

what is the alternative / concerns

a trust protector, as defined in the investments of trust assets

881.01 Uniform prudent investor act.

(1) Definition. In this section:

(a) "Beneficiary," means any of the following:

- 1. With respect to a will, beneficiary as defined in section 851.03.
- 2. With respect to a trust, a beneficiary as defined in section 701.0103(3).
- 3. With respect to a guardianship of the estate, means a ward for whom a guardian of the estate has been appointed.
- 4. and, with respect to a conservator, means a person for whose estate a conservator has been appointed. With respect to a conservatorship, a person whose estate a conservator has been appointed.

took out "for"? current law

(b) "Fiduciary" as applied to a person means a personal representative, trustee, conservator, or guardian of the estate. Fiduciary also means a directing party with the power to direct investment decisions as defined in section 701.0103(7), a special administrator, a special fiduciary and any other person performing substantially the same function as a personal representative, trustee, conservator or guardian of an estate and having power over the investment of the assets of the decedent's estate, trust, conservatorship or guardianship of the estate.

as defined in s. 701.0103(7) ? when it is applied to a person

any other person appointed by a court who has power over the assets

Special trustee by court appointed

(2) Prudent investor rule.

(a) Except as provided in s. 112.11 and except as otherwise provided in par. (b), a fiduciary who invests and manages assets owes a duty to the beneficiaries to comply with the prudent investor rule set forth in this section.

(b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a will, trust, or court order. A fiduciary is not liable to a beneficiary to the extent that the fiduciary acted in reasonable reliance on the provisions of the will, trust, or court order.

(3) Standard of care; portfolio strategy; risk and return objectives.

(a) A fiduciary shall invest and manage assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the estate, trust,

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conservatorship, or guardianship. In satisfying this standard, the fiduciary shall exercise reasonable care, skill, and caution.

(b) A fiduciary's investment and management decisions about individual assets shall be evaluated, not in isolation but in the context of the portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the estate, trust, conservatorship, or guardianship.

(c) Among circumstances that a fiduciary shall consider in investing and managing assets are those of the following that are relevant to the estate, trust, conservatorship, or guardianship or its beneficiaries:

1. General economic conditions.
2. The possible effect of inflation or deflation.
3. The expected tax consequences of investment decisions or strategies.
4. The role that each investment or course of action plays within the overall portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property.
5. The expected total return from income and the appreciation of capital.
6. Other resources of the beneficiaries.
7. Needs for liquidity, regularity of income, and preservation or appreciation of capital.
8. An asset's special relationship or special value to the purposes of the estate, trust, conservatorship, or guardianship or to one or more of the beneficiaries.

(d) A fiduciary shall make a reasonable effort to verify facts relevant to the investment and management of assets.

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(e) A fiduciary may invest in any kind of property or type of investment consistent with the standards of this section.

(f) A fiduciary who has special skills or expertise, or who is named fiduciary in reliance upon the fiduciary's representation that the fiduciary has special skills or expertise, has a duty to use those special skills or expertise.

**(4) Diversification.**

(a) <sup>General Rule</sup> ~~General Rule.~~ A fiduciary shall diversify investments unless the fiduciary reasonably determines that ~~because of special circumstances,~~ <sup>because of special circumstances,</sup> the purposes of the estate, trust, conservatorship, or guardianship are better served without diversifying.

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(b) ~~Special Rule regarding retention of assets collected by the fiduciary.~~ <sup>paragraph</sup>

1. ~~For purposes of this subsection, an "asset that is collected by the fiduciary" is an asset that a fiduciary did not exercise any discretion over to acquire or purchase.~~ <sup>insert</sup>

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2. ~~A fiduciary may retain an asset that is collected by the fiduciary, without regard to the diversification requirement, until the fiduciary reasonably determines that it is advisable to dispose of the asset. While the asset is being retained, the fiduciary has a duty to exercise discretion at reasonable intervals to determine the advisability of continuing to retain or disposing of the asset that was collected.~~

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

4. ~~If a beneficiary files an application under subparagraph 3., the court shall conduct a hearing after giving notice to all interested persons, as determined by the court. After the hearing, the court shall enter an order directing the fiduciary to retain or sell the asset that is being retained based on what the court finds to be in accordance with the terms and purposes of the estate, trust, conservatorship or guardianship of the estate and the interests of the beneficiaries.~~ <sup>Subd.</sup>

~~(COMMENT: Gardner to consider if this is the appropriate place and language to incorporate the provisions of existing Wisconsin statute section 881.05. Do we need to define what is a "collected asset"?)~~

**(5) Duties at inception.** Within a reasonable time after accepting a fiduciary appointment or receiving assets, a fiduciary shall review the assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the estate, trust, conservatorship, or guardianship and with the requirements of this section.

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an asset for which the fiduciary did not exercise discretion  
in order to acquire or purchase  
an asset that the fiduciary acq or purchase  
who exercised discretion

**(6) Loyalty.** A fiduciary shall invest and manage the assets solely in the interest of the beneficiaries.

**(7) Impartiality.** If an estate, trust, conservatorship, or guardianship has 2 or more beneficiaries, the fiduciary shall act impartially in investing and managing the assets, taking into account the differences between the interests of the beneficiaries.

