. Current section 701.065 was renumbered 701.0508.

Do we need to correct the numbering? [Note: see #22 below.]

No

0604

0602

0603 0604

0605  
0606

21. Page 75, line 3 - change "temporary" to "temporarily".

22. Section 701.0606, pages 70 - 81 - this section tracks current law and deals with whether contributions to a trust are valid depending upon on the timing of the execution of the trust and the document purporting to transfer funds to the trust. This section should apply to all trusts, rather than just revocable trusts. Accordingly, change the reference in this section from "revocable trust" to "trust" and move this section to the end of subchapter IV.

23. Page 86, line 2 - after the word "order," insert "or the interested persons, in a nonjudicial settlement agreement,".

23. Page 86, line 7 - replace "specified action" with "direction or lack of direction from the directing party."

24. Page 87, response to comment - your revised language is ok.

25. Page 87, line 13 - please add a new subsection to s. 701.0808 as sub.(7) that is similar to s. 701.0818(10) on p. 103 regarding payment or reimbursement of attorney fees and costs.

26. Page 87, s. 701.0808(8) - we discussed whether this subsection was necessary in light of the changes made to s. 701.0202 and I believe we concluded that while the subsection is probably not necessary, it is helpful to include this subsection and a similar subsection in 701.0818(12). In line 16, insert a comma after the word "state".

27. Page 88, lines 14 and 15 - change "a former trustee, a directing party, or a trust protector." to "a trustee or former trustee or a trust protector or former trust protector."

28. Page 98, line 3 - after the word "order," insert "or the interested persons, in a nonjudicial settlement agreement,".

29. Page 100, line 4 - change the title of this subsection to "TRUST PROTECTOR DUTIES".

30. Page 100, line 11- change "any" to "a".

31. Page 102, line 12 - insert the word "serious" before breach of a duty.

32. Page 104, response to comment - we would like to include the language in subsection (b) as drafted.

33. Page 104, lines 6 and 19 - insert IRC section 2056A into the list of IRC sections. (Adam will confirm the IRC cites to be used in lines 6 and 19.)

34. Page 120, response to comment - your change to create s. 701.1106(6) is ok.

35. Page 120, line 22 and page 121, line 2 - insert IRC section 2056A into the list of IRC sections. (Adam will confirm the IRC cites to be used in lines 22 and 2.)

36. Page 127, response to comment - your language is ok.

37. Page 146, line 1 - it appears there is no subsection 701.1123(3)(a) and this subsection should be cited as 701.1123(3).

38. Page 153, line 10 - insert the word "a" before the word "trust".

39. Page 156, line 4 - insert the word "or" before "a trust protector".

40. Page 161, line 16 - replace the word "power" with "special power of appointment".

41. Page 162 and 163 - revise subsection (3) as follows and insert a new subsection (6) as follows:

702.17(3) AT DEATH OF THE DONEE. If the donee exercises a general power of appointment over all or any portion of an interest subject to the general power of appointment at the time of the donee's death, any creditor of the donee or the donee's estate may reach that portion of the interest over which the donee has exercised the general power of appointment, to the extent that the claim of the creditor has been filed and allowed in the donee's estate or trust but not paid because the assets of the estate or trust are insufficient. To the extent the donee fails to exercise a general power of appointment over an interest that is subject to the general power of appointment at death, the interest subject to the unexercised power of appointment is exempt from a claim of a creditor of the donee or the donee's estate.

702.17(6) GENERAL POLICY: SPECIAL POWER OF APPOINTMENT. Property subject to a special power of appointment is exempt from a claim of a creditor of the donee or the donee's estate.

42. Page 164, lines 9-11 - delete the reference to "living" and change to statute cite to s. 701.0419 (if this is the newly renumbered s. 701.0606 on page 79).

