

1969 Assembly Bill 653

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CHAPTER 283, LAWS OF 1969

AN ACT to repeal 231.01 to 231.40, 231.46 to 231.60, 241.01, 272.30, 317.06 and chapter 323; to renumber 231.45; to amend 179.01, 253.10 (1) and (2), 312.03, 312.08, 312.11, 312.13, 324.35, 324.351 and 324.356; and to create chapter 701 of the statutes, relating to revision of the statutes on trusts.

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

SECTION 1. 179.01 of the statutes is amended to read:

179.01 A limited partnership is a partnership formed by 2 or more persons, *including a trustee*, under ~~the provisions of~~ s. 179.02, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

SECTION 2. 231.01 to 231.40 of the statutes are repealed.

SECTION 3. 231.45 of the statutes is renumbered 710.05.

SECTION 4. 231.46 to 231.60 of the statutes are repealed.

SECTION 5. 241.01 of the statutes is repealed.

SECTION 6. 253.10 (1) and (2) of the statutes are amended to read:

253.10 (1) The jurisdiction of the county court shall extend to the probate of wills and granting letters testamentary and of administration on the estates of all persons deceased who were at the time of their decease inhabitants of or residents in the same county and of all who ~~shall~~ die

without the state having any estate within such county to be administered, and to any other cases authorized by law; to the appointment of guardians to minors and others in the cases prescribed by law; to all matters relating to the settlement of the estates of such deceased persons and of such minors and others under guardianship; to all cases of constructions of wills admitted to probate in such court; and to all cases of trusts ~~and trust powers~~ created by will admitted to probate in such court, including administration ~~under ch. 323~~ of trusts created in accordance with s. ~~231.49 (1)~~ 701.09; and to hearing objections to the granting of licenses to marry, to ordering the refusal of such licenses, and to the granting of stays upon the issuances thereof.

(2) (a) The county court shall have concurrent jurisdiction to hear, try and determine all matters and controversies which may arise between any personal representative, ~~or guardian or trustee~~ appointed by such court ~~or trustee under any will admitted to probate in such court~~ and any other person relating to title to or interest in real and personal property so far as such matter or controversy is incidental to and necessary for the complete administration of the estate, guardianship or trust, and regardless of who has possession of the property or in whose name it may be, to the same extent and with like effect as such matters and controversies may be heard, tried and determined in courts of general jurisdiction.

(b) The county court shall also have concurrent jurisdiction to hear and determine all ~~matters and proceedings involving inter vivos trusts, and the administration thereof, in the manner provided in ch. 231~~ any trust not subject to the jurisdiction of the county court under sub. (1), including a testamentary trust removed to this state from another state. The jurisdiction of the county court under this paragraph shall not continue beyond the determination of a proceeding, except where a court in another state requires continuing jurisdiction as a condition for permitting removal of a testamentary trust to this state. When a proceeding has been commenced in the circuit court, it may by order transfer the same and the record thereof to the county court for disposition, and the county court may in like manner transfer a proceeding to the circuit court.

SECTION 7. 272.30 of the statutes is repealed.

SECTION 8. 312.03 of the statutes is amended to read:

312.03 (1) Every executor, administrator, ~~trustee~~ and guardian, shall verify by his oath every inventory required of him and such verification shall be to the effect that the inventory is true of all property which belongs to his decedent's ~~or to the trust~~ estate or his ward, which has come to his possession or knowledge, and that upon diligent inquiry he has not been able to discover any property belonging to such ~~estates~~ estate or ward which is not included therein. The court, at the request of any party interested, or on its own motion, may examine him on oath in relation thereto, or in relation to any supposed omission therefrom.

(2) If any executor, administrator, ~~trustee~~ or guardian, ~~shall neglect~~ neglects to file his inventory or account when required by law, the county judge shall call his attention to his neglect. If he ~~shall still neglect~~ neglects his duty in the premises, the court shall order him to file his inventory, and the costs of such citation may be adjudged against him.

SECTION 9. 312.08 of the statutes is amended to read:

312.08 The county court, upon the application of any executor, administrator, ~~trustee~~ or guardian appointed by it may order any person who has been intrusted by him with any part of the estate of a decedent or ~~the trust estate~~ ward to appear before such court, and may require such person to render a full account, on oath, of any property or papers belonging to such estate which ~~shall~~ have come to his possession and of his proceedings thereon. If he refuses to appear and render such account the court may proceed against him as for contempt.

SECTION 10. 312.11 of the statutes is amended to read:

312.11 Whenever the county court ~~shall have~~ *has* reason to believe that any executor, administrator, ~~trustee~~ or guardian within its jurisdiction has filed a false inventory, or claims as his own property, or permits others to claim and retain property belonging to the estate which he represents, or is guilty of waste or mismanagement of the estate, or is unfit for the proper performance of his duties, the court shall appoint a guardian ad litem for any minor or incompetent person interested and shall order such executor, administrator, ~~trustee~~ or guardian to file his account. If upon the examination of such account the court ~~shall deem~~ *deems* it necessary to proceed ~~farther~~ *further*, a time and place for the adjustment and settlement of said account shall be fixed by the court, and at least ~~ten~~ *10* days' notice thereof shall be given to such guardian ad litem, if any is appointed, and to all persons interested. If, upon the adjustment of said account, the court ~~shall be~~ *is* of the opinion that the interests of the estate, and of the persons interested, require it, such executor, administrator, ~~trustee~~ or guardian may be removed and another appointed.

SECTION 11. 312.13 of the statutes is amended to read:

312.13 Whenever any executor, ~~or administrator or testamentary trustee~~ has purchased real estate at judicial sale, under a judgment in an action in which he is plaintiff, or has redeemed real estate from a foreclosure or judicial sale, he may sell and convey the same without license, upon such terms as he deems best; and the proceeds arising from such sale shall be held by him the same as he would have held the money due upon the debt by virtue of which he purchased or held the money with which he redeemed such real estate.

SECTION 12. 317.06 of the statutes is repealed.

SECTION 13. Chapter 323 of the statutes is repealed.

SECTION 14. 324.35 of the statutes is amended to read:

324.35 If an executor, administrator, ~~or guardian or trustee~~ resides out of this state, or neglects to render his account within the time provided by law or the order of the court, or neglects to settle the estate according to law, or to perform any judgment or order of the court, or absconds, or becomes insane or otherwise incapable or unsuitable to discharge the trust, the county court may remove him and appoint his successor; but no order of removal shall be made until the person affected has been notified, as provided by ~~section~~ *s.* 310.21, or, if a resident, such notice as the court deems reasonable to show cause at a specified time why he should not be removed.

SECTION 15. 324.351 of the statutes is amended to read:

324.351 If any executor, administrator, ~~or guardian or trustee~~ shall ~~fail~~ *fails* to file his account as required by law or ordered by the court, the court may, upon its own motion or upon the motion of any party interested, issue a citation directed to the sheriff ordering and directing the executor, administrator, ~~or guardian or trustee~~ to show cause before the court why he should not immediately make and file his reports or accounts. ~~Should~~ *If* any executor, administrator, ~~or guardian or trustee~~ ~~fail,~~ ~~neglect,~~ ~~or refuse~~ *fails, neglects or refuses* to make and file any report or account after having been cited by the court so to do, or if he fails to appear in court as directed by a citation issued under direction and by authority of the court, the court may, upon its own motion or upon the petition of any interested party, issue a warrant directed to the sheriff ordering that the executor, administrator, ~~or guardian or trustee~~ *be* brought before the court to show cause why he should not be punished for contempt for such failure, refusal, or neglect. If the court finds that such failure, refusal or neglect is wilful or inexcusable, the

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executor, administrator, or guardian ~~or trustee~~ may be ~~punished for con-~~
~~tempt by a fine~~ fined not to exceed \$50 or ~~by imprisonment~~ imprisoned not
to exceed 10 days, or both.