**(8) Investment costs.** In investing and managing assets, a fiduciary may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the estate, trust, conservatorship, or guardianship, and the skills of the fiduciary.

**(9) Reviewing compliance.** Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a fiduciary's decision or action and not by hindsight.

**(10) Delegation of investment and management functions.**

(a) A fiduciary may delegate investment and management functions that a prudent fiduciary of similar skills could properly delegate under the circumstances. The fiduciary shall exercise reasonable care, skill, and caution in all of the following:

1. Selecting an agent.
2. Establishing the scope and terms of the delegation, consistent with the purposes and terms of the estate, trust, conservatorship, or guardianship.
3. Periodically reviewing the agent's actions to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the estate, trust, conservatorship, or guardianship to exercise reasonable care to comply with the terms of the delegation.

(c) A fiduciary who complies with the requirements of par. (a) is not liable to the beneficiaries or to the estate, trust, conservatorship, or guardianship for the decisions or actions of the agent to whom a function was delegated.

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(d) By accepting the delegation of a function from the fiduciary of an estate, trust, conservatorship, or guardianship that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

**(11) Phrases invoking standard of this section.** The following phrases or similar phrases in a will, trust, or court order, unless otherwise limited or modified, authorize any investment or strategy permitted under this section: "investments permissible by law for investment of trust funds"; "legal investments"; "authorized investments"; "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital"; "prudent man rule"; "prudent trustee rule"; "prudent person rule"; and "prudent investor rule."

**(12) Application to existing estates, trusts, conservatorships, and guardianships.** This section applies to estates, trusts, conservatorships, and guardianships of the estate existing on, or created on or after, April 30, 2004. As applied to estates, trusts, conservatorships, and guardianships of the estate existing on April 30, 2004, this section governs only decisions or actions occurring after that date.

**(13) Uniformity of application and construction.** This section shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this section among the states that have enacted this uniform legislation.

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**History:** 1971 c. 41 s. 8; Stats. 1971 s. 881.01; 1973 c. 85; 1975 c. 94 s. 91 (12); 1975 c. 200; 1983 a. 27; 1987 a. 220; 1989 a. 300; 1995 a. 225, 273; 2003 a. 264, 326; 2009 a. 33.

*An administrator's duty to manage an estate as a prudent person ordinarily includes a duty to reasonably invest estate funds not needed for claims or expenses. A court properly imposed a surcharge against an administrator who breached the duty by allowing estate funds to lie idle in noninterest bearing checking accounts. Estate of Kugler, 117 Wis. 2d 314, 344 N.W.2d 160 (1984).*

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**881.015 Investment companies, investment trusts and collective investment vehicles.**

(1) In this section:

(a) "Collective investment vehicle" means an investment vehicle authorized for the collective investment of trust funds, including vehicles under 12 CFR 9.

(b) "Investment company" means an open-end or closed-end management investment company registered under 15 USC 80a-1 to 80a-64.

(c) "Investment trust" means an investment trust registered under 15 USC 80a-1 to 80a-64.

(2) In addition to other investments authorized by law for the investment of funds held by a fiduciary, or by the instrument governing the fiduciary relationship, a bank or trust company acting as a fiduciary, agent or otherwise may, in the exercise of its investment discretion or at the direction of another person authorized to direct investment of funds held by the bank or trust company as fiduciary, invest and reinvest in the securities of, or other interests in, an investment company, investment trust or collective investment vehicle, so long as the portfolio of the investment company, investment trust or collective investment vehicle consists of investments not prohibited by the governing instrument. In the absence of an express provision to the contrary, when a governing instrument directs or requires investment in obligations of the U.S. government or an agency of the U.S. government, a bank, trust company, trust department trustee or other fiduciary may invest in these obligations either directly or in the form of securities of, or other interests in, an investment company, investment trust or collective investment vehicle, if the portfolio of the investment company, investment trust or collective investment vehicle consists of obligations of the U.S. government or an agency of the U.S. government and repurchase agreements fully collateralized by these obligations.

(3) If the requirements of this subsection are met, a bank or trust company may invest or reinvest funds under sub. (2) in the securities of, or other interests in, an investment company, investment trust or collective investment vehicle, notwithstanding the fact that the bank or trust company or an affiliate of the bank or trust company provides services to the investment company, investment trust or collective investment vehicle such as those of an investment adviser, custodian, transfer agent, broker, registrar, paying agent, sponsor, distributor, administrator, manager or otherwise and receives compensation for those services. In order to invest or reinvest funds under sub. (2) in the securities of, or other interests in, the investment company, investment trust or collective investment vehicle for which the bank, trust company or affiliate provides services, the bank, trust company or affiliate shall disclose in writing the basis upon which any compensation for such services is calculated, whether expressed as a percentage of

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asset value or otherwise. The disclosure shall be made by prospectus, account statement or otherwise and shall be delivered, at least annually, to all persons to whom statements of account for the invested or reinvested funds are provided.