43. Page 170, line 12 - insert "exercisable in a fiduciary capacity" after the word "power".

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## Knepp, Fern

---

**From:** victor.schultz@bmo.com  
**Sent:** Wednesday, September 11, 2013 6:34 PM  
**To:** Knepp, Fern  
**Cc:** Wiensch, Adam J.  
**Subject:** Requested changes to section 702.17

In addition to the change we discussed to s. 702.17(3) described below, we would like to add a new subsection -perhaps as s. 702.17(6)- as follows:

"702.17(6) GENERAL POLICY: SPECIAL POWER OF APPOINTMENT. Property subject to a special power of appointment is exempt from a claim of a creditor of the donee or the donee's estate."

702.17(3) AT DEATH OF THE DONEE. If the donee exercises a general power of appointment over all or any portion of an interest subject to the general power of appointment at the time of the donee's death, any creditor of the donee or the donee's estate may reach that portion of the interest over which the donee has exercised the general power of appointment, to the extent that the claim of the creditor has been filed and allowed in the donee's estate or trust but not paid because the assets of the estate or trust are insufficient. To the extent the donee fails to exercise a general power of appointment over an interest that is subject to the general power of appointment at death, the interest subject to the unexercised power of appointment is exempt from a claim of a creditor of the donee or the donee's estate.

Example: This change in the law is a slight expansion of spendthrift protection that might apply to an irrevocable trust that includes a general power of appointment. The most common use of a general power of appointment is for a trust for descendants that might otherwise be subject to a generation skipping transfer tax upon the death of a child. For example, parent may pass the residue of their estate above the estate tax exemption amount to an irrevocable trust for the benefit of a child and descendants. Because estate planners do not want the trust to be subject to the generation skipping transfer tax at the death of the child, planners often include a general power of appointment within the trust. This will make the trust taxable in the child's estate and will avoid the generation skipping transfer tax. During the life of the child, the assets of the trust are protected from claims of a creditor due to a spendthrift provision that is commonly included in the trust. The proposed change in the law will extend the spendthrift protection at the death of the child if the child does not exercise the general power of appointment. Under current law, creditors of the child may be able to reach the assets of the trust at death, whether or not the child exercised the power of appointment.

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email: [victor.schultz@bmo.com](mailto:victor.schultz@bmo.com)

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## Knepp, Fern

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**From:** victor.schultz@bmo.com  
**Sent:** Wednesday, September 11, 2013 11:49 AM  
**To:** Knepp, Fern  
**Cc:** Wiensch, Adam J.  
**Subject:** Fw: Wisconsin Trust Code

Hi Fern - for our phone call at 2PM, below is the most substantive change we will propose to draft #4. The other changes are mostly wording changes that we can discuss over the phone. I will call you at 2PM and then conference in Adam.

---

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

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----- Forwarded by Victor Schultz/MICorporation on 09/11/2013 11:46 AM -----

**From:** "Randy S. Nelson" <RSN@wbb-law.com>  
**To:** Victor Schultz/MICorporation,  
**Date:** 09/10/2013 06:41 PM  
**Subject:** RE: Wisconsin Trust Code

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Victor, Great. Thanks. Randy

Randy S. Nelson  
Weiss Berzowski Brady LLP  
Direct Dial 414-270-2507  
Fax 414-276-0458

\*\*\*\*\*  
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**From:** victor.schultz@bmo.com [<mailto:victor.schultz@bmo.com>]  
**Sent:** Tuesday, September 10, 2013 6:38 PM  
**To:** Mike Semmann  
**Cc:** Randy S. Nelson; Wiensch, Adam J.  
**Subject:** RE: Wisconsin Trust Code

Mike this is the language we are proposing. I am not sure if my redlining shows up when I send the email so I am just showing the new language. Let me know if you need me to send a redlined word version.

702.17(3) AT DEATH OF THE DONEE. If the donee exercises a general power of appointment over all or any portion of an interest subject to the general power of appointment at the time of the donee's death, any creditor of the donee or the donee's estate may reach that portion of the interest over which the donee has exercised the general power of

appointment, to the extent that the claim of the creditor has been filed and allowed in the donee's estate or trust but not paid because the assets of the estate or trust are insufficient. To the extent the donee fails to exercise a general power of appointment over an interest that is subject to the general power of appointment at death, the interest subject to the unexercised power of appointment is exempt from a claim of a creditor of the donee or the donee's estate.

