

CHAPTER 701

TRUSTS

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

(1) **BENEFICIARY.** “Beneficiary” means a person who has a beneficial interest in a trust.

(2) **CHARITABLE AND PRIVATE TRUST.** To the extent that trust income or principal presently or in the future must be used by the trustee exclusively for a charitable purpose as defined in s. 701.10 (1), the trust is a “charitable trust”; any other trust is a “private trust”, provided it is for the benefit of a person sufficiently identifiable to enforce the trust.

(3) **COURT.** “Court” means the court having jurisdiction.

(4) **PROPERTY.** “Property” means an interest in real or personal property.

(5) **SETTLOR.** “Settlor” means a person who directly or indirectly creates a living or testamentary trust or adds property to an existing trust.

(6) **TESTAMENTARY AND LIVING TRUST.** “Testamentary trust” means a trust subject to the continuing jurisdiction of the court assigned to exercise probate jurisdiction; “living trust” means any other trust, including a testamentary trust removed to this state from another state.

(7) **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.

(8) **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.

History: 1971 c. 66; 1977 c. 187 s. 135; 1977 c. 449; 1983 a. 189.

701.02 Purposes for which trusts may be created. A trust may be created for any lawful purpose.

History: 1993 a. 16, 437.

Cross-reference: See s. 701.10 (1) which lists the purposes for which a charitable trust may be created.

Advantages of the revocable trust estate plan. Keydel, 1975 WBB No. 3.

701.03 Passive trusts abolished. Except as provided in s. 706.08 (4), every trust, to the extent it is private and passive, vests no title or power in the trustee, but the beneficiary takes a title corresponding in extent to the beneficial interest given the beneficiary. A trust is passive if the title or power given the trustee is merely nominal and the creating instrument neither expressly nor by implication from its terms imposes active management duties on the trustee.

History: 1989 a. 231.

When a trustee has the duty of paying taxes and insurance, the trust is an active one. Kinzer v. Bidwill, 55 Wis. 2d 749, 201 N.W.2d 9 (1972).

This statute does not apply to living trusts. Section 701.07, which provides that a living trust cannot be deemed passive, controls. McMahon v. Standard Bank & Trust Co. 202 Wis. 2d 564, 550 N.W.2d 727 (Ct. App. 1996), 95–1303.

701.04 Purchase money resulting trusts abolished.

(1) If title to property is transferred to one person and all or part of the purchase price is furnished by another, the latter may not enforce a purchase 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.

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 the trustee’s fiduciary duties as trustee.

(2) If a trustee of a private trust has title to the trust property, a beneficiary has both a right to have the trustee perform the trustee’s fiduciary duties and an equitable interest, present or future, in the trust property. If a trustee of a private trust holds only a power over property, a beneficiary has a right to have such trustee perform the trustee’s fiduciary duties.

(3) In a private or charitable trust where the trustee takes all title of the settlor or other transferor and holds such title subject to the trustee’s fiduciary duties as trustee, any interest expressly retained by the settlor or not effectively disposed of to others remains in the settlor, or the settlor’s successors in interest, as an equitable reversionary interest and to this extent the settlor, or the settlor’s successors, are beneficiaries of the trust. In a private trust where the trustee takes all title of the settlor or other transferor and holds such title subject to the trustee’s fiduciary duties as trustee, 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.

History: 1971 c. 66; 1991 a. 316.

701.06 Spendthrift provisions and rights of creditors of beneficiaries. (1) **INCOME BENEFICIARIES.** A settlor may expressly provide in the creating instrument that the interest in 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 claims against the beneficiary until paid over to the beneficiary pursuant to the terms of the trust.

(2) **PRINCIPAL BENEFICIARIES.** A settlor may expressly provide in the creating instrument that the interest in principal of a benefi-

ciary 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 claims against the beneficiary, but a judgment creditor, after any payments of principal have become due or payable to the beneficiary pursuant to the terms of the trust, may apply to the court for an order directing the trustee to satisfy the judgment out of any such payments and the court in its discretion may issue an order for payment of part or all of the judgment.

(3) DISCLAIMER OR RENUNCIATION NOT AN ASSIGNMENT. A disclaimer or renunciation by a beneficiary of part or all of his or her 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 part or all of the claim out of part or all of payments of income or principal as they are due, presently or in the future;

(b) In the case of a beneficiary under a discretionary trust, order the trustee to satisfy part or all of the claim out of part or all of future payments of income or principal which are to be made pursuant to the exercise of the trustee's 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 under s. 46.10, 49.345, or 301.12 or the beneficiary is legally obligated to pay for the beneficiary's public support or that furnished the beneficiary's spouse or minor child under s. 46.10, 49.345, or 301.12, upon application by the appropriate state department or county official, the court may:

(a) If such beneficiary is entitled to receive income or principal under the trust, order the trustee to satisfy part or all of the liability out of part or all of payments of income or principal as they are due, presently or in the future;

(b) Except as otherwise provided in par. (c), in the case of a beneficiary under a discretionary trust, order the trustee to satisfy part or all of the liability out of part or all of future payments of income or principal which are to be made pursuant to the exercise of the trustee's discretion in favor of such beneficiary;

(c) In the case of a beneficiary under a discretionary trust who is a settlor or a spouse or minor child of the settlor, order the trustee to satisfy part or all of the liability without regard to whether the trustee has then exercised or may thereafter exercise the trustee's discretion in favor of the beneficiary.

(5m) TRUST FOR DISABLED INDIVIDUAL. Subsection (5) does not apply to any trust that is established for the benefit of an individual who has a disability which has continued or can be expected to continue indefinitely, substantially impairs the individual from adequately providing for his or her own care or custody, and constitutes a substantial handicap to the afflicted individual if the trust does not result in ineligibility for public assistance under ch. 49. A trustee of a trust which is exempt from claims for public support under this subsection shall notify the county department under s. 46.215 or 46.22 in the county where the disabled beneficiary resides of the existence of the trust.

(6) SETTLOR AS BENEFICIARY. (a) Notwithstanding any provision in the creating instrument and in addition to the remedies available under subs. (4) and (5) where the settlor is a beneficiary, upon application of a judgment creditor of the settlor, the court may, if the terms of the instrument require or authorize the trustee to make payments of income or principal to or for the benefit of the settlor, order the trustee to satisfy part or all of the judgment out of part or all of the payments of income or principal as they are due, presently or in the future, or which are payable in the trustee's

discretion, to the extent in either case of the settlor's proportionate contribution to the trust.

(b) A beneficiary of a trust may not be considered a settlor solely because of a lapse, waiver, or release of any of the following:

1. A power described under par. (c).

2. The beneficiary's right to withdraw part of the trust property, to the extent that the value of the property affected by the lapse, waiver, or release in any year does not exceed the greater of the amount in:

a. Section 2041 (b) (2) or 2514 (e), Internal Revenue Code of 1986.

b. Section 2503 (b), Internal Revenue Code of 1986.

(c) A beneficiary of a trust is not a settlor, has not made a voluntary or involuntary transfer of the beneficiary's interest in the trust, or does not have the power to make a voluntary or involuntary transfer of the beneficiary's interest in the trust solely because the beneficiary holds or exercises, in any capacity, any of the following:

1. A presently exercisable power to consume, invade, appropriate, or distribute property to or for the benefit of the beneficiary if the power is any of the following:

a. Exercisable only on consent of another person holding an interest adverse to the beneficiary's interest.

b. Limited by an ascertainable standard, such as health, education, support, or maintenance of the beneficiary.

2. A presently exercisable power to appoint any property of the trust to or for the benefit of a person other than the beneficiary, a creditor of the beneficiary, the beneficiary's estate, or a creditor of the beneficiary's estate.

3. A testamentary power of appointment.

4. A presently exercisable right described in par. (b) 2.

(d) A beneficiary of a trust is not a settlor solely because the beneficiary is entitled to nondiscretionary distributions from the trust.

(7) SUBSEQUENT MODIFICATION OF COURT'S ORDER. Any order entered by a court under sub. (4), (5) or (6) (a) is subject to modification upon application of an interested person.

(8) EXEMPT ASSETS. Assets of a trust, to the extent they are exempt from claims of creditors under other statutes, shall not be subject to sub. (4), (5), or (6) (a).

History: 1971 c. 66; 1977 c. 309, 418; 1985 a. 176; 1991 a. 316; 1997 a. 237; 2005 a. 216; 2007 a. 20.

Cross-reference: See s. 701.07 (3) which deals with creditors' rights where a settlor retains powers over a living trust.

Trust income that is income to the beneficiary under federal tax law is subject to a child support order regardless of whether a distribution is made to the beneficiary. *Grohmann v. Grohmann*, 189 Wis. 2d 532, 525 N.W.2d 261 (1995).

In not revealing that he was a trust beneficiary, a father failed to make proper financial disclosure at the time of a divorce as was required by s. 767.127. The rationale of *Grohmann* is applicable to both grantor and nongrantor trusts if there is an obligation to report that trust's income as one's own because it is the obligation to report the income that makes the income reachable for calculations of a child support obligation. *Stevenson v. Stevenson*, 2009 WI App 29, 316 Wis. 2d 442, 765 N.W.2d 811, 07-2143.