SECTION 16. 324.356 of the statutes is amended to read:

324.356 The judge may at any time require an accounting by any
guardian ~~or trustee~~ at a hearing after notice to all interested persons in-
cluding sureties on the bond of a guardian ~~or trustee~~. The sureties on a bond
of a guardian ~~or trustee~~ may once in every 3-year period petition the court
for such a hearing.

SECTION 17. Chapter 701 of the statutes is created to read:

CHAPTER 701.

TRUSTS.

701.01 DEFINITIONS. As used in this chapter, unless the context
indicates otherwise:

(1) TRUST. "Trust" means an express living or testamentary, private
or charitable trust in property which arises as a result of a manifestation
of intention to create it. "Trust" does not include a business or invest-
ment trust subject to s. 226.14, an assignment for the benefit of creditors
under ch. 128, or a trust securing performance of a debtor's obligation.

(2) TESTAMENTARY AND LIVING TRUST. "Testamentary trust" means a
trust subject to the continuing jurisdiction of the county court under s.
253.10 (1); "living trust" means any other trust, including a testamentary
trust removed to this state from another state.

(3) CHARITABLE AND PRIVATE TRUST. To the extent that trust income
or principal presently or in the future must be used exclusively for a chari-
table purpose as defined in s. 701.10 (1), the trust is a "charitable trust";
to the extent that trust income or principal presently or in the future
must or may be used for the benefit of a person sufficiently identifiable to
enforce the trust, the trust is a "private trust".

(4) SETTLOR. "Settlor" means a person who directly or indirectly cre-
ates a living or testamentary trust or adds property to an existing trust.

(5) TRUSTEE. "Trustee" means a person holding in trust title to or
holding in trust a power over property. "Trustee" includes an original,
added or successor trustee.

(6) BENEFICIARY. "Beneficiary" means a person who has a beneficial
interest in a trust.

(7) PROPERTY. "Property" means an interest in real or personal prop-
erty.

(8) COURT. "Court" means the court having jurisdiction.

701.02 PURPOSES FOR WHICH TRUSTS MAY BE CREATED. A
trust may be created for any lawful purpose.

CROSS REFERENCE: Section 701.10 (1) lists the purposes for which a
charitable trust may be created.

COMMENT: This replaces present ss. 231.01, 231.11 (1) to (5), 231.12
and 231.14.

701.03 PASSIVE TRUSTS ABOLISHED. Every trust, to the extent it
is private and passive, vests no title or power in the trustee, but the bene-
ficiary takes a title corresponding in extent to the beneficial interest
given him. A trust is passive if the title or power given the trustee is
merely nominal and the creating instrument neither expressly nor by im-
plication from its terms imposes active management duties on the trustee.

COMMENT: This replaces present ss. 231.02 to 231.05.

701.04 PURCHASE MONEY RESULTING TRUSTS ABOLISHED. (1)
If title to property is transferred to one person and all or part of the pur-
chase price is furnished by another, the latter may not enforce a pur-
chase money resulting trust.

(2) Creditors of the person furnishing all or part of the purchase price may enforce a resulting trust, in proportion to the amount of purchase price furnished, to the extent necessary to satisfy their demands, unless an intent to defraud creditors is disproved.

(3) Nothing in this section shall affect the right to enforce a valid express trust or to establish a constructive trust based on fraud, undue influence, breach of confidential relationship or other appropriate grounds.

COMMENT: This replaces present ss. 231.07 to 231.09.

701.05 TITLE OF TRUSTEE; INTEREST OF BENEFICIARIES. (1) Unless the creating instrument expressly limits the trustee to a lesser title or to a power, the trustee takes all title of the settlor or other transferor and holds such title subject to his fiduciary duties as trustee.

(2) If a trustee has title to the trust property, a beneficiary has both a right to have the trustee perform his fiduciary duties and an equitable interest, present or future, in the trust property. If a trustee holds only a power over property, a beneficiary has a right to have such trustee perform his fiduciary duties. In a trust where the trustee has absolute legal title to the trust property, any interest expressly retained by the settlor or not effectively disposed of to others remains in the settlor, or his successors in interest, as an equitable reversionary interest and to this extent he, or they, are beneficiaries of the trust. In a trust where the trustee has absolute legal title, any interest, present or future, created by the settlor in any other person is an equitable interest and such person is a beneficiary of the trust.

COMMENT: This replaces present ss. 231.15 to 231.18 and 231.23.

701.06 SPENDTHRIFT PROVISIONS AND RIGHTS OF CREDITORS OF BENEFICIARIES. (1) INCOME BENEFICIARIES. A settlor may expressly provide in the creating instrument that the right to income of a beneficiary other than the settlor is not subject to voluntary or involuntary alienation. The income interest of such a beneficiary cannot be assigned and is exempt from the claims of creditors until paid over to the beneficiary.

(2) PRINCIPAL BENEFICIARIES. A settlor may expressly provide in the creating instrument that the right to principal of a beneficiary other than the settlor is not subject to voluntary or involuntary alienation. The interest in principal of such a beneficiary cannot be assigned and is exempt from the claims of creditors, but a judgment creditor may apply to the court for an order directing the trustee to satisfy the judgment out of any payments of principal which have become due or payable to the beneficiary pursuant to the terms of the trust and the court in its discretion may issue an order for payment of part or all of the judgment.

(3) RENUNCIATION NOT AN ASSIGNMENT. A renunciation by a beneficiary of part or all of his interest under a trust shall not be considered an assignment under sub. (1) or (2).

(4) CLAIMS FOR CHILD SUPPORT. Notwithstanding any provision in the creating instrument or subs. (1) and (2), upon application of a person having a valid order directing a beneficiary to make payment for support of the beneficiary's child, the court may:

(a) If the beneficiary is entitled to receive income or principal under the trust, order the trustee to satisfy the claim, in whole or in part, out of payments of income or principal then or thereafter due or payable;

(b) In the case of a beneficiary under a discretionary trust, order the trustee to satisfy the claim, in whole or in part, out of future payments of income or principal if the trustee has then exercised or thereafter exercises his discretion in favor of such beneficiary.

(5) CLAIMS FOR PUBLIC SUPPORT. Notwithstanding any provision in

the creating instrument or subs. (1) and (2), if the settlor is legally obligated to pay for the public support of a beneficiary or the beneficiary is legally obligated to pay for the public support of a spouse or minor child under s. 46.10, upon application by the appropriate state department or county official the court, after determining the fact and amount of liability, may:

(a) If such beneficiary is entitled to receive income or principal under the trust, order the trustee to satisfy the liability, in whole or in part, out of payments of income or principal then or thereafter due or payable;

(b) In the case of a beneficiary under a discretionary trust, order the trustee to satisfy the liability, in whole or in part, out of future payments of income or principal if the trustee has then exercised or thereafter exercises his discretion in favor of such beneficiary.

(6) **SETTLOR AS BENEFICIARY.** Notwithstanding any provision in the creating instrument, to the extent that a settlor has a right to receive income or principal or to the extent that the trustee may distribute income or principal solely to the settlor, the court, upon application or a judgment creditor of the settlor, may order the trustee to satisfy the judgment, in whole or in part, out of income, principal or both to the extent of the settlor's contribution to the trust.