Example: This change in the law is a slight expansion of spendthrift protection that might apply to an irrevocable trust that includes a general power of appointment. The most common use of a general power of appointment is for a trust for descendants that might otherwise be subject to a generation skipping transfer tax upon the death of a child. For example, parent may pass the residue of their estate above the estate tax exemption amount to an irrevocable trust for the benefit of a child and descendants. Because estate planners do not want the trust to be subject to the generation skipping transfer tax at the death of the child, planners often include a general power of appointment within the trust. This will make the trust taxable in the child's estate and will avoid the generation skipping transfer tax. During the life of the child, the assets of the trust are protected from claims of a creditor due to a spendthrift provision that is commonly included in the trust. The proposed change in the law will extend the spendthrift protection at the death of the child if the child does not exercise the general power of appointment. Under current law, creditors of the child may be able to reach the assets of the trust at death, whether or not the child exercised the power of appointment.

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1           2. and 881.01 (4) (b) of the statutes; **relating to:** the laws of trusts, the Uniform  
2           Trust Code, the Uniform Principal and Income Act, and powers of appointment.

*Analysis by the Legislative Reference Bureau*

applies

subject is  
"set"

This bill replaces current law related to trusts with the Wisconsin Trust Code (Code), a modified version of the Uniform Trust Code, as amended in 2005 (UTC). The Code is primarily a set of basic default rules that apply to certain trusts in this state. With some exceptions, the terms of a trust may override or modify the Code's default rules. There are, however, some mandatory provisions in the Code that may not be overridden or modified by the terms of a trust, including the requirements for creating a trust, the duty of a trustee to act in good faith, the effect of a spendthrift provision, limits on provisions that limit a trustee's liability, periods of limitation for commencing a judicial proceeding related to a trust, and the power of the court to take certain actions. The Code also includes default rules that are not included in the UTC, including rules related to the trustee's power to appoint assets to another trust, trust protectors, directed trusts, and life insurance contracts owned by trusts.

In addition to creating the Code, the bill clarifies the definitions of "general power of appointment" and "special power of appointment" and clarifies when a creditor can reach assets that are subject to a power of appointment. The bill also extends the prudent investor rule to directing parties and trust protectors who have a power over the investment of a trust, and clarifies rules relating to a trustee's retention of securities received by a trustee. A further explanation of these changes is provided after the overview of the Code.

Under this bill, the 11 articles of the UTC are created as subchapters of the Code. Two differences in the structure of the UTC and the Code are: 1) the Uniform Prudent Investor Act, as adopted in this state, is referenced in the Code but otherwise remains outside of the Code; and 2) the Uniform Principal and Income Act, which was previously adopted in this state, is included as subchapter 11 of the Code, moving the miscellaneous provisions of the Code to subchapter 12.

The following is an overview of each subchapter of the Code; as created under the bill:

**Subchapter 1: General Provisions and Definitions**

Subchapter 1 provides definitions for terms that are used throughout the Code, including a number of new terms and definitions. The new terms introduced in subchapter 1 include "qualified beneficiary," "directed trust property," and "trust protector." Under the Code, a "qualified beneficiary" is a person who is a current beneficiary of trust income or principal, a person who would be a beneficiary of trust income or principal if the current beneficiaries' interests in the trust terminate, or a person who would be a beneficiary if the trust terminates. "Directed trust property" is defined as property that is invested or managed by a directing party and for which the trustee has no investment or management responsibility. A "trust protector" is defined as a person who is given a specified power over the trust in a capacity other

"of" is  
superfluous  
here

than as a trustee or a directing party. The terms "directed trust property," "directing party," and "trust protector" are not included in the UTC.

In addition to providing definitions for the Code, subchapter 1 exempts certain types of trusts from the Code, lists the provisions of the Code that may not be overridden by the terms of a trust, incorporates the common law of trusts into the Code, provides procedures for determining and transferring the principal place of administration for a trust, and provides methods for giving and waiving notice. This subchapter also provides that interested persons may enter into a nonjudicial settlement agreement to resolve disputes related to a trust to the extent that a court could approve the terms of the nonjudicial settlement agreement.