**History:** 1995 a. 273.

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**881.02 Construction; court orders; written instruments.** Nothing contained in this chapter shall be construed as authorizing any departure from, or variation of, the express terms or limitations set forth in any will, agreement, court order, or other instrument creating or defining the fiduciary's duties and powers.

**History:** 1971 c. 41 ss. 8, 12; Stats. 1971 s. 881.02; 1995 a. 273; 2003 a. 264.

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**881.03 Jurisdiction of court.** Nothing contained in this chapter shall be construed to affect the power or jurisdiction of any court of the state of Wisconsin in respect to trusts and trustees, nor as restricting the power of a court of proper jurisdiction to permit a fiduciary to deviate from the terms of any will, agreement or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale or management of fiduciary property.

**History:** 1971 c. 41 s. 8; Stats. 1971 s. 881.03.

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**881.04 Investments under prior laws not affected.** Nothing contained in this chapter shall affect any investment made prior to the enactment hereof or any amendment hereof or affect any rights or interests established, accrued or created thereunder or affect any suit or action pending when this chapter or any amendment hereof becomes effective.

**History:** 1971 c. 41 s. 8; Stats. 1971 s. 881.04.

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~~881.05 Retention of securities by trustees.~~

~~(1) Unless the trust instrument or a court order specifically directs otherwise, a trustee shall not be required to dispose of any property, real or personal, or mixed, in the estate or trust, however acquired, until the trustee determines in the exercise of a sound discretion that it is advisable to dispose of the same; but nothing herein contained shall excuse the trustee from the duty to exercise discretion at reasonable intervals and to determine at such times the advisability of retaining or disposing of such property.~~

~~(2) Any heir or beneficiary shall have the right at any time to file an application with the court in which said estate or trust is being administered for the purpose of compelling the sale of such property so held, and to compel the investment of the proceeds in other investments which are in accordance with this chapter. Upon the filing of such application said court shall conduct a hearing, after giving to all persons interested in said estate or trust such notice as shall be designated by said court, and upon such hearing said court shall enter an order thereon directing the retention or sale of such property as may be for the best interests of said estate or trust.~~

~~History: 1971 c. 41 s. 8; Stats. 1971 s. 881.05.~~

Comment: This section has been is being incorporated into section 881.01(4)

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**881.06 Law governing existing instruments.** Subject to s. 881.01 (12), this chapter shall govern fiduciaries, including personal representatives, guardians of the estate, conservators, and trustees acting under wills, agreements, court orders, and other instruments now existing or hereafter made.

**History:** 1971 c. 41 s. 8; Stats. 1971 s. 881.06; 1975 c. 200; 2003 a. 264.

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**UNIFORM TRUST CODE COMMITTEE**

**COMMENTS ON SUBCHAPTER II (SECTIONS 20 – 25; 131 – 135): LRB DRAFT #2**

**1. Page 22, Lines 22-23: §701.0201(2)**

Yes, the purpose of adding the language “upon petition of a settlor, trustee, or qualified beneficiary,” is to prevent a court from sua sponte ordering continuing judicial supervision of a trust. We are intending to narrow the circumstances under which a court may order judicial supervision.

We recommend making the following revision to §701.0201(2) (deletions from LRB draft struck through and additions to LRB draft underlined):

✓ “(2) *Unless ordered by the court upon petition of a settlor, trustee, or qualified beneficiary<sup>who</sup> ~~requesting continuing judicial supervision~~, a trust is not subject to continuing judicial supervision.*”

✓ **2. Page 23, Lines 1-2, Lines 15-16: §701.0201(3)**

LRB revisions are OK. The language “may involve any of the following” is acceptable. Use of singular nouns rather than plural nouns is acceptable.

**3. Page 23, Line 4: §701.0201(3)(b)**

Add a reference to directing party or trust protector (deletions from LRB draft struck through and additions to LRB draft underlined):

✓ “(b) *Appointing or removing a trustee, directing party or trust protector.*”

✓ **4. Page 23, Line 7: §701.0201(3)(d)**

Add a reference to directing party or trust protector (deletions from LRB draft struck through and additions to LRB draft underlined):

“(d) *Reviewing a trustee’s fees or the fee of a directing party or trust protector.*”

✓ **5. Page 23, Line 17: §701.0201(3)(L)**

Thank you for your note regarding the use of the capital (L).

We recommend making the following revision to §701.0201(3)(L) (deletions from LRB draft struck through and additions to LRB draft underlined):

✓ *“(L) Determining any other matter involving a trustee, trust protector, directing party, or beneficiary.”*

**6. Page 23, Lines 19-20; Page 24, Lines 1-3: §701.0202(1)**

We recommend making the following revisions to §701.0202(1) (deletions from LRB draft struck through and additions to LRB draft underlined):

✓ *“(1) By accepting the trusteeship, appointment as a trust protector, or appointment as a directing party of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, the trustee, trust protector, or directing party submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.”*

✓ **7. Page 24, Lines 4-9: §701.0202(2)**

LRB revisions are OK. Use of singular nouns rather than plural nouns is acceptable. The use of the words “a trust having its principal place of administration in this state” is acceptable.