CROSS REFERENCE: Section 701.07 (3) deals with creditors' rights where a settlor retains powers over a living trust.

(7) **EMPLOYEE BENEFIT TRUSTS; BURIAL TRUSTS.** Nothing in this section shall apply to an employee benefit trust described in s. 272.18 (31) or to a reasonable amount placed in a burial trust agreement described in s. 156.125.

COMMENT: This replaces present ss. 231.11 (8), 231.16, 231.19, 241.01 and 272.30.

701.07 **LIVING TRUSTS.** (1) **VALIDITY.** An instrument creating a living trust shall not be held invalid as an attempted testamentary disposition or a passive trust because it contains any or all of the following powers, whether exercisable by the settlor, another person or both:

(a) To revoke, modify or terminate the trust in whole or in part;

(b) To exercise a power or option over property in the trust or over a life insurance policy the proceeds of which are payable to the trust under sub. (2);

(c) To direct, during the lifetime of the settlor or another, the person to whom or on whose behalf the income, principal or both shall be paid or applied;

(d) To control the administration of the trust in whole or in part;

(e) To add property or cause additional life insurance to be made payable to the trust at any time.

(2) **INSURANCE TRUSTS.** A living trust is eligible to receive life insurance proceeds payable to the trustee and such proceeds shall be administered in accordance with the terms of the trust as they exist at the death of the insured. The trustee's right to receive such proceeds is a sufficient corpus for a valid trust.

(3) **CREDITORS' RIGHTS.** If a settlor retains a power to revoke, modify or terminate which is exercisable in his own favor, except when such power is exercisable only in conjunction with a person having a substantial adverse interest, the trust property to the extent it is subject to such power is also subject to the claim of a creditor of the settlor. This subsection shall not apply to an employee benefit trust described in s. 272.18 (31) or to a reasonable amount placed in a burial trust agreement described in s. 156.125.

CROSS REFERENCE: Section 701.06 (6) deals with creditors' rights

where the settlor is a beneficiary of the trust.

COMMENT: This replaces present ss. 231.205 (1) and (7) and 231.51.

701.08 TESTAMENTARY TRANSFERS TO LIVING TRUSTS. (1)

Unless the instrument creating a living trust expressly provides otherwise, a living trust, regardless of the size or character of its corpus, is eligible to receive additional property transferred or appointed by the will of the settlor or any other person. Such a living trust shall be treated as an independently existing entity. No reference in any will to such a trust shall cause assets in the living trust to be included in the property administered as part of the testator's estate; nor shall it cause the trust or any portion thereof to be treated as a testamentary trust.

(2) Property passing under or appointed by a will to a living trust, of which the testator was the sole holder of a power to modify the terms of the trust, shall be administered in accordance with the terms of the trust as they may have been modified even though the will was not reexecuted or republished after exercise of the power to modify, unless the will expressly provides that modifications of the trust occurring after execution of the will are to be disregarded. Property passing under or appointed by a will to a living trust, which is subject to a power of modification exercisable by a person other than the testator, shall be administered in accordance with the terms of the trust in effect at the execution of the will, unless the will expressly provides that the property shall be administered in accordance with the terms of the trust as they may have been modified, in which case the will need not be reexecuted or republished after exercise of the power to modify.

(3) If at the death of a testator a living trust has been completely revoked, or otherwise terminated, a provision in his will purporting to transfer additional property to such trust shall have the following effect, unless the will provides otherwise:

(a) If the testator was also a settlor of such trust, the provision in his will shall be invalid;

(b) If the testator was not a settlor of such trust, the provision in his will shall be deemed to create a testamentary trust upon the same terms as those of the living trust at the time the will was executed.

COMMENT: This replaces present s. 231.205 (2) to (6).

701.09 TRANSFERS TO TESTAMENTARY TRUSTEES. (1) A testamentary transfer or appointment shall not be held invalid because it is made to a trust created, or to be created, under the will of another person if the will of such other person was executed, or was last modified with respect to the terms of such trust, prior to the death of the person making the testamentary transfer or appointment and such other person's will is admitted to probate prior to, or within 2 years after, the death of the person making the testamentary transfer or appointment. Property included in such a testamentary transfer or appointment shall not be considered property subject to administration as part of the other person's estate but shall pass directly to his testamentary trustee, be added to the designated trust and administered as a part thereof.

(2) If such a testamentary transfer or appointment is not accepted by the testamentary trustee of such other person or if no will of such other person which meets the conditions specified in sub. (1) is admitted to probate within the period therein limited, and if the will containing such testamentary transfer or appointment makes no alternative disposition of the assets, the will shall be construed as creating a trust upon the terms contained in the documents constituting the will of such other person as of the date of death of the person making the testamentary transfer or appointment.

(3) A trustee named or to be named in the will of an insured per-

son may be designated beneficiary of an insurance policy on the life of the insured if the designation is made in accordance with the policy and any other requirements of the insurance company issuing the policy. After admission of the insured's will to probate and qualification of such trustee, the insurance proceeds shall be paid to the trustee to be administered in accordance with the terms of the trust as they exist at the death of the insured, and such proceeds may be commingled with other assets passing to the trust under the insured's will. Insurance proceeds paid to a testamentary trustee because of his designation of life insurance beneficiary shall not be subject to inheritance tax to any greater extent than if such proceeds were payable to any other beneficiary other than the insured's estate. Such proceeds shall be inventoried for tax purposes only and shall not be considered assets of the insured's estate.

(4) A trustee named or to be named in the will of an employe covered by any employe benefit plan described in s. 272.18 (31) or any annuity contract purchased by an employer which is a religious, scientific, educational, benevolent or other corporation or association not organized or conducted for pecuniary profit may be designated payee of any benefits payable after the death of the employe if the designation is made in accordance with the plan or contract and any other requirements of the payor. Such benefits shall be treated in the same manner as insurance proceeds are treated under sub. (3).

(5) Interests other than those described in subs. (3) and (4) may be made payable to or transferred to a trustee named or to be named in a will in the same manner and with the same consequences as insurance proceeds under sub. (3).

COMMENT: This replaces present ss. 231.47 and 231.49.

701.10 CHARITABLE TRUSTS. (1) VALIDITY. A charitable trust may be created for any of the following charitable purposes: relief of poverty, advancement of education, advancement of religion, promotion of health, governmental or municipal purposes or any other purpose the accomplishment of which is beneficial to the community. No gift to charity, in trust or otherwise, is invalid because of indefiniteness. If a particular charitable purpose is not indicated and the trustee is not expressly authorized by the creating instrument to select such a purpose, the trustee has an implied power to select one or more charitable purposes. If a particular charitable purpose is not indicated and no trustee is named in the creating instrument, the court may appoint a trustee with such an implied power to select or may direct that the property be transferred outright to one or more established charitable entities.

(2) MODIFICATION AND TERMINATION. (a) If a purpose of a charitable trust is or becomes impractical, unlawful or impossible, the court may order the trust continued for one or more other charitable purposes designated by the settlor or, in the absence of such designation, order the property devoted to one or more other charitable purposes either by continuing the trust by distributing the property to one or more established charitable entities. In determining the alternative plan for disposition of the property, the court shall take into account current and future community needs in the general field of charity within which the original charitable purpose falls, other charitable interest of the settlor, the amount of principal and income available under the trust and other relevant factors. The provisions of this subsection do not apply insofar as the settlor expressly provides in the creating instrument for an alternative disposition if the original trust fails; nor do they apply to gifts by several persons to a charitable entity on a subscription basis if the court finds that the donors intended their gifts to be limited to the original purpose and such purpose fails initially.