**Subchapter 2: Judicial Proceedings**

Subchapter 2 addresses the role of the court in administering a trust. Under current law, a testamentary trust is subject to continuing court supervision. Under the Code, a court may intervene in the administration of a trust to the extent that its jurisdiction is invoked by an interested person or as otherwise provided by law. However, a trust is not subject to continuing judicial supervision unless ordered by the court in response to a petition requesting the supervision. This subchapter also addresses procedural issues such as personal jurisdiction, subject jurisdiction, and venue for judicial proceedings related to trusts.

**Subchapter 3: Representation**

Subchapter 3 allows a person to be represented and bound by another person for certain purposes. Under the Code, notice, information, accountings, or reports given to a person who has the power to represent and bind another person have the same effect as if the notice, information, accountings, or reports were given to the represented person. A person may be represented by a fiduciary, a parent, or by a representative chosen by the trustee or a court. A trustee is not required to provide this information to a beneficiary if the trustee provides the information to the beneficiary's representative. This subchapter also specifically allows a minor, incapacitated person, unborn individual, or a person whose identity is not known to be represented by and legally bound by a person who has a substantially identical interest with respect to the particular question or dispute to the extent there is no conflict of interest in that representation.

**Subchapter 4: Creation, Validity, Modification, and Termination of a Trust**

Subchapter 4 establishes the requirements for creating, modifying, and terminating a trust. Generally, the Code provides that a trust is created when a person transfers property to a trustee with the intent to create a trust relationship. This subchapter expands upon the common law by specifically validating trusts for animals and trusts for certain noncharitable purposes. This subchapter also recognizes oral trusts if the terms of the trust are established by clear and convincing evidence.

This subchapter provides default rules for when a trust may be modified or terminated. For example, under the Code, a noncharitable irrevocable trust may be modified or terminated without court approval with the consent of the settlor and all of the beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. Additionally, for purposes of terminating a trust, the

Wade Per Victor

"subject jurisdiction not 'subject matter juris.'?"

if we want these head to match exactly, delete "a"

Code increases the value of what qualifies as an uneconomic trust to a trust with a value of less than \$100,000, as adjusted for inflation. Upon providing notice to the qualified beneficiaries, every trust protector, every directing party, and the settlor, if living, the trustee of an uneconomic trust may terminate the trust without court approval.

Under this subchapter, a court is directed to (liberally apply) the doctrine of cy pres to a charitable trust if the charitable purpose identified in the trust becomes unlawful, impracticable, impossible, or wasteful. Under the doctrine of cy pres, a court may substitute an alternative charitable purpose for a purpose that is unlawful, impracticable, impossible, or wasteful. The Code preserves the requirement under current law that, when applying the doctrine of cy pres, a court must consider the community needs and charitable interest of the settlor in determining an alternative plan for disposition of the trust property.

Finally, this subchapter includes a concept not addressed in the UTC, which is the authority of a trustee of an irrevocable trust to appoint trust assets to the trustee of another trust (a second trust) under certain circumstances. This procedure is commonly referred to as decanting. Under the Code, subject to certain requirements, a trustee who has the power to invade trust principal for the benefit of an income beneficiary may appoint trust property to a second trust provided that the appointment does not reduce any fixed income, annuity, or unitrust interest of the beneficiary. If a trustee's power to invade trust principal under the first trust is limited by a standard, the second trust may not grant the trustee a broader power to invade trust income or principal. Also, if the trustee's power to invade the principal of the first trust is not limited by a standard, the beneficiaries of the second trust do not have to include all of the beneficiaries of the first trust; otherwise, the beneficiaries of both trusts must be the same. A trustee may appoint assets to a second trust with or without court approval by providing notice to the qualified beneficiaries, every trust protector, every directing party, and the settlor, if living.

income  
or ?