**8. Page 24, Lines 16-17; §701.0202(4)**

Add a reference to directing party or trust protector (deletions from LRB draft struck through and additions to LRB draft underlined):

✓ *“(4) This section does not preclude other methods of obtaining jurisdiction over a trustee, directing party, trust protector, beneficiary, or other person receiving property from the trust.”*

✓ **9. Page 24, Lines 19-22; Page 25, Lines 1-2: §701.0203(1)**

LRB revisions are OK. Removal of the “false imperatives” and the word “such” is acceptable.

We recommend making the following revisions to §701.0203(1) (deletions from LRB draft struck through and additions to LRB draft underlined):

*“(1) The circuit court assigned to exercise probate jurisdiction has exclusive jurisdiction of proceedings in this state brought by a trustee, trust protector, directing party, or beneficiary concerning the administration of a trust. Except as otherwise provided in this chapter, and as applicable, the probate procedure described in ch. 879 applies to a proceeding brought by a trustee, trust protector, directing party, or beneficiary concerning the administration of a trust.”*

**10. Page 25, Lines 20-22; Page 26, top of page: §701.0204(3)**

LRB revisions are OK. Removal of the “false imperatives” is acceptable. Also, we prefer to retain §701.0204(3) as is to ensure all civil procedure provisions relating to trusts are contained in the Wisconsin Trust Code. We do not, however, have an objection to adding a cross reference in §801.50 to §701.0204(3) if the LRB feels this is necessary.

**11. Page 115, Lines 3-7: §701.0205**

LRB revisions are generally OK, but we recommend making the following revisions to the fourth sentence of §701.0205 (deletions from LRB draft struck through and additions to LRB draft underlined):

*“Interested persons, on behalf of themselves, or their representatives or guardians ad litem, on behalf of the representative or guardian ad litem and the interested person the representative or guardian ad litem represents, may in writing waive service of notice and consent to the hearing of any matter without notice.”*

**12. Page 115, Lines 13-22; Page 116, top of page: §701.0206**

LRB revisions are generally OK, but we recommend using the term “interested person” throughout this section and making the following revisions to §701.0206 (deletions from LRB draft struck through and additions to LRB draft underlined):

*“At the time of filing a petition for a judicial proceeding involving a trust, the petitioner shall file an affidavit setting forth the name of any interested 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 an interested person ~~in any trust judicial proceeding involving a trust~~ and is not represented by an attorney, or by an attorney-in-fact who is duly authorized to act on the interested person’s behalf in the matter, the court shall appoint an attorney to represent the interested person and protect the person’s interest.”*

**COMMENTS ON SUBCHAPTER III (SECTIONS 26 - 32):  
SECOND DRAFT**

**1. 701.0301(1) PAGE 26 LINE 12**

Agree with proposed change. ✓

**2. 701.0302 PAGE 27 LINES 8 – 13**

We have added a definition of power of appointment and general power of appointment and special power of appointment are defined in chapter 702. Wisconsin law does not define testamentary power of appointment and we do not think a reference to testamentary power of appointment is necessary in this section. Please revise this section to remove the reference to “testamentary.”

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

**3. 701.0303(2) PAGE 27 LINE 23**

✓ Agree that it makes sense to add “notwithstanding sec. 54.20” and “notwithstanding sec. 54.25(2)(d)2.L”. The intent is that 701.0303 provides authority for the guardians to act without court approval. ✗

**4. 701.0303(8) PAGE 29 LINE 8**

✓ Yes, that is our intent. After further discussing this comment with you, we also decided to modify this subparagraph to reference section 701.0304:

*“(8) If there is no one permitted to act under subs. (1) to (6), if all the people entitled to act under those subsections have declined to act, if there is no representation by a person having a substantially identical interest under s. 701.0304, or if the trustee determines that the otherwise available representation might be inadequate, the trustee may appoint a representative to act.”*

**5. 701.0305(1) PAGE 30 LINE 2**

✓ Delete the word “in.”



**6. 701.0305(1) PAGE 30 LINE 3**

The UTC language in the first sentence “If the court determines that an interest . . .” should be kept. The UTC refers to “interests” being represented in several spots and in the comments rather than “persons” being represented. An example of this is found at the end of 701.0305, which refers to “persons or interests.” Thus (1) should read:

*“If the court determines that an interest is not represented under this subchapter, or that the otherwise available representation might be inadequate, the court may appoint a representative or guardian ad litem to receive notice, give consent, and otherwise represent, bind, and act on behalf of the person who is not represented or whose representation might be inadequate. A representative or guardian ad litem may be appointed to represent several persons or interests.”*

UNIFORM TRUST CODE COMMITTEE

PROPOSED FINAL COMMENTS ON SUBCHAPTER IV (SECTIONS 33 - 52): LRB DRAFT #2

✓ 1. Section 701.0401(5); PDF page 31, line 6

We have defined both guardian of the estate and guardian of the person. Change the reference in this paragraph to "guardian of the estate." Additionally, the term "Agent" is defined in 244.02(1):

"Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise."