(b) If any administrative provision of a charitable trust or part of a

plan set forth by the settlor to achieve his charitable purpose is or becomes impractical, unlawful, inconvenient or undesirable, and a modification of such provision or plan will enable the trustee to achieve more effectively the basic charitable purpose, the court may by appropriate order modify the provision or plan.

(c) If a charitable trust is or becomes uneconomic when principal and probable income, cost of administration and other relevant factors are considered, or in any event if the trust property is valued at less than \$5,000, the court may terminate the trust and order outright distribution to an established charitable entity in the general field of charity within which the charitable purpose falls.

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

(e) The settlor if living, the trustee and an established charitable entity to which income or principal must be paid under the terms of the trust shall be made a party to any proceeding under this subsection.

(3) ENFORCEMENT; NOTICE TO ATTORNEY GENERAL. (a) A proceeding to enforce a charitable trust may be brought by:

1. An established charitable entity to which income or principal must be paid under the terms of the trust;
2. The attorney general in the name of the state upon his own information or, in his discretion, upon complaint of any person;
3. Any settlor or group of settlors who contributed half or more of the principal; or
4. A cotrustee.

(b) In a proceeding affecting a charitable trust, notice must be given to the attorney general.

CROSS REFERENCE: See s. 879.03 (2) (c) of the proposed probate code on notice to the attorney general of probate proceedings affecting a charitable trust.

(4) ESTABLISHED CHARITABLE ENTITY. As used in this section, "established charitable entity" means a corporation or trust operated exclusively for a charitable purpose defined in sub. (1).

COMMENT: This replaces present ss. 231.11 (7), 231.34, 317.06 (4) and, as to charitable trusts, s. 323.025.

701.11 HONORARY TRUSTS; CEMETERY TRUSTS. (1) Except under sub. (2), where the owner of property makes a testamentary transfer in trust for a specific noncharitable purpose, and there is no definite or definitely ascertainable human beneficiary designated, no enforceable trust is created; but the transferee has power to apply the property to the designated purpose, unless the purpose is capricious. If the transferee refuses or neglects to apply the property to the designated purpose within a reasonable time and the transferor has not manifested an intention to make a beneficial gift to the transferee, a resulting trust arises in favor of the transferor's estate and the court is authorized to order the transferee to retransfer the property.

(2) A trust may be created for perpetually maintaining, keeping in repair and preserving any grave lot, tomb, monument, gravestone or any cemetery; any cemetery company, association or corporation is authorized to receive property in trust for any aforementioned purpose and apply the income therefrom to the purpose stated in the creating instrument.

(3) (a) A trust described in sub. (2) is invalid to the extent it was created for a capricious purpose or the purpose becomes capricious.

(b) If the assets of any trust described in sub. (2) are valued at less than \$5,000 and the court finds that the cost of operating the trust will

probably defeat the intent of the settlor or if the trustee, including a cemetery company, association or corporation, named in the creating instrument is improperly described, the court may order distribution of the assets on terms which will as nearly as possible carry out the settlor's intention.

COMMENT: This replaces present s. 231.11 (6) and, as to cemetery trusts, s. 323.025.

701.12 REVOCATION, MODIFICATION AND TERMINATION OF TRUSTS WITH CONSENT OF SETTLOR. (1) By written consent of the settlor and all beneficiaries of a trust or any part thereof, such trust or part thereof may be revoked, modified or terminated.

(2) For purposes of this section such consent may be given on behalf of a legally incapacitated, unascertained or unborn beneficiary by the court after a hearing in which the interests of such beneficiary are represented under s. 701.15. A representative of such beneficiary may rely on general family benefit accruing to living members of the beneficiary's family as a basis for approving a revocation, modification or termination of a trust or any part thereof.

(3) Nothing in this section shall prevent revocation, modification or termination of a trust pursuant to its terms or otherwise in accordance with law.

COMMENT: This replaces present s. 231.50.

701.13 MODIFICATION AND TERMINATION OF OTHER TRUSTS.

(1) ANTICIPATION OF DIRECTED ACCUMULATION OF INCOME. When an accumulation of income is directed for the benefit of a beneficiary without other sufficient means to support or educate himself, the court on the application of such person or his representative under s. 701.15 (2) may direct that a suitable sum from the income accumulated or to be accumulated be applied for the support or education of such person.

(2) APPLICATION OF PRINCIPAL TO INCOME BENEFICIARY. Unless the creating instrument provides to the contrary, if a beneficiary is entitled to income or to have it applied for his benefit, the court may make an allowance from principal to such beneficiary if his support or education is not sufficiently provided for, taking into account all other resources available to the beneficiary.

(3) TERMINATION. In the case of a living trust where the settlor is deceased and in the case of any testamentary trust, regardless in either case of spendthrift or similar protective provisions, a court with consent of the trustee may order termination of the trust, in whole or in part, if the court is satisfied that because of any substantial reason existing at the inception of a testamentary trust or, in the case of any trust, arising from a subsequent change in circumstances (including but not limited to the amount of principal in the trust, income produced by the trust and the cost of administering the trust) continuation of the trust, in whole or in part, is impracticable.

(4) MARITAL DEDUCTION TRUSTS. In a trust where the income beneficiary also has a general power of appointment as defined in s. 702.01 (4) or where all accumulated income and principal are payable to such beneficiary's estate, any termination, in whole or in part, of the trust under sub. (3) can only be ordered in favor of such beneficiary.

(5) CHARITABLE TRUSTS. This section does not apply to a trust where a future interest is indefeasibly vested in, or an indefeasibly vested future interest may be validly appointed to:

(a) The United States or a political subdivision for exclusively public purposes;

(b) A corporation organized exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of

art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual and no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation;

(c) A trustee or a fraternal society, order or association operating under the lodge system, provided the principal or income of such trust is to be used by such trustee or by such fraternal society, order or association exclusively for religious, charitable, scientific, literary or educational purposes or for the prevention of cruelty to children and animals, and no substantial part of the activities of such trustee or of such fraternal society, order or association is carrying on propaganda or otherwise attempting to influence legislation; or

(d) Any veteran's organization incorporated by act of congress, or if its departments or local chapters or posts, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(6) OTHER APPLICABLE LAW. Nothing in this section shall prohibit modification or termination of any trust pursuant to its terms or limit the general equitable power of a court to modify or terminate a trust in whole or in part.

COMMENT: This replaces present ss. 231.21 and 231.60.

701.14 COUNTY COURT PROCEDURE IN TRUST PROCEEDINGS.

(1) GENERALLY. A proceeding in the county court involving a living or testamentary trust may be commenced by a trustee or person interested in the trust and all probate procedure governing county courts shall apply to such proceeding.

(2) NOTICE. If notice of any such proceeding is required by law or deemed necessary by the court, the court shall order notice to be given as prescribed in s. 879.05. The court may order both personal service and service by publication on designated persons.

(3) VENUE. A proceeding involving a living trust shall be governed by ch. 261 so far as applicable and shall be regarded as a civil action for that purpose.

CROSS REFERENCE: Section 701.10 (3) lists the persons who may start proceedings to enforce a charitable trust and requires notice be given to the attorney general of any proceeding affecting such trust.

COMMENT: This replaces present s. 231.36 (4) and (5) and, as to trust proceedings, s. 324.19. Section 879.05 is in the proposed probate code.

701.15 REPRESENTATION OF OTHERS. In a trust proceeding in the county or circuit court:

(1) POWER TO CREATE OF EXTINGUISH. The sole holder or all coholders of a power of revocation or a general power of appointment as defined in s. 702.01 (4) may represent any or all persons whose interests are subject to such power.