701.065 Debts of decedents. (1) LIMITATIONS ON CLAIMS.

(a) 1. A trustee who has a duty or power to pay the debts of a decedent may publish in the county in which the decedent resided, as a class 3 notice, under ch. 985, a deadline for filing claims with the trustee. The deadline shall be the date that is 4 months after the date of the first insertion of the notice.

2. Except as provided in pars. (b) and (c), if the trustee satisfies the requirements for the publication of the notice under subd. 1., all claims, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, are barred against the trustee, the trust property and any recipient of trust property unless filed with the trustee on or before the date specified in the notice under subd. 1.

(b) Notwithstanding par. (a) 2., a claim that is not filed on or before the date specified in the notice under par. (a) 1. is not barred if any of the following apply:

1. The claim is a claim based on tort, on a marital property agreement that is subject to the time limitations under s. 766.58 (13) (b) or (c), on Wisconsin income, franchise, sales, withholding, gift or death taxes, or on unemployment compensation contributions due or benefits overpaid; a claim for funeral or administrative expenses; a claim of this state under s. 46.27 (7g), 49.496 or 49.682 or rules promulgated under s. 46.286 (7); or a claim of the United States.

2. All of the following circumstances exist:

a. On or before the date specified in the notice under par. (a) 1., the trustee knew, or in the exercise of reasonable diligence should have known, of the existence of the potential claim and of the identity and mailing address of the potential claimant.

b. At least 30 days before the date specified in the notice under par. (a) 1., the trustee had not given notice to the potential claimant of the final day for filing his or her claim.

c. At least 30 days before the date specified in the notice under par. (a) 1., the claimant did not have actual knowledge of the date on which the claim would be barred.

(c) If an action is pending against a decedent at the time of his or her death and the action survives, the plaintiff in that action may serve a notice of substitution of party defendant on the trustee and file proof of service of notice in the court. Filing of proof of service on or before the deadline for filing a claim under par. (a) 1. gives the plaintiff the same rights against the trust as the filing of a claim. A judgment in any such action constitutes an adjudication of or against the trust.

(2) EFFECT OF STATUTE OF LIMITATIONS. A trustee shall not pay a claim that was barred by a statute of limitations at the time of the decedent's death. A claim not barred by a statute of limitations at the time of the decedent's death shall not be barred thereafter by a statute of limitations if the claim is filed with the trustee on or before the deadline for filing a claim under sub. (1) (a) 1.

(3) CLAIMS OF CREDITORS WITHOUT NOTICE. (a) A claim not barred by sub. (1) (a) 2. because of the operation of sub. (1) (b) 2. may be enforced against trust property only as provided in this subsection.

(b) The claimant shall file the claim with the trustee within one year after the decedent's death and within 30 days after the earlier of the following:

1. The date that the trustee gives notice to the potential claimant of the deadline for filing a claim under sub. (1) (a) 1.

2. The date that the claimant first acquires actual knowledge of the deadline for filing a claim under sub. (1) (a) 1.

(c) The claimant shall have the burden of establishing by the greater weight of the credible evidence that all of the circumstances under sub. (1) (b) 2. existed.

(d) This subsection does not extend the time for commencement of a claim beyond the time provided by any statute of limitations applicable to that claim.

(4) SATISFACTION OF CLAIM FROM OTHER PROPERTY. Failure of a claimant timely to file a claim as provided in this section does not bar the claimant from satisfying the claim, if not otherwise barred, from property other than trust property.

History: 1997 a. 188; 1999 a. 9.

701.07 Living trusts. (1) VALIDITY. A living trust, otherwise valid, shall not be held invalid as an attempted testamentary disposition, a passive trust under s. 701.03, or a trust lacking a sufficient principal because:

(a) It contains any or all of the following powers, whether exercisable by the settlor, another person or both:

1. To revoke, modify or terminate the trust in whole or in part;

2. To exercise a power or option over property in the trust or over interests made payable to the trust under an employee benefit plan, life insurance policy, or otherwise;

3. To direct, during the lifetime of the settlor or another, the person to whom or on whose behalf the income or principal shall be paid or applied;

4. To control the administration of the trust in whole or in part;

5. To add property or cause additional employee benefits, life insurance, or other interests to be made payable to the trust at any time.

(b) The principal consists of a designation of the trustee as a primary or direct, secondary or contingent beneficiary under a will, employee benefit plan, life insurance policy or otherwise; or

(c) The principal consists of assets of nominal value.

(2) ELIGIBILITY TO RECEIVE ASSETS. A living trust shall be eligible to receive property from any source.

(3) CREDITORS' RIGHTS. If a settlor retains a power to revoke, modify or terminate which is exercisable in the settlor's 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 trust property to the extent it is exempt from claims of creditors under other statutes.

History: 1971 c. 66; 1979 c. 110 s. 60 (4); 1991 a. 316.

Cross-reference: See s. 701.06 (6) which deals with creditors' rights where the settlor is a beneficiary of the trust.

Section 701.03, which prohibits passive trusts, does not apply to living trusts. This statute, which provides that a living trust cannot be deemed passive, controls. *McMahon v. Standard Bank & Trust Co.* 202 Wis. 2d 564, 550 N.W.2d 727 (Ct. App. 1996), 95–1303.

Understanding Living Trusts. Moschella. Wis. Law. March 1992.

Informing the Public About Living Trusts. Twohig. Wis. Law. March 1992.

701.08 Transfers to living trusts. (1) VALIDITY AND EFFECT. The order of execution of a living trust instrument and a will or other instrument purporting to transfer or appoint property to the trust evidenced by the trust instrument shall be disregarded in determining the validity of the transfer or appointment. No reference in any will to a living trust shall cause assets in such trust to be included in 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) GOVERNING TERMS. Property transferred or appointed by a will or by a beneficiary designation under an employee benefit plan, life insurance policy or other instrument permitting designation of a beneficiary to a living trust, the terms of which the testator or designator was the sole holder of a power to modify, shall be administered in accordance with the terms of the trust as they may have been modified prior to the testator's or designator's death, even though the will or beneficiary designation was not reexecuted or republished after exercise of the power to modify, unless the will or beneficiary designation expressly provides otherwise. Such property transferred or appointed to a living trust, which is subject to a power of modification requiring action or consent of a person other than the testator or designator, shall be administered in accordance with the terms of the trust instrument as they exist at the execution of the will or beneficiary designation, unless expressly otherwise provided. If the will or beneficiary designation expressly provides that the property shall be administered in accordance with the terms of the trust instrument as they may be modified thereafter, the will or beneficiary designation need not be reexecuted or republished after exercise of the power to modify.

(3) DISPOSITION WHEN NO EXISTING LIVING TRUST. If at the death of a testator a living trust has been completely revoked, or otherwise terminated, a provision in the testator's will purporting to transfer or appoint property to such trust shall have the following effect, unless the will provides otherwise:

(a) If the testator was a necessary party to the revocation or other termination of such trust, the provision in the testator's will shall be invalid;

(b) If the testator was not a necessary party to the revocation or other termination of such trust, the provision in the testator's will shall be deemed to create a testamentary trust upon the terms of the living trust instrument at the time the will was executed or as otherwise provided where sub. (2) is applicable.

History: 1971 c. 66; 1991 a. 316.

701.09 Transfers to testamentary trusts. (1) TESTAMENTARY TRANSFER TO TRUST OF ANOTHER. A transfer or appointment by will 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 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 transfer or appointment. Property included in such a transfer or appointment shall not be considered property subject to administration as part of the other person's estate but shall pass directly to that other person's testamentary trustee, be added to the designated trust and administered as a part thereof.

(2) INVALID TESTAMENTARY TRANSFER. If such a transfer or appointment by will 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 transfer or appointment by will 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 transfer or appointment by will.

(3) LIFE INSURANCE PROCEEDS TRANSFERRED TO TRUST OF INSURED. A trustee named or to be named in the will of an insured person may be designated beneficiary of an insurance policy on the life of the insured if the designation is made in accordance with the terms of the policy. After admission of the insured's will to probate and issuance of letters to 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 the proceeds may be commingled with other assets passing to the trust. Insurance proceeds paid to a testamentary trustee because of his or her designation as life insurance beneficiary shall not be subject to death tax to any greater extent than if the proceeds were payable to a beneficiary other than the insured's estate. The proceeds shall be inventoried for tax purposes only and shall not be subject to taxes, debts or charges enforceable against the estate or otherwise considered assets of the insured's estate to any greater extent than if the proceeds were payable to a beneficiary other than the insured's estate.