Accordingly, the subcommittee suggests this language:

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

✓ 2. Section 701.0402(1)(a), PDF page 31, line 15

We have defined both guardian of the estate and guardian of the person. Change the reference in this paragraph to "guardian of the estate."

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

✓ 3. Section 701.0402(1)(b), Pdf page 31, lines 17-19:

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

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

**Subcommittee Response:** The subcommittee concurs with the LRB to strike the phrase "under s. 701.0401" as unnecessary. 701.0402(1)(b) would now read:

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

4. Section 701.0402(2), Pdf page 32, lines 3-4:

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

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

✓ **Subcommittee Response:** Section 402(b) of the original UTC states: "A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities." The LRB deleted the UTC word "now" and inserted the words "at the time the trust is created" for specificity to lock in that instant in time as the earliest instant in which a beneficiary may be ascertained. The wording in LRB draft 2 does not change the subcommittee's intent. The Article 4 subcommittee has no objection to par. (2) as amended by the LRB.

✓ **5. Section 701.0402, PDF page 32, lines 5-6**

We broadly defined a trust protector as any person (acting in a capacity other than as trustee or directing party) designated in the trust instrument with a power over the trust instrument. Thus any person with a power to select a beneficiary from an indefinite class would be a trust protector. We suggest revising this paragraph to delete the reference to "other person designated in the trust instrument".

✗ Confirms as def of trust not change

(3) A power in a trustee or trust protector to select a beneficiary from an indefinite class is valid.

....

✓ **6. Section 701.0406, Pdf page 33, lines 19-21:**

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

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

**Subcommittee Response:** The subcommittee concurs with the LRB that the phrase "in whole or in part" may be deleted without affecting the meaning or intent of this section. The revised language will track the UTC model language and will read:

*A trust is void to the extent its creation was induced by fraud, duress, or undue influence.*

✓ **7. Section 701.0407, Pdf page 34, lines 1-4:**

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

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

**Subcommittee Response:** Other than, perhaps, the statute of frauds, the committee is not aware of other specific statute sections that we should reference in this section. No changes are necessary to this section.

**8. Section 701.0408(3), Pdf page 34, lines 18-20:**

~~Except as otherwise provided in the terms of the trust~~ Property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

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

**Subcommittee Response:** The Article 4 subcommittee agrees with the LRB.

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**9. Section 701.0409(3), PDF page 35, lines 12-14**

Should we add a reference to trust protector in this section?

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

**Subcommittee Response:** To be consistent with the language used in item 5, above the sentence should read:

*(3) A trust authorized by this section may be enforced by a trust protector ~~or other person~~ appointed in the terms of the trust or, if no person is so appointed, by a trust protector ~~or other person~~ appointed by the court.*

**10. Section 701.0409(4), PDF page 35, lines 15-19**

~~Except as otherwise provided in the terms of the trust~~ Property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

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

**Subcommittee Response:** The Article 4 subcommittee agrees with the LRB.

**11. Section 701.0410(3), Pdf page 36, lines 15-19:**

\*\*\*NOTE: Did you intentionally use "public assistance" in this paragraph, as compared to "medical assistance" in the definition of "trust for an individual with a disability" or "a government program" in s. 701.0418 (4) (c)?

**Subcommittee Response:** To be as all-inclusive as possible regardless of the label attached to a current or future program, the amendment to the final sentence suggested by the Article 4 subcommittee follows:

*(3) ... A court may modify the terms of a trust for an individual with a disability with retroactive effect or reform the terms of such trust to achieve the settlor's objective or, if because of circumstances not anticipated by the settlor, to otherwise further the purposes of the trust so*

*that it does not result in the ineligibility of the individual with the disability for benefits under a government program ~~public assistance~~.*

**12. Section 701.0410(4), Pdf page 36, lines 20-21:**

Sections 701.0410 to 701.0418 are not applicable to a conversion of a trust to a unitrust under s. 701.1106.

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

**Subcommittee Response:** The Article 4 subcommittee agrees with the LRB.

**13. Section 701.0411(3), Pdf page 37, lines 21-24 continuing to the top of page 38:**

(3) (a) Except as provided in par. (b), a spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.

(b) A court may not compel a beneficiary to consent to a modification or termination to satisfy a creditor of the beneficiary.

\*\*\*\*NOTE: It is not clear to me how par. (b) is an exception to the presumption that a spendthrift provision is not a material purpose of the trust. Should par. (b) be its own subsection?

**Subcommittee Response:** This should be renumbered to read:

(3) A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.

(4) A court may not compel a beneficiary to consent to a modification or termination to satisfy a creditor of the beneficiary.

This will also require renumbering the following subsections from 4, 5, and 6, to 5, 6, and 7.

**14. Section 701.0411(6), Pdf page 38, lines 10-11**

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

\*\*\*NOTE: This subsection is written in the passive voice. Who is required to notify the settlor of the proceeding? This language is repeated in ss. 701.0411 to 701.0416.