#### ***Subchapter 5: Creditor's Claim; Spendthrift and Discretionary Trusts***

Subchapter 5 addresses the validity of a spendthrift provision and the rights of a creditor of a settlor or a beneficiary to reach trust assets. The Code defines a "spendthrift provision" as a provision that restrains either or both of the voluntary or involuntary transfer of a beneficiary's interest in a trust. In general, the Code preserves current law related to spendthrift provisions and creditors' rights, including exceptions for claims for child support and public support. The Code also preserves current law that allows a trustee to limit the claims of a creditor of a settlor upon the settlor's death by providing or publishing notice to the creditors and current law that, upon implementation, allows the Department of Health Services to recover medical assistance payments from certain trusts. Thus, the Code's treatment of spendthrift provisions and creditor's rights differs from the UTC.

Under the Code, a creditor may reach the assets of a revocable trust during the lifetime of the settlor. If the trust is a self-settled irrevocable trust, a creditor may reach the maximum amount that can be distributed to or for the settlor's benefit presently, or in the future.

currently

Subchapter 5 also specifies that a beneficiary's use of real or tangible property owned by a trust does not subject the property to the claims of the beneficiary's creditors. The subchapter treats trusts that give the trustee absolute discretion in making distributions and trusts that require the trustee to make distributions for purposes of support in a similar manner. Under the Code, a beneficiary's interest in a trust that is subject to a trustee's discretion does not constitute an interest in property.

#### ***Subchapter 6: Revocable Trusts***

Subchapter 6 addresses "revocable trusts," which the Code defines as trusts that may be revoked by a settlor without the consent of the trustee or an adverse party. Property held in a revocable trust reverts back to the settlor if the trust is revoked. The Code treats a revocable trust as a will substitute and therefore provides that the capacity required to create or modify a revocable trust is the same as the capacity required to create or modify a will. Under the Code, a trust is revocable unless the trust instrument expressly provides that it is irrevocable. This reverses the presumption under current law and applies only to trusts that are created after the effective date of the bill.

This subchapter provides that, while a trust is revocable, the trustee owes its duties exclusively to the settlor. Under the Code, a settlor's powers of revocation may be exercised by a properly authorized agent, or by a conservator or guardian with court approval. Therefore, a trust may remain revocable, even for an incapacitated settlor, until the settlor's death. When the settlor dies, the trust is no longer revocable and the duties of the trustee shift to the beneficiaries.

Finally, subchapter 6 limits the period during which a person may challenge the validity of a revocable trust. Under the Code, to challenge the validity of a revocable trust, a person must commence a judicial proceeding no later one year after the settlor's death or four months after the trustee sends the person a copy of the trust and notice of the time allowed for commencing a proceeding, whichever occurs first.

#### ***Subchapter 7: Office of Trustee***

Subchapter 7 specifies numerous default procedural rules that apply to the office of the trustee. Subchapter 7 includes rules related to acceptance or declination of a trusteeship, requiring a bond, the rights and obligations of cotrustees, the vacancy and appointment of successor trustees, the resignation of a trustee, the grounds for removing a trustee, duties of a former trustee to deliver trust property, trustee compensation, and the reimbursement of trustee expenses. Subchapter 7 also provides that property is properly transferred to a trust by titling the property in the name of the trustee. However, property titled in the name of the trust also places legal title in the name of the trustee.

#### ***Subchapter 8: Duties and Powers of the Trustee,<sup>S</sup> Directing Parties, and Trust Protectors<sup>A</sup>***

Subchapter 8 sets forth the fiduciary obligations of a trustee, except for those fiduciary duties included in the Uniform Prudent Investor Act. Under the Code, a trustee must administer the trust in good faith, solely in the interests of the beneficiaries, impartially, and prudently, incurring only reasonable costs and using any special skills or expertise the trustee may have. A trustee must take reasonable

steps to control and protect trust property, to maintain adequate records that clearly identify separate trust interests, to enforce claims of the trust and defend claims against the trust, to collect trust property and to redress breaches of former trustees, and to exercise ~~its~~<sup>his</sup> discretion in good faith and in accordance with the terms of the trust. A trustee has a duty to inform and report and must provide requested trust accountings to certain beneficiaries.