(4) EMPLOYEE BENEFITS TRANSFERRED TO TRUST OF EMPLOYEE. A trustee named or to be named in the will of an employee covered by any employee benefit plan or contract described in s. 815.18 (3) (j) or any annuity or insurance contract purchased by an employer that 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 employee if the designation is made in accordance with the terms of the plan or contract. After admission of the employee's will to probate and issuance of letters to the trustee, the death benefits 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 employee, and the benefits may be commingled with other assets passing to the trust. Death benefits paid to a testamentary trustee because of his or her designation as payee are not subject to the death tax to any greater extent than if the benefits were payable to a beneficiary other than the employee's estate. The benefits shall be inventoried for tax purposes only and are not subject to taxes, debts or charges enforceable against the estate or otherwise considered assets of the employee's estate to any greater extent than if the benefits were payable to a beneficiary other than the employee's estate.

(5) TRANSFER OF OTHER PROPERTY. Property other than that described in subs. (3) and (4) may be made payable to or transferred to a trustee named or to be named in the will of the transferor.

History: 1971 c. 66; Sup. Ct. Order, 67 Wis. 2d 585, 777 (1975); 1975 c. 218; 1987 a. 27; 1989 a. 278; 1991 a. 316.

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 or 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 the settlor's 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 \$50,000, 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, the attorney general and an established charitable entity to which income or principal must be paid under the terms of the trust shall be persons interested in 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 named in the governing instrument to which income or principal must or may be paid under the terms of the trust;

2. The attorney general in the name of the state upon the attorney general's own information or, in the attorney general's 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, but, except as provided in sub. (2), notice need not be given where the income or principal must be paid exclusively to one or more established charitable entities named in the governing instrument.

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

History: 1971 c. 66; 1991 a. 316; 1993 a. 160.

Cross-reference: See s. 879.03 (2) (c) on notice to the attorney general of probate proceedings affecting a charitable trust.

A trust for residents of a city cannot be enlarged as to the area only because the trustees believe the original restriction has become unfair. In re Charitable Trust, Oshkosh Foundation, 61 Wis. 2d 432, 213 N.W.2d 54 (1973).

Construction of a trust’s terms to allow the majority of the proceeds to be used for a college seminar series for clergy was impermissible when that construction would increase the class of beneficiaries and divert the trust purpose from one providing living facilities for the original beneficiaries into one primarily for the educational benefit of clergy. In re Petition of Downer Home, 67 Wis. 2d 55, 226 N.W.2d 444 (1975).

This section applies only to entities operated exclusively for charitable purposes. ABC for Health, Inc. v. Commissioner of Insurance, 2002 WI App 2, 250 Wis. 2d 56, 640 N.W.2d 510, 00–2944.

If a trust instrument provides a specified procedure for altering administrative provisions of the trust, there is no reason to suppose the legislature intended that sub. (2) (b) be used to override such a procedure. League of Women Voters v. Madison Community Foundation, 2005 WI App 239, 288 Wis. 2d 128, 707 N.W.2d 285, 04–2036.

701.105 Private foundations. (1) (a) In the administration of any trust which is a private foundation, as defined in section 509 of the internal revenue code, a charitable trust, as defined in section 4947 (a) (1) of the internal revenue code, or a split–interest trust as defined in section 4947 (a) (2) of the internal revenue code, all of the following acts shall be prohibited:

1. Engaging in any act of self–dealing as defined in section 4941 (d) of the internal revenue code, which would give rise to any liability for the tax imposed by section 4941 (a) of the internal revenue code.

2. Retaining any excess business holdings as defined in section 4943 (c) of the internal revenue code, which would give rise to any liability for the tax imposed by section 4943 (a) of the internal revenue code.

3. Making any investments which would jeopardize the carrying out of any of the exempt purposes of the trust, within the meaning of section 4944 of the internal revenue code, so as to give rise to any liability for the tax imposed by section 4944 (a) of the internal revenue code.

4. Making any taxable expenditures as defined in section 4945 (d) of the internal revenue code, which would give rise to any liability for the tax imposed by section 4945 (a) of the internal revenue code.

(b) This subsection shall not apply either to those split–interest trusts or to amounts thereof which are not subject to the prohibitions applicable to private foundations by reason of the provisions of section 4947 of the internal revenue code.

(2) In the administration of any trust which is a private foundation as defined in section 509 of the internal revenue code, or which is a charitable trust as defined in section 4947 (a) (1) of the internal revenue code, there shall be distributed, for the purposes specified in the trust instrument, for each taxable year, amounts at least sufficient to avoid liability for the tax imposed by section 4942 (a) of the internal revenue code.

(3) Subsections (1) and (2) shall not apply to any trust to the extent that a court of competent jurisdiction shall determine that such application would be contrary to the terms of the instrument governing such trust and that the same may not properly be changed to conform to such subsections.

(4) Nothing in this section shall impair the rights and powers of the courts or the attorney general of this state with respect to any trust.

History: 1971 c. 66; 1991 a. 39.

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 maintaining, keeping in repair and preserving any grave, tomb, monument, gravestone or any cemetery. Any cemetery company, association or corporation may receive property in trust for any of those purposes and apply the income from the trust 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.

History: 1989 a. 307.

701.115 Future interests in revocable trusts. (1) (a) In par. (b), “revocable trust” means a trust that the grantor, at the time of death, was alone empowered to change or revoke, by law or under the instrument creating the trust, regardless of whether the grantor then had the capacity to exercise the power.

(b) Unless a contrary intention is found, if a person has a future interest in property under a revocable trust and, under the terms of the trust, the person has the right to possession and enjoyment of the property at the grantor’s death, the right to possession and enjoyment is contingent on the person’s surviving the grantor. Extrinsic evidence may be used to show contrary intent.

(2) Survivorship under sub. (1) (b) is governed by s. 854.03.

(3) The rights of the issue of a predeceasing beneficiary under sub. (1) (b) are governed by s. 854.06.

History: 1997 a. 188; 2005 a. 216.

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, except as provided under s. 445.125 (1) (a) 2. to 4.

(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 by a guardian ad litem. A guardian ad litem for 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 or prevent conversion of a trust to a unitrust under s. 701.20 (4g).

History: 1971 c. 66; 1977 c. 40; 1979 c. 175 s. 53; 1979 c. 221 s. 2202 (45); 1981 c. 64; 1995 a. 295; 2005 a. 10.

That s. 701.18 allows removing a trustee for cause does not prevent removal of a trustee under this section with the approval of the settlor and all beneficiaries, without showing cause. *Weinberger v. Bowen*, 2000 WI App 264, 240 Wis. 2d 55, 622 N.W.2d 471, 00–0903.

701.13 Modification and termination of trusts by court action.

(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 or herself, the court on the application of the beneficiary or the beneficiary's guardian 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 the beneficiary's benefit, the court may make an allowance from principal to or for the benefit of such beneficiary if the beneficiary's 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 whose settlor is deceased and in the case of any testamentary trust, regardless in either case of spendthrift or similar protective provisions, a court with the consent of the trustee may order termination of the trust, in whole or in part, and the distribution of the assets that it considers appropriate 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 impractical. In any event, if the trust property is valued at less than \$50,000, the court may order termination of the trust and the distribution of the assets that it considers appropriate.

(4) MARITAL DEDUCTION TRUSTS. In a trust where the income beneficiary also has a general power of appointment as defined in s. 702.01 (3) 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. (a) In this subsection, "participate or intervene in any political campaign" includes the publishing or distributing of statements.

(b) Subsections (2) and (3) do not apply to a trust under which a future interest is indefeasibly vested in any of the following:

1. The United States or a political subdivision for exclusively public purposes.

2. A corporation that is 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, and that does not participate or intervene in any political campaign on behalf of any candidate for public office.

3. 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, and such trustee or such fraternal society, order, or association does not participate or intervene in any political campaign on behalf of any candidate for public office.

4. Any veteran's organization incorporated by act of congress, or of 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.

History: 1971 c. 66; 1983 a. 189 s. 329 (26); 1991 a. 316; 1993 a. 143; 1999 a. 85.

701.14 Circuit court procedure in trust proceedings.

(1) GENERALLY. A proceeding in the circuit court involving a living or testamentary trust may be commenced by a trustee or other person interested in the trust and, except as otherwise provided in this chapter, all probate procedure governing circuit courts, so far as it may be applicable, shall apply to such proceeding.

(2) NOTICE. If notice of a trust proceeding to a person interested in the trust, to the person's representative or guardian ad litem as provided in s. 701.15 or to other persons, is required by law or deemed necessary by the court, the court shall order such notice to be given as prescribed in s. 879.05 except that service by publication shall not be required unless ordered by the court. The court may order both personal service and service by publication on designated persons. Proof of service shall be made as provided in s. 879.07. Persons interested in the trust, on behalf of themselves, or their representatives or guardians ad litem as provided in s. 701.15, on behalf of themselves and those whom they represent, may in writing waive service of notice and consent to the hearing of any matter without notice. Waiver of notice or an appearance by any person interested in the trust or the person's representative or guardian ad litem as provided in s. 701.15 is equivalent to timely service of notice.