(2) VIRTUAL REPRESENTATION. Subject to sub. (1), the court may appoint a guardian ad litem for any interested person who is legally incapacitated, unascertained or unborn if such person is not already represented by a fiduciary having no adverse interest in the proceeding. A guardian ad litem may represent 2 or more such persons where they have a substantially identical interest in the proceeding. The court may dispense with or terminate the appointment of a guardian ad litem for such person if there is a legally competent person who is a party to the proceeding and has a substantially identical interest in it.

COMMENT: This replaces present ss. 231.35, 323.10 and, as to trust proceedings, ss. 256.52, 260.23 and 324.29 (4).

701.16 TESTAMENTARY TRUSTEES. (1) APPOINTMENT. (a) *Trustee named in will.* A trustee named in a will derives his authority to

carry out the trust from the will and need not be appointed by the court. After the court has admitted a will to probate, it shall issue letters of trust to the trustee named in the will, at his request, as evidence of his authority. A trustee named in a will may renounce the position by an instrument filed with the court having jurisdiction to admit the will to probate.

(b) *Appointment of other original trustee.* If a testamentary trust is created which fails to name a trustee, or the named trustee refuses to accept the position or predeceases the settlor and no alternate trustee is named in the will, after the court has admitted the will to probate it shall appoint a suitable person as trustee. A nonresident trustee must appoint a resident agent to accept service of process and such appointment must be filed with the court before letters of trust are issued to such trustee.

(c) *Appointment of special trustee.* If it appears necessary, the court can appoint a special trustee until a regular trustee can be appointed. A special trustee may be appointed without notice and may be removed whenever the court so orders. Such special trustee shall give such bond as the court requires and shall have such powers as are conferred by the order of appointment and set forth in any letters of trust issued him.

(d) *Foreign trustee.* Where a trustee is authorized to carry out a trust created by will admitted to probate outside this state, but not also admitted to probate in this state, such foreign trustee may have recorded in the office of the register of deeds of a county in which part of the subject matter of the trust is located a duly authenticated copy of his letters of trust and filed with the register of probate of the same county a statement appointing the register of probate in his official capacity the trustee's resident agent for service of process. Thereafter the trustee may exercise all powers and have all the rights, remedies and defenses that he would have if he received letters of trust from a county court of this state. Service of process shall be complete upon delivery of duplicate copies to the register of probate, one of which copies the register of probate shall promptly forward by registered mail to the foreign trustee.

CROSS REFERENCE: Section 223.12 contains requirements which must be met before a foreign corporate trustee is qualified to act in this state.

(2) **BOND.** The court may require a testamentary trustee to give a bond in accordance with ch. 878 and conditioned on the faithful performance of his duties. If a settlor directs that a trustee serve without bond, the court shall give effect to this direction unless it determines that a bond is required by a change in the trustee's personal circumstances since the execution of the settlor's will. If the court requires a bond, and the trustee named in the will fails to furnish the required bond within a reasonable period of time after receiving notice of the bond requirement, the court may remove the trustee named in the will and appoint a successor trustee under s. 701.17. No bond shall be required of a trust company bank, state bank or national banking association which is authorized to exercise trust powers and which has complied with s. 220.09 or 223.02, nor shall a bond be required of a religious, charitable or educational corporation or society.

(3) **INVENTORY.** A testamentary trustee shall make and file a verified inventory of all property received from the settlor's personal representative or from any other source.

(4) **ANNUAL ACCOUNTING.** (a) A testamentary trustee is required to make and file a verified account annually with the court except as provided in par. (b). Production of securities and other assets for examination shall not be necessary upon the filing of an annual account unless the court determines such production is necessary to ascertain the correctness of an account filed for a particular trust. In the case of a testamentary charitable trust a copy of the annual account filed with the court shall be filed with the attorney general.

(b) Except in the case of a testamentary charitable trust, the court may dispense with the requirement of an annual accounting where, due to the size or nature of the trust property, the duration of the trust, the relationship of the trustee to the beneficiaries or other relevant factors, compliance with such requirement is unnecessary or unduly burdensome on the trustee. Whether or not an annual accounting is required a beneficiary may petition the court to require an accounting and the trustee may petition for approval of his accounts on a periodic basis.

(c) Notwithstanding pars. (a) and (b) the court may require an accounting at any time.

(5) FINAL ACCOUNTING. A verified final account is required upon the death of a trustee, resignation of a trustee, removal of a trustee and the termination of a testamentary trust. The court may require such proof of the correctness of a final account as it considers necessary.

(6) DISCHARGE. No testamentary trustee or personal representative of a deceased trustee shall be discharged from further responsibility with respect to a testamentary trust until the court is satisfied upon notice and hearing that the requirements of this section have been met and it has received satisfactory proof that the trust property has been turned over to a successor or special trustee or, where the trust is terminated, distributed to the beneficiaries entitled to such property or turned over to a special trustee for distribution.

CROSS REFERENCE: Section 701.23 (1) provides for the discharge of a trustee where a testamentary trust is removed to another state.

COMMENT: This replaces present ss. 231.29, 231.295, 317.06 (1) and (2), 323.01, 323.02, 323.03, 323.035, 323.07 and, as to trustees, ss. 312.03, 312.08, 312.11, 324.351, 324.356; ch. 878 is in the proposed probate code.

701.17 TRUSTEE SUCCESSION. (1) APPOINTMENT OF SUCCESSOR TRUSTEE. If there is a vacancy in the office of trustee because of the death, resignation or removal of a trustee, the court may appoint a successor trustee unless the creating instrument names or provides an effective method for appointing a successor. Upon the death of a sole trustee, title to the trust property does not pass to his personal representative but to the successor named in or appointed pursuant to the terms of the creating instrument or, in the case of a successor or special trustee appointed by the court, as provided in sub. (5).

(2) APPOINTMENT OF SPECIAL TRUSTEE. If it appears necessary, the court may appoint a special trustee until a successor trustee can be appointed or, where a trust has terminated, to distribute the assets. A special trustee may be appointed without notice and may be removed whenever the court so orders. Such special trustee shall give such bond as the court requires and shall have the powers conferred by the order of appointment and set forth in any letters of trust issued him.

(3) POWERS OF SUCCESSOR TRUSTEE. Unless expressly prohibited in the creating instrument, all powers conferred upon the trustee by such instrument attach to the office and are exercisable by the trustee holding the office.

(4) POWERS OF COTRUSTEES. If one of several trustees dies, resigns or is removed, the remaining trustees shall have all rights, title and powers of all the original trustees. If the creating instrument manifests an intent that a successor trustee be appointed to fill a vacancy, the remaining trustees may exercise the powers of all the original trustees until such time as a successor is appointed.

(5) VESTING OF TITLE. A special or successor trustee is vested with the title of the original trustee to all trust property within the jurisdiction of the court. The court may order a trustee who resigns or is removed to execute such documents transferring title to trust property as may be

appropriate to facilitate administration of the trust.

CROSS REFERENCE: Section 223.11 deals with the effect of consolidation of trust company banks.

COMMENT: This replaces present ss. 231.24, 231.27, 231.28, 231.33, 231.46, 323.03 and 323.035.

701.18 RESIGNATION AND REMOVAL OF TRUSTEES. (1) RESIGNATION. A trustee may petition the court to accept his resignation and the court, subject to s. 701.17 (5) in the case of a testamentary trust, may, upon notice and hearing, discharge him from further responsibility for the trust upon such terms and conditions as are necessary to protect the rights of the beneficiaries and any cotrustee. If, however, the instrument creating a living trust provides a method for resignation, such method shall be followed rather than the method prescribed by this subsection.