Under the Code, a trustee may delegate certain duties and powers but must exercise reasonable care, skill, and caution when selecting an agent, establishing the scope and terms of the delegation, and periodically reviewing the agent's actions. An agent who accepts a delegation of duty or power from a trustee has a duty to exercise reasonable care to comply with the terms of the delegation. A trustee who properly delegates to an agent is not liable to the beneficiaries for the agent's actions.

Subchapter 8 provides that a trustee has broad power to achieve proper investment, management, and distribution of the trust property and may exercise all the powers that an unmarried, competent owner would have over individually owned property. This subchapter also enumerates specific powers that a trustee has absent contrary provisions in the trust instrument, and requires a trustee to make certain presumptions related to certain tax objectives, including presumptions concerning marital deduction transfers that are not included in the UTC.

As an addition to the UTC, the Code specifically allows a settlor or court to appoint directing parties and trust protectors. The Code defines "directing party" as a person who is granted a power, in a capacity other than as a trustee or a trust protector, to make or to direct the trustee to make investment and distribution decisions. A directing party is a fiduciary and is obligated to act in good faith, consistent with the terms and purposes of the trust, and the interests of the beneficiaries. A trustee has no duty to monitor the directing party, and a trustee who follows a directing party's directions is not liable for any resulting losses, unless the loss is a result of the trustee's willful misconduct.

Under the Code, a "trust protector" is a person who is granted certain powers over the trust, the trustee, or trust property in a capacity other than as a trustee or a directing party. A settlor or court may specify whether a power granted to a trust protector must be exercised in a fiduciary or nonfiduciary capacity. If a settlor does not specify the legal capacity in which a trust protector is to exercise a particular power, the Code provides default rules for determining the capacity for specific powers. A trustee has no duty to monitor the actions of a trust protector and, subject to certain exceptions, is not liable for taking actions consistent with the actions of the trust protector.

### ***Subchapter 9: Investment Management of Trusts***

Subchapter 9 provides that, subject to certain exceptions, the investment management of trust property is governed by the Uniform Prudent Investor Act, which has been adopted in this state. As an exception to this general rule, a trustee who has no power over directed trust property does not have a duty to monitor the conduct or investment performance of the directing party.

The Code also limits the application of the Uniform Prudent Investor Act to life insurance trusts. If the principal purpose of a trust is to hold a life insurance

for?  
it's easy to  
misread  
this  
sentence

contract, a trustee does not have a duty to determine whether the life insurance contract is, or remains, a proper investment. This change applies to all trusts executed after the effective date of the bill and to trusts executed before that date if the trustee provides a notice to the qualified beneficiaries.

***Subchapter 10: Liability of Trustees and Rights of Persons Dealing with the Trustee***

Subchapter 10 identifies the remedies for breach of trust, provides how damages are determined for a breach of trust, reaffirms the court's power to award costs and attorney fees, specifies potential defenses, and addresses trustee relations with and liability to persons other than beneficiaries. Under the Code, a trust instrument may not waive or vary the trustee's duty of good faith or relieve the trustee of liability for reckless indifference. The Code also provides that a term in a trust that relieves a trustee of liability is not enforceable if the inclusion of the term is the result of an abuse of the settlor's confidential relationship with the trustee.

Generally, under the Code, a beneficiary must commence a proceeding against a trustee for breach of trust within five years after the first to occur of the following: the termination of the trust, the termination of the beneficiary's interest, or the removal, resignation, or death of the trustee. However, the Code creates a one-year statute of limitation for commencing such a proceeding if the beneficiary received a report that adequately disclosed the existence of a potential claim.

Under the Code, a trustee is protected from liability for a loss in value of the trust property if there is no breach of trust. A trustee generally is not liable if the trustee acts in reasonable reliance on the express provisions of the trust, if the trustee exercises reasonable care but fails to ascertain unknown external facts, or if a beneficiary provides a consent, release, or ratification for the trustee's action. A trustee is also protected from personal liability on a contract entered into in a fiduciary capacity and for contracts and torts of a partnership in which the trustee holds a general partnership interest if the other party had notice of the fiduciary relationship.