(3) ATTORNEY FOR PERSON IN MILITARY SERVICE. At the time of filing a petition for a trust proceeding, an affidavit shall be filed setting forth the name of any person interested in the proceeding who is actively engaged in the military service of the United States. Whenever it appears by the affidavit or otherwise that any person in the active military service of the United States is interested in any trust proceeding and is not represented by an attorney, or by an attorney-in-fact who is duly authorized to act on the person's behalf in the matter, the court shall appoint an attorney to represent the person and protect the person's interest.

(4) VENUE. A proceeding involving a living trust shall be governed by ss. 801.50 to 801.62 so far as applicable and shall be regarded as a civil action for that purpose.

History: 1971 c. 66; Sup. Ct. Order, 67 Wis. 2d 585, 777 (1975); 1977 c. 449 s. 497; 1991 a. 220, 316.

Cross-reference: See s. 701.10 (3), which 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 the trust.

701.15 Representation of others. Except as otherwise provided in ss. 701.12 and 701.13 (1), in a trust proceeding in the circuit court:

(1) POWER TO CREATE OR EXTINGUISH. The sole holder or all coholders of a power of revocation or a general power of appointment as defined in s. 702.01 (3) may represent any or all persons whose interests are subject to such power.

(2) GUARDIAN AD LITEM; VIRTUAL REPRESENTATION. Subject to sub. (1), the court may appoint a guardian ad litem for any person interested 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.

History: 1971 c. 66; 1977 c. 449; 1983 a. 189 s. 329 (26).

The decision to appoint a guardian ad litem under sub. (2) is discretionary. *McGuire v. McGuire*, 2003 WI App 44, 260 Wis. 2d 815, 660 N.W.2d 308, 02–0390.

701.16 Testamentary trustees. (1) APPOINTMENT OF ORIGINAL TRUSTEE. (a) *Trustee named in will.* A trustee who is named or whose appointment is provided for in a will derives the authority to carry out the trust from the will and assumes the office of trustee upon the issuance of letters of trust by the court as provided in s. 856.29. 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) *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 nor effective provision made for appointment of an alternate trustee, the court shall appoint a suitable person as trustee. Letters of trust shall be issued to such trustee as provided in s. 856.29.

(c) *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 the special trustee.

(d) *Foreign trustee.* If 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, the 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 certified copy of the letters of trust and filed with the register of probate of the same county a statement appointing the register of probate in his or her 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 the trustee would have if he or she received letters of trust from a circuit 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.

(2) BOND. Prior to the issuance of letters of trust to an original testamentary trustee under sub. (1) or to a successor or added testamentary trustee under s. 701.17 (1), the court may require such trustee to give a bond in accordance with ch. 878 and conditioned on the faithful performance of such trustee's 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 pars. (am) and (b). If the trustee is accounting on a calendar-year basis, the court may not require the trustee to file the annual account prior to April 15. Production of securities and other assets for examination is not 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.

(am) The annual accounting requirements under par. (a) do not apply to corporate trustees or to corporate cotrustees if those trustees or cotrustees agree, in their initial consent to act as trustees or cotrustees or in a subsequent filing with the register in probate for the county that has jurisdiction over the trust, to provide annual accounts to all persons interested, as defined in s. 851.21, who request those accounts by writing to the trustee or cotrustee. Each request is effective until the requester withdraws it or is no longer a person interested. A corporate trustee or cotrustee may withdraw its agreement by notifying the appropriate register in probate of its intent to do so.

(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 the trustee's accounts on a periodic basis.

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

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

(5) FINAL ACCOUNTING. A verified final account is required upon the termination of a testamentary trust. Upon the petition of a surviving or successor trustee, a beneficiary, a personal representative of a deceased trustee or on its own motion, the court may order a verified account filed upon the death, resignation or removal of a testamentary trustee. 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.

History: 1971 c. 66; 1977 c. 449; 1979 c. 32; 1987 a. 220; 1991 a. 316.

Cross-reference: See s. 223.12 which contains requirements which must be met before a foreign corporate trustee is qualified to act in this state.

See s. 701.23 (1), which provides for the discharge of a trustee when a testamentary trust is removed to another state.

Even during a hearing on discharge, a trustee's duty to affirmatively represent the beneficiaries' interests by disclosing relevant information remains, and a breach of this duty leaves the discharge open to attack. *Hammes v. First National Bank & Trust Co.* 79 Wis. 2d 355, 255 N.W.2d 555 (1977).

A trustee has a duty to the trust beneficiaries to ensure that the personal representative transfers all property to which the trust is entitled. Even when the same person acts as trustee and personal representative, the trustee has a duty to enforce claims the trust has against the personal representative. *Old Republic Surety Co. v. Erlen*, 190 Wis. 2d 400, 527 N.W.2d 389 (Ct. App. 1994).

701.17 Successor and added trustees. (1) APPOINTMENT OF SUCCESSOR OR ADDED 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 the trustee's 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). The court may in the exercise of a sound discretion appoint an additional trustee if necessary for the better administration of the trust, unless the creating instrument expressly prohibits such addition or provides an effective method for appointing an additional trustee.

Subject to s. 701.16 (2), a successor or added testamentary trustee shall be issued letters of trust, at that trustee's request.

(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 the special trustee.

(3) **POWERS OF SUCCESSOR OR ADDED 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 and an added trustee becomes a joint tenant with the existing trustee in all trust property. The court may order a trustee who resigns, is removed or is joined by an added trustee to execute such documents transferring title to trust property as may be appropriate to facilitate administration of the trust or may itself transfer title.

History: 1971 c. 66; 1991 a. 316.

701.18 Resignation and removal of trustees. (1) RESIGNATION. A trustee may resign in accordance with the terms of the creating instrument or petition the court to accept the trustee's resignation and the court may, upon notice and hearing, discharge the trustee from further responsibility for the trust upon such terms and conditions as are necessary to protect the rights of the beneficiaries and any cotrustee. In no event shall a testamentary trustee be discharged from further responsibility except as provided in s. 701.16 (6).

(2) **REMOVAL.** A trustee may be removed in accordance with the terms of the creating instrument or the court may, upon its own motion or upon a petition by a beneficiary or cotrustee, and upon 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. In no event shall a testamentary trustee be discharged from further responsibility except as provided in s. 701.16 (6).

History: 1971 c. 66; 1991 a. 316.

Trustees of an employees' profit-sharing plan who are also beneficiaries may not be removed simply because other beneficiaries have lost confidence in them or because they personally benefit in a minor way from a denial of benefits to a participant. *Zimmermann v. Brennan*, 56 Wis. 2d 623, 202 N.W.2d 923 (1973).

Although the will creating the trust provided that the trustee could resign without court approval, filing a petition for the appointment of a successor and approval of accounts invoked court jurisdiction and required the exercise of discretion regarding the trustee's resignation. *Matter of Sherman B. Smith Family Trust*, 167 Wis. 2d 196, 482 N.W.2d 118 (Ct. App. 1992).

That this section allows removing a trustee for cause does not prevent removal of a trustee under s. 701.12 with the approval of the settlor and all beneficiaries, without showing cause. *Weinberger v. Bowen*, 2000 WI App 264, 240 Wis. 2d 55, 622 N.W.2d 471, 00–0903.

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 the trustee 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) A trustee may not sell individually owned assets to the trust unless the sale is authorized in the creating instrument, made with the written consent of all beneficiaries or made with the approval of the court upon 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 BY COURT ORDER.** (am) In the absence of contrary or limiting provisions in the creating instrument, the circuit 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:

1. For conduct of the business solely by the trustee, jointly with one or more of the settlor's surviving partners or as a corporation or limited liability company to be formed by the trustee;

2. 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;

3. 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

4. For the period of time for which the business may be conducted and any 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 liquidating the business is not required by the creating instrument or other applicable law.

(4m) **CONTINUATION OF BUSINESS BY DIRECTION OF SETTLOR.** If the settlor directs retention of a business that is among the trust's assets in the trust document or by other written means, a trustee may retain that business during the settlor's lifetime without liability.

(5) **FORMATION OF BUSINESS ENTITY.** In the absence of contrary or limiting provisions in the creating instrument:

(a) The court may by order authorize a trustee to become a partner under ch. 178 or 179 and transfer trust property to the partnership in return for a partnership interest.

(aL) The court may by order authorize a trustee to become a member of a limited liability company under ch. 183 and transfer

trust property to the limited liability company in return for an ownership 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 the person's own land. The order under this subsection may in the court's discretion be issued without notice and hearing.

(9) JOINT TRUSTEES. (a) 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. This paragraph shall not apply to living trusts created prior to July 1, 1971, or to testamentary trusts contained in wills executed or last republished prior to that date.

(b) A trustee who has not joined in exercising a power is not liable to an affected person for the consequences of the exercise unless the trustee has failed to discharge the trustee's duty to participate in the administration of the trust. A dissenting trustee is not liable for the consequences of an act in which the dissenting trustee joins at the direction of the majority of the trustees if the dissenting trustee's dissent is expressed in writing to the other trustees at or before the time of the joinder.