(2) REMOVAL. A beneficiary or cotrustee may petition the court for removal of a trustee and the court may, upon notice and hearing, remove a trustee found to be unsuitable to continue in office. The court may, upon its own motion and notice and hearing, remove a trustee who fails to comply with the requirements of this chapter or a court order, or who is otherwise unsuitable to continue in office.

COMMENT: This replaces present ss. 231.25, 231.26, 317.06 (3), 323.04, 323.05 and, as to trustees, s. 324.35.

701.19 POWERS OF TRUSTEES. (1) POWER TO SELL, MORTGAGE OR LEASE. In the absence of contrary or limiting provisions in the creating instrument, in the court order appointing a trustee or in a subsequent order, a trustee has complete power to sell, mortgage or lease trust property without notice, hearing or order. A trustee has no power to give warranties in a sale, mortgage or lease which are binding on himself personally. In this section "sale" includes an option or agreement to transfer for cash or on credit, exchange, partition or settlement of a title dispute; this definition is intended to broaden rather than limit the meaning of "sale". "Mortgage" means any agreement or arrangement in which trust property is used as security.

(2) COURT AUTHORIZATION OF ADMINISTRATIVE ACTION. (a) In the absence of contrary or limiting provisions in the creating instrument, in any case where it is for the best interests of the trust, on application of the trustee or other interested person, the court may upon notice and hearing authorize or require a trustee to sell, mortgage, lease or otherwise dispose of trust property upon such terms and conditions as the court deems just and proper.

(b) Despite contrary or limiting provisions in the creating instrument, upon application of a trustee or other interested person, a court may upon notice and hearing order the retention, investment, reinvestment, sale, mortgage, lease or other disposition of trust property if the court is satisfied that the original purpose of the settlor cannot be carried out, substantially performed or practically achieved for any reason existing at the inception of the trust or arising from any subsequent change in circumstances and the retention, investment, reinvestment, sale, mortgage, lease or other disposition of the property more nearly approximates the settlor's intention.

(c) Unless authorized in the creating instrument, a trustee may not be interested as a purchaser, mortgagee or lessee of trust property unless such purchase, mortgage or lease is made with the written consent of all beneficiaries or with the approval of the court upon notice and hearing. A representative of a beneficiary, under s. 701.15, may give written consent for such beneficiary.

(d) With the approval of the court, a trustee may sell individually owned assets to the trust at the price the trustee originally paid for such

assets or their current fair market value, whichever is lower, provided such assets satisfy the investment standards set forth in s. 320.01 (1) and (2). The court may approve the sale without notice and hearing.

(3) **WHEN MANDATORY POWER DEEMED DISCRETIONARY.** If a creating instrument expressly or by implication directs a trustee to sell trust property and such property has not been sold for a period of 25 years after the creation of the trust, such direction to the trustee shall be deemed a discretionary power of sale.

(4) **CONTINUATION OF BUSINESS.** In the absence of contrary or limiting provisions in the creating instrument, the county court may, where it is in the best interests of the trust, order the trustee to continue any business of a deceased settlor. The order may be issued without notice and hearing, in the court's discretion and, in any case, may provide:

(a) For conduct of the business solely by the trustee, jointly with one or more of the settlor's surviving partners or as a corporation to be formed by the trustee;

(b) As between the trust and the trustee, the extent of liability of the trust and the extent of the personal liability of the trustee for obligations incurred in the continuation of the business;

(c) As between beneficiaries, the extent to which liabilities incurred in the continuation of the business are to be chargeable solely to a part of the trust property set aside for use in the business or to the trust as a whole; and

(d) As to the period of time for which the business may be conducted and such other conditions, restrictions, regulations, requirements and authorizations as the court orders.

(e) Nothing in this subsection shall be construed as requiring a trustee to liquidate a business, including a business operated as a closely held corporation, when such action is not required by the creating instrument or other applicable law.

(5) **FORMATION OF PARTNERSHIP OR CORPORATION.** In the absence of contrary or limiting provisions in the creating instrument:

(a) The court may by order authorize a trustee to become a limited partner under ch. 179 and transfer trust property to the partnership in return for a partnership interest.

(b) The court may by order authorize a trustee to organize a corporation for any purpose permitted by ch. 180, subscribe for shares of such corporation and transfer trust property to such corporation in payment for the shares subscribed.

(c) The court may by order authorize a trustee to form a corporation for any purpose permitted by ch. 181.

(d) An order under this subsection may in the court's discretion be issued without notice and hearing.

(6) **REGISTRATION OF SECURITIES IN NOMINEE.** Unless prohibited in the creating instrument, a trustee may register securities in the name of a nominee.

(7) **PROXY VOTING OF STOCK.** Unless the creating instrument contains an express prohibition or specifies the manner in which the trustee is to vote stock in a corporation or certificates of beneficial interest in an investment trust, the trustee may vote such stock or certificates by general or limited proxy, with or without power of substitution.

(8) **PLATTING LAND.** In the absence of contrary or limiting provisions in the creating instrument, the court may by order authorize a trustee to plat land which is part of the trust, either alone or together with other owners of such real estate. In such platting the trustee must comply with the same statutes, ordinances, rules and regulations which apply to a

person who is platting his own land. The order under this subsection may in the court's discretion be issued without notice and hearing.

(9) **JOINT TRUSTEES.** In the absence of contrary or limiting provisions in the creating instrument, any power vested in 3 or more trustees may be exercised by a majority, but a trustee who has not joined in exercising a power is not liable to an affected person for the consequences of the exercise unless he has failed to discharge his duty to participate in the administration of the trust. A dissenting trustee is not liable for the consequences of an act in which he joins at the direction of the majority of the trustees if he expressed his dissent in writing to his cotrustees at or before the time of the joinder.

(10) **RESTRICTION ON EXERCISE OF POWERS.** Unless the creating instrument expressly negates application of this subsection, a power conferred upon a person in his capacity as trustee to make discretionary distributions of principal or income to himself or to make discretionary allocations in his own favor of receipts or expenses as between principal and income, cannot be exercised by him. If the power is conferred on 2 or more trustees, it may be exercised by the trustees who are not so disqualified. If there is no trustee qualified to exercise the power, it may be exercised by a special trustee appointed by the court.

CROSS REFERENCE: Section 112.02 provides for suspending powers of a testamentary trustee in military service. Section 112.05 prohibits a trustee from dealing in margins. Chapter 320 and s. 223.055 contain limitations on investments by trustees.

(11) **PROTECTION OF THIRD PARTIES.** With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust power and its proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise. A third person is not bound to assure the proper application of trust property paid or delivered to the trustee.

CROSS REFERENCE: See s. 112.01, the Uniform Fiduciaries Act, and s. 112.06, the Uniform Act for Simplification of Fiduciary Security Transfers, on protection of third parties.

COMMENT: This replaces present ss. 231.22, 231.31, 231.36 (3), 231.52, 323.06, 323.065 and, as to trustees, s. 312.13.

701.20 **PRINCIPAL AND INCOME.** (1) **DEFINITIONS.** As used in this section:

(a) "Principal" means any realty or personalty which has been so set aside or limited by the owner thereof or a person thereto legally empowered that it and any substitution for it are eventually to be conveyed, delivered or paid to a person, while the return therefrom or use thereof or any part of such return or use is in the meantime to be taken or received by or held for accumulation for the same or another person;

(b) "Income" means the return derived from principal;

(c) "Tenant" means the person to whom income is presently or currently payable, or for whom it is accumulated or who is entitled to the beneficial use of the principal presently and for a time prior to its distribution;

(d) "Remainderman" means the person ultimately entitled to the principal, whether named or designated by the terms of the transaction by which the principal was established or determined by operation of law.