In general, a trustee is entitled to payment from the trust for attorney fees incurred in good faith. However, if a claim against the trustee is based on a breach of trust, the trustee must provide notice to qualified beneficiaries of the trustee's intention to pay attorney fees from the trust. Any party to the action may seek a court order prohibiting payment of attorney fees from the trust by demonstrating to the court that there is a reasonable basis for the court to find that a breach of trust occurred.

A third party dealing with a trust is not liable for any breach of the trustee's obligations to the beneficiaries resulting from a transaction, unless the third party has knowledge of an actual breach by the trustee. In addition, a third party may rely upon a certification of trust that sets out certain required information, including a statement that the trust has not been revoked, modified, or amended in any manner that would cause the representations in the certificate to be incorrect. A third party who receives a certification of trust and continues to demand a complete copy of a trust instrument may be liable for damages if the demand is not in good faith.

**Subchapter 11: *The Uniform Principal and Income Act***

Subchapter 11 incorporates into the Code the Uniform Principal and Income Act, which has been adopted in this state. The bill also updates the Uniform Principal and Income Act by incorporating recent changes related to deferred compensation, annuities, and other similar payments ~~that were recommended by the Uniform Law Commission.~~

necessary?

**Subchapter 12: *Miscellaneous Provisions***

Subchapter 12 provides that, subject to certain exceptions, the Code applies to trusts that are in existence on the effective date of the bill as well as to trusts created after the effective date of the bill. It also provides that the Code applies to a judicial proceeding concerning a trust commenced before, on, or after the effective date of the bill, unless a court determines that the application of the Code to a proceeding commenced before the effective date of the bill will substantially interfere with the effective conduct of the judicial proceedings or will prejudice the rights of the parties. The effective date of the bill is the first day of the seventh month beginning after publication.

relate to provisions

The following provisions of the bill ~~occur~~ outside of the Code:

***Powers of Appointment***

The bill changes the "general power" to "general power of appointment," which 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. Under the bill, a "special power of appointment" is defined as any power of appointment that is not a general power of appointment. The bill also clarifies the rights of a creditor of a person who holds a power of appointment. Under the bill, a donee's creditor can reach property that is subject to a general power of appointment during a donee's life if the general power is presently exercisable. Upon the death of the donee, a creditor can reach property that is subject to a general power of appointment, whether or not the donee exercised the general power of appointment.

to the extent the power is exercised  
If is not exercised do back credits

this may need to be revised

***Uniform Prudent Investor Act***

The bill modifies the definition of "fiduciary" in the Uniform Prudent Investor Act to include a directing party with the power to direct the trustee's investment decisions and a trust protector who has a power over the investment of the trust assets. Therefore, the default rule is that directing parties and trust protectors are subject to the prudent investor rule if the directing party or trust protector has a power over the trust investments. Finally, the bill provides that the general rule of diversification does not apply to assets collected by a fiduciary.

exercisable in a fiduciary capacity

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

1. SECTION 1. 23.0918 (2) of the statutes is amended to read:

## Knepp, Fern

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**From:** victor.schultz@bmo.com  
**Sent:** Thursday, September 12, 2013 3:43 PM  
**To:** Knepp, Fern  
**Cc:** Wiensch, Adam J.  
**Subject:** LRB analysis

Here is a suggested revision of the language in the Powers of Appointment section.

Adam, have you had a chance to finalize the various marital trust IRC statute cites? Fern is hoping to get this to editing by the end of the week with the hopes that editing will be able to produce a bill by Wednesday of next week.

The bill also clarifies the rights of a creditor of a person who holds a power of appointment. Under the bill, a donee's creditor can reach property that is subject to a general power of appointment during a donee's life only if the general power is presently exercisable. Upon the death of the donee, a creditor can reach property that is subject to a general power of appointment if the donee exercises the general power. To the extent a general power is not exercised at death, property subject to the general power cannot be reached by a creditor of the donee or the donee's estate. A donee's creditor cannot reach property that is subject to a special power of appointment.

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