(10) RESTRICTION ON EXERCISE OF POWERS. (a) Except as provided in par. (c), a person may not exercise any of the following powers conferred upon him or her in his or her capacity as trustee:

1. The power to make discretionary distributions of trust principal or income if the distributions are to himself or herself or for the discharge of his or her legal obligations.

2. The power to make discretionary allocations of receipts or expenses as between principal and income if the allocations are in his or her favor.

(b) If a power under par. (a) is conferred upon more than one person as trustee, a person who is not disqualified to act under par. (a) may exercise the power for the benefit of the person who is disqualified to act, unless the creating instrument expressly provides otherwise. A special trustee appointed by a court may exercise a power under par. (a) for the benefit of the disqualified person if no other trustee is qualified to exercise the power.

(c) Paragraph (a) does not apply if any of the following applies:

1. The person is also the settlor of the trust, and the trust may be revoked or amended by the settlor.

2. The terms of the creating instrument specifically limit the scope of the power to expenditures and distributions of income or principal on the basis of an ascertainable standard relating to the person's health, maintenance, support, or education such that the person would not be subject to tax under section 2041 or 2514 of the Internal Revenue Code as a result of having or exercising the power.

3. The person is the spouse, widow, or widower of the settlor of the trust, and a marital deduction has been allowed for federal gift or estate tax purposes with respect to the trust property that is subject to the power.

4. The creating instrument negates the application of par. (a) with respect to the power or indicates that provisions that are similar to par. (a) do not apply.

(d) Section 701.24 (3) governs the applicability of this statute.

(11) PROTECTION OF 3RD PARTIES. With respect to a 3rd 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 3rd person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a 3rd person, without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers the trustee purports to exercise. A 3rd person is not bound to assure the proper application of trust property paid or delivered to the trustee.

History: 1971 c. 66; 1979 c. 175 s. 50; 1991 a. 316; 1993 a. 112, 160, 486; 1995 a. 336; 1999 a. 85; 2005 a. 216, 253.

Cross-reference: See s. 112.01, the Uniform Fiduciaries Act on protection of third parties.

Cross-reference: See s. 112.02, which provides for suspending powers of a testamentary trustee in military service.

Cross-reference: Chapter 881 and s. 223.055 contain limitations on investments by trustees.

The loss of future profit to an estate through the disposal of a parcel is damage chargeable to the trustee or personal representative only if the parcel was not needed for liquidity. In re Estate of Meister, 71 Wis. 2d 581, 239 N.W.2d 52 (1976).

Fiduciary and estate liability in contract and in tort. Dubis, 55 MLR 297.

701.20 Principal and income. (2) DEFINITIONS. In this section:

(a) "Accounting period" means a calendar year, unless a fiduciary selects another 12-month period, and includes a portion of a calendar year or other 12-month period that begins when an income interest begins or that ends when an income interest ends.

(b) "Beneficiary" means a person who has a beneficial interest in a trust or an estate and includes, in the case of a decedent's estate, an heir, a legatee, and a devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(c) "Fiduciary" means a personal representative or a trustee and includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function as any of those.

(d) "Income" means money or property that a fiduciary receives as current return from a principal asset. "Income" includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in subs. (10) to (24).

(e) "Income beneficiary" means a person to whom net income of a trust is or may be payable.

(f) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion.

(g) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(h) "Net income" means the total receipts allocated to income during an accounting period, minus the disbursements made from income during the period, plus or minus transfers under this section to or from income during the period.

(i) "Person" means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(j) “Principal” means property held in trust for distribution to a remainder beneficiary when the trust terminates or property held in trust in perpetuity.

(k) “Remainder beneficiary” means a person entitled to receive principal when an income interest ends.

(L) “Sui juris beneficiary” means a beneficiary not under a legal disability. The term includes all of the following:

1. A court–appointed guardian of a beneficiary who is adjudicated incompetent.
2. An agent for an incapacitated beneficiary.
3. A court–appointed guardian of a minor beneficiary’s estate or, if there is no court–appointed guardian, the parents of the minor beneficiary.

(m) “Terms of a trust” means the manifestation of the intent of a settlor or decedent with respect to a trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(n) “Trustee” includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

(3) FIDUCIARY DUTIES; GENERAL PRINCIPLES. (a) In allocating receipts and disbursements to income or principal or between income and principal, and with respect to any matter within the scope of subs. (5) to (9), a fiduciary:

1. Shall first administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this section.
2. May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this section.
3. Shall administer a trust or estate in accordance with this section if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration.
4. Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this section do not provide a rule for allocating the receipt or disbursement to principal or income or between principal and income.

(b) In exercising the power to adjust under sub. (4) (a) or a discretionary power of administration regarding a matter within the scope of this section, whether granted by the terms of a trust, a will, or this section, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this section is presumed to be fair and reasonable to all of the beneficiaries.

(4) TRUSTEE’S POWER TO ADJUST. (a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust’s income, and the trustee determines, after applying the rules in sub. (3) (a), that the trustee is unable to comply with sub. (3) (b).

(b) In deciding whether and to what extent to exercise the power conferred by par. (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

1. The nature, purpose, and expected duration of the trust.
2. The intent of the settlor.
3. The identity and circumstances of the beneficiaries.
4. The needs for liquidity, regularity of income, and preservation and appreciation of capital.
5. The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible

and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor.

6. The net amount allocated to income under the other subsections of this section and the increase or decrease in the value of the principal assets, which the trustee may estimate in the case of assets for which market values are not readily available.

7. Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income.

8. The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation.

9. The anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

1. If possessing or exercising the power to make an adjustment would disqualify an estate tax or gift tax marital or charitable deduction in whole or in part.

2. That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion.

3. That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets.

4. From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust and for which an estate tax or gift tax charitable deduction has been taken unless both income and principal are so set aside.

5. If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment.

6. If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment.

7. If the trustee is a beneficiary of the trust.

8. If the trust has been converted under sub. (4g) to a unitrust.

9. If the trust is an express unitrust, as defined in sub. (4j) (a).

(d) If par. (c) 5., 6., or 7. applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the terms of the trust do not permit the exercise of the power by that cotrustee.

(e) A trustee may release the entire power conferred by par. (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in par. (c) 1. to 6. or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in par. (c). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this subsection unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by par. (a).

(4c) NOTICE TO BENEFICIARIES OF PROPOSED ACTION. (b) A trustee may, but is not required to, obtain approval of a proposed action under sub. (4) (a) by providing a written notice that complies with all of the following:

1. Is given at least 30 days before the proposed effective date of the proposed action.
2. Is given in the manner provided in ch. 879, except that notice by publication is not required.

3. Is given to all sui juris beneficiaries who are any of the following:

a. Income beneficiaries currently eligible to receive income from the trust.

b. Eligible to receive, if no powers of appointment were exercised, income from the trust if the interest of all of those eligible to receive income under subd. 3. a. were to terminate immediately before the giving of notice.

c. A recipient, if no powers of appointment were exercised, of a distribution of principal if the trust were to terminate immediately before the giving of the notice.

4. States that it is given in accordance with this subsection and discloses the following information:

a. The identification of the trustee.

b. A description of the proposed action.

c. The time within which a beneficiary may object to the proposed action, which shall be at least 30 days after the giving of the notice.

d. The effective date of the proposed action if no objection is received from any beneficiary within the time specified in subd. 4. c.

(c) If a trustee gives notice of a proposed action under this subsection, the trustee is not required to give notice to a sui juris beneficiary who consents to the proposed action in writing at any time before or after the proposed action is taken.

(d) A sui juris beneficiary may object to the proposed action by giving a written objection to the trustee within the time specified in the notice under par. (b) 4. c.

(e) A trustee may decide not to take a proposed action after the trustee receives a written objection to the proposed action or at any other time for any other reason. In that case, the trustee shall give written notice to the sui juris beneficiaries of the decision not to take the proposed action.

(f) If a trustee receives a written objection to a proposed action within the time specified in the notice under par. (b) 4. c., either the trustee or the beneficiary making the written objection may petition the court to have the proposed action approved, modified, or prohibited. In the court proceeding, the beneficiary objecting to the proposed action has the burden of proving that the proposed action should be modified or prohibited. A beneficiary who did not make the written objection may oppose the proposed action in the court proceeding.

(g) For purposes of this subsection, a proposed action under sub. (4) includes a course of action or a decision not to take action under sub. (4).

(4g) CONVERSION TO UNITRUST. (a) Subject to par. (d), a trust may be converted to a unitrust in any of the following ways:

1. By the trustee, at his or her own discretion or at the request of a beneficiary, if all of the following apply:

a. The trustee determines that the conversion will enable the trustee to better carry out the purposes of the trust.

b. The trustee provides notice in the same manner as provided in sub. (4c) (b) of the trustee's intention to convert the trust to a unitrust, and the notice advises how the unitrust will operate, including the fixed percentage under par. (c) 1. and any other initial determinations under par. (c) 4. that the trustee intends to follow.

c. There is at least one sui juris beneficiary under sub. (4c) (b) 3. a. and at least one other sui juris beneficiary under sub. (4c) (b) 3. b. or c.

d. Every sui juris beneficiary consents to the conversion to a unitrust in a writing delivered to the trustee.

e. The terms of the trust describe the amount that may or must be distributed by referring to the trust income.