(2) **APPLICATION; POWERS OF SETTLOR.** This section shall govern the

ascertainment of income and principal, and the apportionment of receipts and expenses between tenants and remaindermen, in all cases where a principal has been established with or, unless otherwise stated hereinafter, without the interposition of a trust; except that in the establishment of the principal provision may be made touching all matters covered by this section and the person establishing the principal may himself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so, and such provision and direction, where not otherwise contrary to law, shall control notwithstanding this section.

(3) **INCOME AND PRINCIPAL; DISPOSITION.** (a) All receipts of money or other property paid or delivered as rent of realty or hire of personalty or dividends on corporate shares payable other than in shares of the corporation itself, or interest on money loaned, or interest on or the rental or use value of property wrongfully withheld or tortiously damaged, or otherwise in return for the use of principal, shall be deemed income unless otherwise expressly provided in this section.

(b) All receipts of money or other property paid or delivered as the consideration for the sale or other transfer, not a leasing or letting, of property forming a part of the principal, or as a repayment of loans, or in liquidation of the assets of a corporation, or as the proceeds of property taken on eminent domain proceedings where separate awards to tenant and remainderman are not made, or as proceeds of insurance upon property forming a part of the principal except where such insurance has been issued for the benefit of either tenant or remainderman alone, or otherwise as a refund or replacement or change in form of principal, shall be deemed principal unless otherwise expressly provided in this section. Any profit or loss resulting upon any change in form of principal shall inure to or fall upon principal.

(c) All income after payment of expenses properly chargeable to it shall be paid and delivered to the tenant or retained by him if already in his possession or held for accumulation where legally so directed by the terms of the transaction by which the principal was established; while the principal shall be held for ultimate distribution as determined by the terms of the transaction by which it was established or by law.

(4) **DISPOSITION OF PROBATE INCOME BY EXECUTORS AND TESTAMENTARY TRUSTEES.** (a) *Application.* This subsection applies only to executors and trustees acting under wills admitted to probate in this state, but does not apply if a contrary provision has been made by the testator or by the executor or a trustee under the will pursuant to a power given him by the testator. "Executor" includes an administrator with the will annexed.

(b) *Determination of net probate income.* The executor shall determine net probate income as follows:

1. He shall ascertain the amount of property received by him which is the product of the property which passed to him by the will or by the execution of a power of appointment, or of any substitute for such property obtained by the executor by purchase, exchange or otherwise.

2. He shall include in the amount so ascertained the product of property used by the executor to discharge liabilities of the testator, or of the executor in his representative capacity, including debts, claims, taxes, expenses of administration, legacies payable in money, or of any donee under the will.

3. He shall determine how much of the amount so ascertained under the other provisions of this section.

4. From the amount so determined he shall deduct a) any income taxes paid thereon by the executor except taxes on capital gains, b) interest on all legacies payable in money, and c) that share of the expenses of

administration which is properly payable out of probate income. The amount remaining after the deduction is the net probate income.

(c) *Disposition by executor.* The executor at the time of distribution:

1. Shall pay over to the trustee of any trust or other legatee to whom specific property other than money is bequeathed the net probate income of such property; and

2. Shall pay over all other net probate income to a) the trustee of any trust created out of the residue, and b) any legatee for life or years of any portion of the residue, and c) any legatee of an absolute interest in any portion of the residue, and d) any trustee of a sum of money under a trust created by the will, but not payable out of the residue, in pro rata shares, in accordance with the respective values of the property bequeathed or given in trust at the death of the testator as determined by the executor.

3. If the executor makes a partial distribution to any legatee or trustee under sub. (2) the partial distributee shall share in the net probate income collected to that date, but his share in the net probate income later collected by the executor shall be reduced accordingly.

(d) *Decree.* The amount of any net probate income distributed by the executor to each trustee or other distributee shall be stated in any order of distribution.

(e) *Distribution by trustee.* A testamentary trustee who receives net probate income from an executor shall treat it as income of the trust for which he is acting.

(5) **APPORTIONMENT OF INCOME.** Whenever a tenant has the right to income from periodic payments, which includes rent, interest on loans and annuities, but shall not include dividends on corporate shares, and such right ceases and determines by death or in any other manner at a time other than the date when such periodic payments should be paid, he or his personal representative shall be entitled to that portion of any such income next payable which amounts to the same percentage thereof as the time elapsed from the last due date of such periodic payments to and including the day of the determination of his right is of the total period during which such income would normally accrue. The remaining income shall be paid to the person next entitled to income by the terms of the transaction by which the principal was established. But no action shall be brought by the trustee or tenant to recover such apportioned income or any portion thereof until after the day on which it would have become due to the tenant, but for the determination of the right of the tenant entitled thereto. This subsection shall apply whether an ultimate remainderman is specifically named or not. Likewise when the right of the first tenant accrues at a time other than the payment dates of such periodic payments, he shall only receive that portion of such income which amounts to the same percentage thereof as the time during which he has been so entitled is of the total period during which such income would normally accrue; the balance shall be a part of the principal.

(6) **CORPORATE DIVIDENDS AND SHARE RIGHTS.** (a) All dividends on shares of a corporation forming a part of the principal which are payable in the shares of the corporation shall be deemed principal. Subject to this subsection, all dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations other than the declaring corporation, shall be deemed income, except that any distribution of shares or other securities or obligations of corporations other than the distributing corporation, or the proceeds of sale or other disposition thereof, made as a result of a court decree or final administrative order by a governmental agency heretofore or hereafter entered ordering the distributing corporation to divest itself of the shares, securities

or other obligations shall be deemed principal unless the distributing corporation indicates that the distribution is wholly or partly in lieu of an ordinary cash dividend in which case the distribution to the extent that it is in lieu of the ordinary cash dividend shall be deemed income. Where the trustee has the option of receiving a dividend either in cash or in the shares of the declaring corporation, it shall be considered as a cash dividend and deemed income, irrespective of the choice made by the trustee, except that any distribution by a mutual fund or investment company designated by it as a capital gains distribution shall be treated as principal.

(b) All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in such corporation, and the proceeds of any sale of such rights, shall be deemed principal. All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in another corporation, and the proceeds of any sale of such rights, shall be deemed income.

(c) Where the assets of a corporation are liquidated, amounts paid upon corporate shares as cash dividends declared before such liquidation occurred or as arrears of preferred or guaranteed dividends shall be deemed income; all other amounts paid upon corporate shares on disbursement of the corporate assets to the stockholders shall be deemed principal. All disbursements of corporate assets to the stockholders, whenever made, which are designated by the corporation as a return of capital or division of corporate property shall be deemed principal.

(d) Where a corporation succeeds another by merger, consolidation or reorganization or otherwise acquires its assets, and the corporate shares of the succeeding corporation are issued to the shareholders of the original corporation in like proportion to, or in substitution for, their shares of the original corporation, the 2 corporations shall be considered a single corporation in applying this subsection. But 2 corporations shall not be considered a single corporation under this subsection merely because one owns corporate shares of or otherwise controls or directs the other.

(e) In applying this section the date when a dividend accrues to the person who is entitled to it shall be held to be the date specified by the corporation as the one on which the stockholders entitled thereto are determined, or in default thereof, the date of declaration of the dividend.