**Subcommittee Response:** The Article 4 subcommittee examined all persons and parties who could most efficiently provide notice with the least additional burden. Because of the keystone nature of the office of trustee, in this section the subcommittee suggests the following language:

(6) *The trustee shall give notice to the settlor, if living and not under incapacity, any trust protector, and any directing party of a proceeding under this section.*

---

**15. Section 701.0412(4), PDF page 39, lines 3-4**

This is additional language added by the Study Group. Notice should go to the trustee and any directing party or trust protector. This will also affect sections 701.0411 – 701.0416.

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

**Subcommittee Response:** Because there's only 1 petitioning party (even if multiple parties have standing to petition, or may have prepared petitions for filing) the Article 4 subcommittee suggests the change above.

**16. Section 701.0413(4), PDF page 40, lines 6-7**

This is additional language added by the Study Group. Notice should go to the trustee and any directing party or trust protector.

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

**Subcommittee Response:** (Same response as #15) Because there's only 1 petitioning party (even if multiple parties have standing to petition, or may have prepared petitions for filing) the Article 4 subcommittee suggests the change above.

**17. Section 701.0414(1)(c), PDF page 40 lines 18-19 and Section 701.0414(3), PDF page 40 line 25**

Presumably the date 2014 will be inserted in these sections after the bill is signed into law.

**18. Section 701.0414(2), PDF page 40 line 20**

We should add a reference to directing party and trust protector here:

*(2) After notice to the qualified beneficiaries and any directing party or trust protector, the trustee of a trust consisting ....*

**Subcommittee Response:** For consistency with the notice provisions in previous items in this memo, the following language is suggested:

*After notice to the settlor, if living and not under incapacity, any trust protector, any directing party, and the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than \$100,000 ....*

**19. Section 701.0414(7), PDF page 42, lines 1-2**

This is additional language added by the Study Group. Notice should go to the trustee and any directing party or trust protector.

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

**Subcommittee Response:** (Same response as #15) Because there's only 1 petitioning party (even if multiple parties have standing to petition, or may have prepared petitions for filing) the Article 4 subcommittee suggests the change above.

**20. Section 701.0415, PDF page 42, lines 8-9 (last sentence of section)**

This is additional language added by the Study Group. Notice should go to the trustee and any directing party or trust protector.

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

**Subcommittee Response:** (Same response as #15) Because there's only 1 petitioning party (even if multiple parties have standing to petition, or may have prepared petitions for filing) the Article 4 subcommittee suggests the change above.

**21. Section 701.0416, PDF page 42, lines 14-15 (last sentence of section)**

This is additional language added by the Study Group. Notice should go to the trustee and any directing party or trust protector.

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

**Subcommittee Response:** (Same response as #15) Because there's only 1 petitioning party (even if multiple parties have standing to petition, or may have prepared petitions for filing) the Article 4 subcommittee suggests the change above.

**22. Section 701.0417(1), PDF page 42, line 18**

We should add a reference to directing party and trust protector here:

**Subcommittee Response:** (Similar response to #15) the Article 4 subcommittee suggests the following:

(4) *After notice to any trust protector, any directing party, and the qualified beneficiaries the trustee may do any of the following.....*

**23. Section 701.0417, Pdf page 42, lines 17-22:**

**701.0417 Article IV, Section 417 — Combination and division of trusts. (1)** After notice to the qualified beneficiaries, a trustee may do any of the following if the result does not impair rights of any beneficiary or adversely affect achievement of any trust purposes:

- (a) Combine 2 or more trusts into a single trust.
- (b) Divide a trust into 2 or more separate trusts.

\*\*\*\*NOTE: How does this interact with a trustee's ability to divide or merge a first trust under s. 701.0418? Is this a different power that does not require the power to invade trust principal?

**Subcommittee response:** The power in 701.0417 is different from and does not interact with the power 701.0418. This power is also different from the power to invade principal (i.e. for a distribution to a beneficiary outright and free of trust). To be consistent with other notice provisions, the following language is suggested:

*(1) After notice to any trust protector, any directing party, and the qualified beneficiaries, a trustee may do any of the following if the result does not impair rights of any beneficiary or adversely affect achievement of any trust purposes:*

---

**24. Section 701.0417, Pdf page 43, lines 4-6:**

A separate trust created by severance under sub. (1) (b) is treated as a separate trust for all purposes from the date on which the severance is effective.

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

**Subcommittee Response:** The proposed change is acceptable to the subcommittee. This provision is not a directive, but a statement of law that the new trust is a separate trust beginning at the time of severance.

---

**25. Possible new section 701.0418 or 701.0419, PDF page 43, before section 51 on line 10**

Subchapter XII includes a section on private foundations, based on current law s. 701.105. Should we move this provision to subchapter IV, which discusses charitable trusts in s. 701.0405? In addition, we want to add some tax savings language to the Trust Code to emphasize the settlor's intent to create certain trusts for tax purposes. Should that savings language be incorporated into subchapter IV? Section 701.0416 deals with modifications to achieve settlor's tax objectives.