2. By a court on the petition of the trustee or a beneficiary, if all of the following apply:

a. The trustee or beneficiary has provided notice under sub. (4c) of the intention to request the court to convert the trust to a unitrust, and the notice advises how the unitrust will operate, including the fixed percentage under par. (c) 1. and any other initial determinations under par. (c) 4. that will be requested.

b. The court determines that the conversion to a unitrust will enable the trustee to better carry out the purposes of the trust.

(b) In deciding whether to convert the trust to a unitrust under par. (a) 1., the trustee shall consider all relevant factors under sub. (4) (b) 1. to 9.

(c) 1. If a trust is converted to a unitrust under this subsection by the trustee or a court, notwithstanding sub. (3) (a) 1. and 4. and s. 701.21 (4) the trustee shall make distributions in accordance with the creating instrument, except that any reference in the creating instrument to "income" means a fixed percentage of the net fair market value of the unitrust's assets, whether such assets otherwise would be considered income or principal under this section, averaged over a preceding period determined by the trustee, which is at least 3 years but not more than 5 years, or the period since the original trust was created, whichever is less.

2. a. Subject to subd. 2. b., if the trust is converted to a unitrust under par. (a) 1., the trustee shall determine the fixed percentage to be applied under subd. 1., and the notice under par. (a) 1. b. must state the fixed percentage. If the trust is converted to a unitrust under par. (a) 2., the court shall determine the fixed percentage to be applied under subd. 1.

b. Any fixed percentage under subd. 1. that is determined by a trustee may not be less than 3 percent nor more than 5 percent.

3. After a trust is converted to a unitrust, the trustee may, subject to the notice requirement under sub. (4c) and with the consent of every sui juris beneficiary, do any of the following:

a. Convert the unitrust back to the original trust under the creating instrument.

b. Change the fixed percentage under subd. 1., subject to subd. 2. b.

4. After a trust is converted to a unitrust, a trustee may determine or change any of the following:

a. The frequency of distributions during the year.

b. Standards for prorating a distribution for a short year in which a beneficiary's right to payments commences or ceases.

c. The effect on the valuation of the unitrust's assets of other payments from, or contributions to, the unitrust.

d. How, and how frequently, to value the unitrust's assets.

e. The valuation dates to use.

f. Whether to omit from the calculation of the value of the unitrust's assets unitrust property occupied by or in the possession of a beneficiary.

g. The averaging under subd. 1. to a different preceding period, which is at least 3 years but not more than 5 years.

h. Any other matters necessary for the proper functioning of the unitrust.

5. The trustee may not deduct from a unitrust distribution expenses that would be deducted from income if the trust were not a unitrust.

6. Unless otherwise provided by the creating instrument, the unitrust distribution is considered to have been paid from the following sources in the order of priority:

a. Net income, determined as if the trust were not a unitrust.

b. Ordinary income for federal income tax purposes that is not net income under subd. 6. a.

c. Net realized short-term capital gains for federal income tax purposes.

d. Net realized long-term capital gain for federal income tax purposes.

e. Principal.

7. A court may, on the petition of the trustee or a beneficiary, do any of the following:

a. Change the fixed percentage that was determined under subd. 2. by the trustee or by a prior court order.

b. If necessary to preserve a tax benefit, provide for a distribution of net income, determined as if the trust were not a unitrust, that exceeds the unitrust distribution.

c. Average the valuation of the unitrust's assets over a period other than that specified in subd. 1.

d. Require the unitrust to be converted back to the original trust under the creating instrument.

8. Conversion to a unitrust under this subsection does not affect a provision in the creating instrument that directs or authorizes the trustee to distribute principal or that authorizes a beneficiary to withdraw a portion or all of the principal.

(d) 1. A trust may not be converted under this subsection to a unitrust if any of the following applies:

a. The creating instrument specifically prohibits the conversion.

b. Payment of the unitrust distribution will change the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets.

c. The unitrust distribution will be made from any amount that is permanently set aside for charitable purposes under the creating instrument and for which an estate or gift tax charitable deduction has been taken, unless both income and principal are so set aside.

d. Converting to a unitrust will cause an individual to be treated as the owner of all or part of the trust for income tax purposes and the individual would not be treated as the owner if the trust were not converted.

e. Converting to a unitrust will cause all or a part of the trust assets to be subject to estate or gift tax with respect to an individual and the trust assets would not be subject to estate or gift tax with respect to the individual if the trust were not converted.

f. Converting to a unitrust will result in the disallowance of an estate or gift tax marital deduction that would be allowed if the trust were not converted.

g. A trustee is a beneficiary of the trust.

2. Notwithstanding subd. 1., if a trust may not be converted to a unitrust solely because subd. 1. g. applies to a trustee, a cotrustee, if any, to whom subd. 1. g. does not apply may convert the trust to a unitrust under par. (a) 1., unless prohibited by the creating instrument, or a court may convert the trust to a unitrust under par. (a) 2. on the petition of a trustee or beneficiary.

(e) A trustee may release the power conferred by par. (a) 1. if the trustee is uncertain about whether possessing or exercising the power will cause a result described in par. (d) 1. b. to f. or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in par. (d) 1. The release may be permanent or for a specified period, including a period measured by the life of an individual.

(4j) EXPRESS UNITRUSTS. (a) In this subsection “express unitrust” means any trust that by its governing instrument requires the distribution at least annually of a unitrust amount equal to a fixed percentage of the net fair market value of the trust's assets, valued at least annually, other than a trust solely for charitable purposes or a charitable split-interest trust under section 664 (d) or 170 (f) (2) (B) of the Internal Revenue Code.

(b) The following apply to an express unitrust:

1. To the extent not otherwise provided for in the governing instrument, the unitrust amount of not less than 3 percent nor more than 5 percent may be determined by reference to the net fair market value of the trust's assets averaged over a preceding period determined by the trustee, which is at least 3 years but not more than 5 years.

2. Distribution of such a fixed percentage unitrust amount of not less than 3 percent nor more than 5 percent is a distribution of all of the income of the unitrust and is an income interest.

3. Such a distribution of a fixed percentage of not less than 3 percent nor more than 5 percent is a reasonable apportionment of the total return of the trust.

4. A trust that provides for a fixed annual percentage payout in excess of 5 percent per year of the net fair market value of the trust is considered to be a 5 percent express unitrust, paying out all of the income of the unitrust, and to have paid out principal of the trust to the extent that the fixed percentage payout exceeds 5 percent per year.

5. The governing instrument may grant discretion to the trustee to adopt a consistent practice of treating capital gains as part of the unitrust distribution, to the extent that the unitrust distribution exceeds the income determined as if the trust were not a unitrust, or it may specify the ordering of such classes of income.

6. Unless the terms of the trust specifically provide otherwise, a distribution of the unitrust amount is considered to have been made from the following sources in the following order of priority:

a. Net income determined as if the trust were not a unitrust.

b. Ordinary income for federal income tax purposes that is not net income under subd. 6. a.

c. Net realized short-term capital gains for federal income tax purposes.

d. Net realized long-term capital gains for federal income tax purposes.

e. Principal.

7. The trust document may provide that assets used by the trust beneficiary, such as a residence or tangible personal property, may be excluded from the net fair market value for computing the unitrust amount. Such use may be considered equivalent to the income or unitrust amount.

8. In the absence of contrary provisions in the governing document of an express unitrust, the provisions of sub. (4g) (c) 1., 4., and 5. apply.

(4k) POWER TO TREAT CAPITAL GAINS AS PART OF A DISTRIBUTION. Unless prohibited by the governing instrument, a trustee may cause gains from the sale or exchange of trust assets, as determined for federal income tax purposes, to be taxed for federal income tax purposes as part of a distribution of income that has been increased by an adjustment from principal to income under sub. (4), of a unitrust distribution, of a fixed annuity distribution, or of a principal distribution to a beneficiary.

(4m) JUDICIAL REVIEW OF DISCRETIONARY POWER. (a) Nothing in this section creates a duty to make an adjustment under sub. (4) or to convert a trust to a unitrust under sub. (4g). Unless it determines that the decision to make an adjustment or to convert to a unitrust was an abuse of the fiduciary's discretion, a court may not grant relief from any decision a fiduciary makes regarding the exercise of a discretionary power conferred by sub. (4) or (4g).

(am) An action taken under sub. (4) or (4g) is not an abuse of a fiduciary's discretion if the fiduciary gave written notice of the proposed action under sub. (4c) and did not receive a timely written objection to the notice. It is not an abuse of discretion not to exercise the power to adjust under sub. (4) or to convert under sub. (4g).

(b) A fiduciary's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.