(7) PREMIUM AND DISCOUNT BONDS. Where any part of the principal consists of bonds or other obligations for the payment of money, they shall be deemed principal at their inventory value or in default thereof at their market value at the time the principal was established, or at their cost where purchased later, regardless of their par or maturity value; and upon their respective maturities or upon their sale any loss or gain realized thereon shall fall upon or inure to the principal; but the foregoing shall not apply to bonds or other obligations issued on a discount basis and subject to definite appreciation in value on a fixed schedule. The increment in value of such bonds or other obligations shall constitute income as of each date on which an increment occurs and shall be made available as income for such disposition as is provided for by the terms of the transaction under which the principal was established by transferring from the principal on each such date an amount equivalent to the increment then occurring.

(8) DISPOSITION OF NATURAL RESOURCES. Where any part of the principal consists of property in lands from which may be taken timber, minerals, oils, gas or other natural resources and the trustee or tenant is authorized by law or by the terms of the transaction by which the principal was established to sell, lease or otherwise develop such natural resources, and no provision is made for the disposition of the net proceeds thereof after the payment of expenses and carrying charges on such prop-

erty, such proceeds, if received as rent on a lease, shall be deemed income, but if received as consideration, whether as royalties or otherwise, for the permanent severance of such natural resources from the lands, shall be deemed principal to be invested to produce income. Nothing in this subsection shall be construed to abrogate or extend any right which may otherwise have accrued by law to a tenant to develop or work such natural resources for his own benefit.

(9) EXPENSES; TRUST ESTATES. (a) All ordinary expenses incurred in connection with the trust estate or with its administration and management, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the estates of both tenant and remainderman, interest on mortgages on the principal, ordinary repairs and compensation of assistants and agents shall be paid out of income.

(b) All other expenses including cost of investing or reinvesting principal, court costs, attorneys' fees, and other fees on accountings and in maintaining or defending any action to protect the trust or the property or assure the title thereof, unless due to the fault or cause of the tenant, and costs of or assessments for improvements to property forming part of the principal, shall be paid out of principal. Any tax levied by any authority, federal, state or foreign, upon profit or gain defined as principal under the terms of sub. (3) (b) shall be paid out of principal notwithstanding the tax may be denominated a tax upon income by the taxing authority. The amount of tax paid out of principal shall be that proportion of the total tax payable by the trustee which the taxable portion of such profit or gain bears to taxable income.

(c) In the absence of any direction in an instrument creating a trust, unless the court having jurisdiction over the administration thereof shall otherwise direct, 75% of the customary annual fees of the trustee shall be charged against the incomes, and 25% thereof shall be charged against the corpus of the trust.

(d) Expenses paid out of income according to par. (a) which represent regularly recurring charges shall be considered to have accrued from day to day, and shall be apportioned on that basis whenever the right of the tenant begins or ends at some date other than the payment date of the expenses. Where the expenses to be paid out of income are of unusual amount, the trustee may distribute them throughout an entire year or part thereof or throughout a series of years. After such distribution, where the right of the tenant ends during the period, the expenses shall be apportioned between tenant and remainderman on the basis of such distribution.

(e) Where the costs of, or special taxes or assessments for, an improvement representing an addition of value to property held by the trustee as part of principal are paid out of principal, under par. (b), the trustee shall reserve out of income and add to the principal each year a sum equal to the cost of the improvement divided by the number of years of the reasonably expected duration of the improvement.

(10) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(11) SHORT TITLE. This section may be cited as the "Uniform Principal and Income Act".

(12) CONFLICTS. This section shall supersede any provision of law in conflict therewith.

COMMENT: This is present s. 231.40 and will be revised later.

701.21 INCOME PAYMENTS AND ACCUMULATIONS. (1) DISTRIBUTION OF INCOME. Where a beneficiary is entitled to receive income from

a trust, but the creating instrument fails to specify how frequently it is to be paid, the trustee shall distribute at least annually the income to which such beneficiary is entitled.

(2) **PERMITTED ACCUMULATIONS.** No provision directing or authorizing accumulation of trust income shall be invalid.

(3) **CHARITABLE TRUST ACCUMULATIONS.** A trust containing a direction or authorization to accumulate income from property devoted to a charitable purpose shall be subject to the general equitable supervision of the court with respect to any such accumulation of income, including its reasonableness, amount and duration.

(4) **DISPOSITION OF ACCUMULATED INCOME.** Income not required to be distributed by the creating instrument, in the absence of a governing provision in the instrument, may in the trustee's discretion be held in reserve for future distribution as income or be added to principal subject to re-transfer to income of the dollar amount originally transferred to principal; but at the termination of the income interest, any undistributed income shall be distributed as principal.

COMMENT: This replaces present ss. 230.37 and 230.40.

701.22 DISTRIBUTIONS IN KIND BY TRUSTEES; MARITAL BEQUESTS. 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 governing instrument expressly provided that another value may be used. If the governing instrument requires or permits a different value to be used, all assets available for distribution, including cash, shall, unless otherwise expressly provided, be so distributed that the assets, 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 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.

COMMENT: This is present s. 231.55.

701.23 REMOVAL OF TRUSTS. (1) **REMOVAL TO FOREIGN JURISDICTION.** Unless the creating instrument contains an express prohibition or provides a method of removal, a county court having jurisdiction of a trust created by a will admitted to probate in such court may, upon petition of a trustee or a beneficiary with the consent of the trustee and after a hearing as to which notice has been given to the trustee and other interested persons, order removal of such trust to another state where the court finds that such removal is in accord with the express or implied intention of the settlor, would aid the efficient administration of the trust or is otherwise in the best interests of the beneficiaries. Such order may be conditioned on the appointment of a trustee in the state to which the trust is to be removed and shall be subject to such other terms and conditions as the court deems appropriate for protection of the trust property and the interests of the beneficiaries. Upon receipt of satisfactory proof of compliance with all terms and conditions of the order, the court may discharge the local trustee from further responsibility in the administration of the trust.

(2) **REMOVAL TO THIS STATE.** Unless the creating instrument contains an express prohibition against removal or provides a method for removal, a court may, upon the petition of a foreign trustee or beneficiary with the consent of the trustee, appoint a local trustee to receive and administer trust property presently being administered in another state. Such trustee may be required to give bond conditioned on the faithful performance of his duties or to meet any other conditions required by a

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court in the other state before permitting removal of the trust to this state.

701.24 APPLICABILITY OF CHAPTER. The provisions of this chapter are applicable to a trust existing on July 1, 1971, as well as a trust created after such date and shall govern trustees acting under such trusts. If application of any provision of this chapter to a trust in existence on the effective date of this chapter is unconstitutional, it shall not affect application of the provision to a trust created after the effective date of this chapter.

SECTION 18. In the list of program responsibility statutes specified for the department of health and social services under s. 15.191 (intro.), the reference to "s. 231.11 (8)" is deleted.

SECTION 19. In the list of program responsibility statutes specified for the department of justice under s. 15.251 (intro.), the reference to "s. 231.34" is deleted and "s. 701.10 (3)" is substituted.

SECTION 20. In sections 49.70 (1) and 224.10 (1) (c) of the statutes, the reference to "s. 231.45" is deleted and "s. 710.05" is substituted.

SECTION 21. In section 157.125 of the statutes, the reference to "chapter 231" is deleted and "ch. 701" is substituted.

SECTION 22. In section 223.12 (4) of the statutes, the reference to "s. 323.01" is deleted and "s. 701.16" is substituted.

SECTION 23. This act shall take effect July 1, 1971.

Approved December 2, 1969.