**Subcommittee Response:** It was the collective judgment of the subcommittee to omit the Private Foundations language from Article 4. The original UTC addresses the substantive requirements for the creation and administration of trusts in general. While the subcommittee understands the arguments for including tax provisions in 701.0405 or a new section 701.0418 or 701.0419, it is thought this will be unnecessarily confusing or burdensome regarding the balance of Article 4. The subcommittee thinks the Private Foundation and similar tax provisions are best left to another Article dealing with "miscellaneous", "tax", or "other" provisions.

**26. Section 701.0418, Pdf pages 43 - 54, Comments on trustee's power to appoint assets to new trust.**

This section shall be commented upon in a separate memo.



OK  
w/ 29 119

**UNIFORM TRUST CODE COMMITTEE  
COMMENTS ON SUBCHAPTER IV (SECTION 51): LRB DRAFT #2**

DECANTING STATUTE – SEC. 701.0418

Comments drafted 12/17/12

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Reference to page numbers is to page numbers in LRB-0010/P1 transmitted to Senator Risser on 10/09/12.

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Yes 1. 701.0418 pp 43 – 54, section 51 yes

This section describes the trustee's power to appoint assets to a new trust. In section 701.0103, we define trust "property" but not trust "assets". Should we change the reference from "assets" to "property" throughout this section?

2. 701.0418(1)(a) p. 43, ln. 17

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

OK RESPONSE: The change is fine. It does leave open the question, though, regarding "specific or ascertainable standard," which is what the wording is now. What is a "specific standard"? I suppose it could be something as specific as invading principal to allow the beneficiary to visit Jerusalem. In any event the change is fine.

---

3. 701.0418(1) p. 43, ln. 21

\*\*\*\*NOTE: "Standard" was only used twice in the draft and in those instances the usage seemed somewhat ambiguous because it was not clear that the term was being used "with reference to the basis upon which a decision is made by a trustee." I attempted to incorporate the meaning of "standard" into the two provisions that used the term. Please review subs. (2) and (4) (a) 8. and confirm that I have retained the intended meaning of "standard" and that those subsections are consistent with your intent.

4(a) 8. RESPONSE: The use of the term "standard" in sub. (2) is fine. I don't understand the reference to (4)(a)8, as the term "standard" does not appear there. Did you mean (4)(c)2.?

*↳ in your draft, in this draft*

---

4. 701.0418(2)(a) p. 44, ln. 6

\*\*\*\*NOTE: I removed the terms "first trust" and "second trust" from this paragraph because the definitions, both which include "appointed under sub. (2)" do not work when

inserted in place of the terms. Also, it is LRB policy to be as specific as possible when using the phrase, "except as otherwise provided." Please let me know if additional provisions should be added to the list.

RESPONSE: We wish to include the terms "first trust" and "second trust" in sub. (2), which describes the essential power to "decant" granted under s. 701.0418. Every other state that has adopted a decanting statute has used the term "first trust" and "second trust," or in some cases "invaded trust" and "appointed trust," in describing where the assets are coming from and where they are going to in the operative subsection setting forth the power. The use of the words "different trust" in the LRB revised draft could lead to confusion. As for the second point made in the note, the specific references to subs. (3) and (5) are fine, but it should say "Except as otherwise provided in this subsection and in subs. (3) and (5),". Thus this section should read:

*leave read w/inserted definitions*  
" (a) Except as otherwise provided in this subsection and in subs. (3) and (5), a trustee who has the power to invade the principal of a first trust for the benefit of a beneficiary who is eligible for or entitled to the income of the first trust or entitled to an annuity or unitrust payment from the first trust, may exercise the power by appointing part or all of the assets of the first trust in favor of a trustee of a second trust if all of the following apply:" *OK*

---

5. 701.0418(2)(a)2. p. 44, ln. 14

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

RESPONSE: The change is fine. Note to LRB – since "second trust" is a defined term, should we reference "second trust" instead of "2nd trust"? *- drafting convention*

---

6. 701.0418(2)(a)3. p. 45, before ln. 1

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

RESPONSE: We do not intend to allow the second trust to include additional beneficiaries that are not included in the first trust. We propose that subd. 3 be written as follows:

*✓* "3. One of the following applies:

"a. All of the The beneficiaries of the first trust are the beneficiaries of the 2nd trust.

"b. If the first trust grants the trustee the absolute power to invade principal, ~~some of the beneficiaries of the 2nd trust are beneficiaries of the 2nd trust~~ the second trust includes only all or some of the beneficiaries of the first trust."

---

7. 701.0418(2)(c) p. 45, ln. 4

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

RESPONSE: Subs. 701.0410(5) can be changed to read: "(5) Sections 701.0410 to 701.0418 are subject to s. 445.125 (1) (a) 2. to 4." and then (3)(c) can be deleted from s. 701.0418.

---

8. 701.0418(3) p. 45, ln. 6

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

RESPONSE: Yes, the referenced power is the power to invade principal of the first trust. When we refer to the power under (2), we are referring to the exercise of the power by appointing assets to a second trust. This is really the act of "decanting." We do not want to grant the trustee the power to appoint assets to a second trust, rather we want to confirm that a trustee can exercise its power to invade principal by appointing assets to a second trust. We do not object to your revised language, but please contact us if we need to discuss a simpler way to describe this power and the permissible use of the power.