(c) If the court determines that a fiduciary has abused the fiduciary's discretion, the remedy shall be to restore the income and remainder beneficiaries to the positions that they would have occupied had the discretion not been abused, according to the following rules:

1. To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or in a distribution that is too small, the court shall order the fiduciary to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position.

2. To the extent that the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court shall place the beneficiaries, the trust, or both, in whole or in part, in their appropriate positions by ordering the fiduciary to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or by ordering that beneficiary to return some or all of the distribution to the trust.

3. To the extent that the court is unable, after applying subds. 1. and 2., to place the beneficiaries, the trust, or both in the positions that they would have occupied had the discretion not been abused, the court may order the fiduciary to pay an appropriate amount from its own funds to one or more of the beneficiaries, the trust, or both.

(d) Upon petition by the fiduciary, the court having jurisdiction over a trust shall determine whether a proposed exercise or nonexercise by the fiduciary of a discretionary power conferred under this section will result in an abuse of the fiduciary's discretion. The petition must describe the proposed exercise or nonexercise of the power and contain sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power. A beneficiary who challenges the proposed exercise or nonexercise of the power has the burden of establishing that it will result in an abuse of discretion.

(5) DETERMINATION AND DISTRIBUTION OF NET INCOME. In the case of an estate of a decedent or after an income interest in a trust ends, the following rules apply:

(a) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in subs. (7) to (30) that apply to trustees and the rules in par. (e). The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(b) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in subs. (7) to (30) that apply to trustees and by:

1. Including in net income all income from property used to discharge liabilities.

2. Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction.

3. Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(c) A fiduciary shall distribute to a beneficiary, including a trustee, who receives a pecuniary amount not determined by a pecuniary formula interest at the legal rate set forth in s. 138.04 on any unpaid portion of the pecuniary amount for the period commencing one year after the decedent's death or after the income interest in the trust ends. The interest under this paragraph shall be distributed from net income determined under par. (b) or from

principal to the extent that net income is insufficient. For purposes of this paragraph, the deferred marital property elective share amount elected by a surviving spouse under s. 861.02 (1) is a bequest of a specific amount of money not determined by a pecuniary formula.

(d) A fiduciary shall distribute the net income remaining after distributions required by par. (c) in the manner described in sub. (6) to all other beneficiaries, including a beneficiary who receives a pecuniary amount determined by a pecuniary formula.

(e) A fiduciary may not reduce principal or income receipts from property described in par. (a) because of a payment described in sub. (25) or (26) to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a 3rd party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

(6) DISTRIBUTION TO RESIDUARY AND REMAINDER BENEFICIARIES. (a) Each beneficiary described in sub. (5) (d) is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this subsection applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(b) In determining a beneficiary's share of net income, the following rules apply:

1. The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

2. The beneficiary's fractional interest in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not determined by a pecuniary formula.

3. The beneficiary's fractional interest in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

4. The distribution date for purposes of this subsection may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(c) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(d) A trustee may apply the rules in this subsection, to the extent that the trustee considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this subsection applies to the income from the asset.

(7) WHEN RIGHT TO INCOME BEGINS AND ENDS. (a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

1. On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life.

2. On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate.

3. On the date of an individual's death in the case of an asset that a 3rd party transfers to a fiduciary because of the individual's death.

(c) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under par. (d), even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

(8) APPORTIONMENT OF RECEIPTS AND DISBURSEMENTS WHEN DECEDENT DIES OR INCOME INTEREST BEGINS. (a) A trustee shall allocate to principal an income receipt or disbursement other than one to which sub. (5) (a) applies if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(b) A trustee shall allocate to income an income receipt or disbursement if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement must be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date of death or an income interest begins must be allocated to principal and the balance must be allocated to income.

(c) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this section. Distributions to shareholders or other owners from an entity, as defined in sub. (10), are due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

(9) APPORTIONMENT WHEN INCOME INTEREST ENDS. (a) In this subsection, "undistributed income" means net income received before the date on which an income interest ends. "Undistributed income" does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or to the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than 5 percent of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked must be added to principal.

(c) When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

(10) CHARACTER OF RECEIPTS. (a) In this subsection, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which sub. (11) applies, a business or activity to which sub. (12) applies, or an asset-backed security to which sub. (24) applies.

(b) Except as otherwise provided in this subsection, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate the following receipts from an entity to principal:

1. Property other than money.

2. Money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity.

3. Money received in total or partial liquidation of the entity.

4. Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) Money is received in partial liquidation:

1. To the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation.

2. If the total amount of money and property distributed in a distribution or series of related distributions is greater than 20 percent of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(e) Money is not received in partial liquidation, nor may it be taken into account under par. (d) 2., to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

(11) DISTRIBUTION FROM TRUST OR ESTATE. A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest, and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, sub. (10) or (24) applies to a receipt from the trust.

(12) BUSINESS AND OTHER ACTIVITIES CONDUCTED BY TRUSTEE. (a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(c) Activities for which a trustee may maintain separate accounting records include:

1. Retail, manufacturing, service, and other traditional business activities.

2. Farming.

3. Raising and selling livestock and other animals.

4. Management of rental properties.

5. Extraction of minerals and other natural resources.

6. Timber operations.

7. Activities to which sub. (23) applies.

(13) PRINCIPAL RECEIPTS. A trustee shall allocate to principal:

(a) To the extent not allocated to income under this section, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary.

(b) Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to subs. (10) to (24).

(c) Amounts recovered from 3rd parties to reimburse the trust because of disbursements described in sub. (26) (a) 7. or for other reasons to the extent not based on the loss of income.

(d) Proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income.

(e) Net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income.

(f) Other receipts as provided in subs. (17) to (24).

(14) RENTAL PROPERTY. To the extent that a trustee accounts for receipts from rental property in accordance with this subsection, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, must be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

(15) OBLIGATION TO PAY MONEY. (a) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, must be allocated to income without any provision for amortization of premium.

(b) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after the trustee purchases or acquires it, an amount received in excess of its purchase price or its value when the trust acquires it must be allocated to income.

(c) This subsection does not apply to an obligation to which sub. (18), (19), (20), (21), (23), or (24) applies.

(16) INSURANCE POLICIES AND SIMILAR CONTRACTS. (a) Except as provided in par. (b), a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to, a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

(b) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to sub. (12), loss of profits from a business.

(c) This subsection does not apply to a contract to which sub. (18) applies.

(17) INSUBSTANTIAL ALLOCATIONS NOT REQUIRED. If a trustee determines that an allocation between principal and income required by sub. (15) (b), (18), (19), (20), (21), or (24) is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in sub. (4) (c) applies to the allocation. This power may be exercised by a cotrustee in

the circumstances described in sub. (4) (d) and may be released for the reasons and in the manner described in sub. (4) (e). An allocation is presumed to be insubstantial if:

(a) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than 10 percent.

(b) The value of the asset producing the receipt for which the allocation would be made is less than 10 percent of the total value of the trust's assets at the beginning of the accounting period.

(18) DEFERRED COMPENSATION, ANNUITIES, AND SIMILAR PAYMENTS. (a) In this subsection, "payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer, including a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c) 1. In this paragraph, "plan income" means any of the following:

a. With respect to payments received from a plan that maintains separate accounts or funds for its participants or account holders, such as defined contribution retirement plans, individual retirement accounts, Roth individual retirement accounts, and some types of deferred compensation plans, either the amount of the plan account or fund held for the benefit of the trust that, if the plan account or fund were a trust, would be allocated to income under pars. (b) and (d) for that accounting period, or 4 percent of the value of the plan account or fund on the first day of the accounting period. The trustee shall, in his or her discretion, choose the method of determining "plan income" under this subd. 1. a., and may change the method of determining "plan income" under this subd. 1. a. for any subsequent accounting period.

b. With respect to payments received from a plan that does not maintain separate accounts or funds for its participants or account holders, such as defined benefit retirement plans and some types of deferred compensation plans, 4 percent of the total present value of the trust's interest in the plan as of the first day of the accounting period, based on reasonable actuarial assumptions as determined by the trustee.

2. For each accounting period of a trust in which the trust receives a payment but no part of any payment is allocated to income under par. (b), the trustee shall allocate to income that portion of the aggregate value of all payments received by the trustee in that accounting period that is equal to the amount of plan income that is attributable to the trust's interest in the plan from which payment is received for that accounting period. The trustee shall allocate the balance of any payments to principal.

(d) If, to obtain an estate or gift tax marital deduction for an interest in a trust, a trustee must allocate more of a payment to income than provided for by this subsection, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction.

(e) This subsection does not apply to payments to which sub. (19) applies.

(19) LIQUIDATING ASSET. (a) In this subsection, "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not

include a payment subject to sub. (18), resources subject to sub. (20), timber subject to sub. (21), an activity subject to sub. (23), an asset subject to sub. (24), or any asset for which the trustee establishes a reserve for depreciation under sub. (27).

(b) A trustee shall allocate to income 10 percent of the receipts from a liquidating asset and the balance to principal.

(20) MINERALS, WATER, AND OTHER NATURAL RESOURCES. (a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources in accordance with this subsection, the trustee shall allocate them as follows:

1. If received as nominal delay rental or nominal annual rent on a lease, a receipt must be allocated to income.

2. If received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal.

3. If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, 90 percent must be allocated to principal and the balance to income.

4. If an amount is received from a working interest or any other interest not provided for in subd. 1., 2., or 3., 90 percent of the net amount received must be allocated to principal and the balance to income.

(b) An amount received on account of an interest in water that is renewable must be allocated to income. If the water is not renewable, 90 percent of the amount must be allocated to principal and the balance to income.

(c) This subsection applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(d) If a trust owns an interest in minerals, water, or other natural resources on May 17, 2005, the trustee may allocate receipts from the interest as provided in this subsection or in the manner used by the trustee before May 17, 2005. If the trust acquires an interest in minerals, water, or other natural resources after May 17, 2005, the trustee shall allocate receipts from the interest as provided in this subsection.

(21) TIMBER. (a) To the extent that a trustee accounts for receipts from the sale of timber and related products in accordance with this subsection, the trustee shall allocate the net receipts:

1. To income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest.

2. To principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber.

3. To income or principal or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying the rules in subds. 1. and 2.

4. To principal to the extent that advance payments, bonuses, and other payments are not allocated under subd. 1., 2., or 3.

(b) In determining net receipts to be allocated under par. (a), a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(c) This subsection applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

(d) If a trust owns an interest in timberland on May 17, 2005, the trustee may allocate net receipts from the sale of timber and related products as provided in this subsection or in the manner used by the trustee before May 17, 2005. If the trust acquires an interest in timberland after May 17, 2005, the trustee shall allocate

net receipts from the sale of timber and related products as provided in this subsection.

(22) PROPERTY NOT PRODUCTIVE OF INCOME. (a) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the surviving spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under sub. (4) and distributes to the spouse from principal in accordance with the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by sub. (4) (a). The trustee may decide which action or combination of actions to take.

(b) In cases not governed by par. (a), proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

(23) DERIVATIVES AND OPTIONS. (a) In this subsection, “derivative” means a contract or financial instrument or a combination of contracts and financial instruments that gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or another market indicator for an asset or a group of assets.

(b) To the extent that a trustee does not account under sub. (12) for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(c) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option must be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, must be allocated to principal.

(24) ASSET-BACKED SECURITIES. (a) In this subsection, “asset-backed security” means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset to which sub. (10) or (18) applies.

(b) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment that the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(c) If a trust receives one or more payments in exchange for the trust’s entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust’s interest in the security over more than one accounting period, the trustee shall allocate 10 percent of the payment to income and the balance to principal.

(25) DISBURSEMENTS FROM INCOME. A trustee shall make the following disbursements from income to the extent that they are not disbursements specified in sub. (5) (b) 2. or 3.:

(a) One-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee.

(b) One-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests.

(c) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest.

(d) Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

(26) DISBURSEMENTS FROM PRINCIPAL. (a) A trustee shall make the following disbursements from principal:

1. The remaining one-half of the disbursements described in sub. (25) (a) and (b).

2. All of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale.

3. Payments on the principal of a trust debt.

4. Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property.

5. Premiums paid on a policy of insurance not described in sub. (25) (d) of which the trust is the owner and beneficiary.

6. Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust.

7. Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by 3rd parties, and defending claims based on environmental matters.

(b) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

(27) TRANSFERS FROM INCOME TO PRINCIPAL FOR DEPRECIATION. (a) In this subsection, "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

1. Of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary.

2. During the administration of a decedent's estate.

3. Under this subsection if the trustee is accounting under sub. (12) for the business or activity in which the asset is used.

(c) An amount transferred to principal need not be held as a separate fund.

(28) TRANSFERS FROM INCOME TO REIMBURSE PRINCIPAL. (a) If a trustee makes or expects to make a principal disbursement described in this subsection, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(b) Principal disbursements to which par. (a) applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a 3rd party:

1. An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs.

2. A capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments.

3. Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and brokers' commissions.

4. Periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments.

5. Disbursements described in sub. (26) (a) 7.

(c) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in par. (a).

(29) INCOME TAXES. (a) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid proportionately:

1. From income to the extent that receipts from the entity are allocated to income.

2. From principal to the extent that:

a. Receipts from the entity are allocated to principal.

b. The trust's share of the entity's taxable income exceeds the total receipts described in subds. 1. and 2. a.

(d) For purposes of this subsection, receipts allocated to principal or income must be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.

(30) ADJUSTMENTS BETWEEN PRINCIPAL AND INCOME BECAUSE OF TAXES. (a) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

1. Elections and decisions, other than those described in par. (b), that the fiduciary makes from time to time regarding tax matters.

2. An income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust.

3. The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate or trust or of a beneficiary.

(b) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced must be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

(31) LIMITS ON LIABILITY. (a) If a trustee sends to all beneficiaries a written communication relating to the trust, any action against the trustee that is based on the subject of the written communication shall be commenced within 2 years after the trustee sends the written communication or be barred.

(b) 1. A written communication is sent to a sui juris beneficiary on the date on which the written communication is delivered per-

sonally to the sui juris beneficiary or on the date on which the written communication is postmarked if mailed to the sui juris beneficiary at his or her last-known address.

2. A written communication is sent to a beneficiary who is not a sui juris beneficiary on the date on which the written communication is delivered personally to the beneficiary's parent or legal guardian or on the date on which the written communication is postmarked if mailed to the beneficiary's parent or legal guardian at his or her last-known address.

(c) The identity of all of the beneficiaries shall be determined on the date on which the written communication is sent.

(d) Paragraph (a) does not apply to an action based on fraud or misrepresentation with respect to the written communication.

History: 1971 c. 40; 1977 c. 408; 1983 a. 189; 1985 a. 37; 1987 a. 27; 1987 a. 393 s. 53; 1991 a. 39; 1993 a. 112, 160; 1997 a. 188; 1999 a. 85; 2005 a. 10, 216; 2009 a. 180.

701.21 Income payments and accumulations. (1) DISTRIBUTION OF INCOME. Except as otherwise determined by the trustee or a court under s. 701.20 (4g) with respect to unitrust distributions, if 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 retransfer 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.

History: 2005 a. 10.

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.

The valuation of assets for distribution is the current market value at the time of distribution. Estate of Naulin, 56 Wis. 2d 100, 201 N.W.2d 599 (1972).

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 circuit 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. The local trustee may be required to give bond conditioned on the faithful performance of his or her duties or to meet any other conditions required by a court in the other state before permitting removal of the trust to this state.

History: 1977 c. 449 s. 497; 1993 a. 486.

701.24 Applicability. (1) Except as otherwise provided in sub. (3) and s. 701.19 (9) (a), ss. 701.01 to 701.19, 701.21, 701.22, and 701.23 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 ss. 701.01 to 701.19, 701.21, 701.22, and 701.23 to a trust in existence on August 1, 1971, is unconstitutional, it shall not affect application of the provision to a trust created after that date.

(2) Section 701.20 applies to every trust or decedent's estate existing on May 17, 2005, and to every trust or decedent's estate created or coming into existence after that date, except as otherwise expressly provided in s. 701.20 or by the decedent's will or the terms of the trust. With respect to a trust or decedent's estate existing on May 17, 2005, s. 701.20 (5) to (30) shall apply at the beginning of the trust's or estate's first accounting period, as defined in s. 701.20 (2) (a), that begins on or after May 17, 2005.

(3) Sections 701.06 (6) (b), (c), and (d) and 701.19 (10) are applicable to a trust existing on April 11, 2006, as well as a trust created after that date, and shall govern trustees acting under such trusts. If application of any provision of s. 701.06 (6) (b), (c), or (d) or 701.19 (10) to a trust in existence on April 11, 2006, is unconstitutional, it shall not affect application of the provision to a trust created after that date.

History: 1971 c. 66; 1977 c. 309; 2005 a. 10, 216.

701.25 Applicability of general transfers at death provisions. Chapter 854 applies to transfers at death under trust instruments.

History: 1997 a. 188.

Wisconsin's New Probate Code. Erlanger. Wis. Law. Oct. 1998.

701.26 Disclaimers of nonprobate transfers. (1) A recipient may disclaim, under s. 854.13, any of the following:

(a) All or part of an interest in a joint tenancy, upon the death of another joint tenant.

(b) All or part of an interest in survivorship marital property, upon the death of the other spouse.

(c) All or part of an interest that is created by a nontestamentary instrument and transferred at death, upon the death that causes the transfer.

(d) All or part of any other interest transferred under a governing instrument, as defined in s. 854.01 (2).

(2) A recipient may disclaim, under s. 700.27, all or part of any interest transferred under an inter vivos governing instrument, as defined in s. 700.27 (1) (c).

History: 1997 a. 188; 2005 a. 216.