OK

---

9. 701.0418(3)(c) p. 46, ln. 6

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

RESPONSE: Fine.

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10. 701.0418(3)(d)2. p. 46, ln. 13

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

Leave impair  
Up to them

RESPONSE: As to the first comment, Code Section 2503 provides for annual exclusion gifts. Since we also refer earlier to the marital deduction (which can apply for gift or estate tax purposes, see Code Sections 2523 and 2056) and to the charitable deduction (which can apply for income, gift or estate tax purposes (see Code Sections 170, 2522 and 2055), should we refer to all of those as well? We are concerned with cluttering up s. 701.0418 with Internal Revenue Code references.

(3)(b) - a little (as) concerning because marital or charitable for income, gift, or estate incl. Dec

As for the use of "prevent" instead of "impair," we think the term "prevent" suggests a point in time before the initial allowance of the deduction. We are talking about something that happens after the fact. We propose "adversely affect" in place of the term "impair" as follows:

"2. The terms of the second trust would adversely affect gifts previously made to the first trust from qualifying for the federal gift tax annual exclusion under s. 2305 of the Internal Revenue Code."

2503

---

11. 701.0418(4)(a) p. 47, ln. 3

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

RESPONSE: As for the first comment, "subs. (2), (3) and (5) of this section" can be substituted for "section." As for the second comment, the trustee will create the trust instrument for the second trust (see subsection (5)(a).) This may beg the question "Who is the settlor of the 2nd trust?" Is it the trustee who exercises the power or the settlor of the first trust? This is a question that may have tax implications. See generally ACTEC Comments on Transfers by a Trustee from an Irrevocable Trust to Another Irrevocable Trust (Sometimes called "Decanting")(Notice 2011-101) Released December 21, 2011, ([http://www.actec.org/public/Governmental\\_Relations/Mezzullo\\_Comments\\_04\\_02\\_12.asp](http://www.actec.org/public/Governmental_Relations/Mezzullo_Comments_04_02_12.asp)) (among the questions posited is "7. Whether the grantor of the Distributing Trust continues to be the grantor of the Receiving Trust following a decanting."). We don't want to try to identify the settlor of the second trust. We propose the following:

*"(4)(a) Subject to subs. (2), (3) and (5) of this section, the trustee of the first trust may create a second trust instrument that includes terms that are intended to achieve any new permissible purpose, including to do any of the following:"*

active voice  
Add note  
re: trustee  
is the  
settlor  
not necessary

12. 701.0418(4) p. 47, ln. 3

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

RESPONSE: This is fine.

---

13. 701.0418(4)(a)4. p. 47, ln. 7

\*\*\*\*NOTE: I assumed that "the trust" meant the first trust. Please let me know if

this is not correct.

RESPONSE: This is fine.

---

14. 701.0418(a)6. p. 47, ln. 14

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

RESPONSE: We wanted to use the term "community trust" because this is the term used by elder law practitioners to reference pooled special needs trust. The largest such trust in Wisconsin is the Wisconsin Pooled and Community Trust, Inc. (WISPACT), which is a nonprofit organization that administers pooled and community special needs trusts for persons with disabilities. We thought the reference to community trust was more helpful than just the generic reference to a master trust arrangement.

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15. 701.0418(4)(a) Page 47 QUESTION: Why did LRB remove from the list the following, which was submitted to LRB?:

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"Change the terms of the trust applicable to a beneficiary who is a disabled individual, regardless of whether the first trust includes standards for distribution, where the purpose of such change is to allow such beneficiary to qualify or continue to be qualified to receive benefits under a government program." ✱

We just want to confirm that you deleted this provision and inserted 701.0418(c)1. in its place.

*see comments 13.*

*see RP paras (c)*

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16. 701.0418(a)17. p. 48, ln. 20

\*\*\*\*NOTE: It is a LRB drafting convention not to use "et seq." Please confirm that I have included the correct range of sections of the IRC. Also, the adjectives "desirable" and "adverse" are subjective, especially if the sentence does not say to whom the tax treatment is supposed to be desirable or adverse. Is it possible that a tax treatment could be desirable to one interested party and adverse to another? I assumed it would be up to the trustee of the first trust to determine whether a tax treatment was desirable or adverse. Please let me know if this does not reflect your intent.

RESPONSE: Yes, LRB has included the correct range of IRS sections. As for the second part of the comment, it is insightful, as a tax consequence may be beneficial to one person and not to another. The trustee has discretion and is the one making the call, so the suggested language is fine.

---

17. 701.0418(4)(b) p. 49, ln. 5

\*\*\*\*NOTE: Would it be accurate to say "modify the terms governing the trustee's power to invade income and principal?"

? take out

RESPONSE: If a trustee does not have absolute power, the trustee can modify the terms governing the power to invade income and principal so long as the modification does not broaden the trustee's power (except in the case of a trust for a disabled individual). See 701.0418(2)(a)2. In the case of a trust where the trustee has absolute power we could say:

"1. Modify in any manner deemed desirable by the trustee the terms of the first trust governing the power to invade income and principal."

18. 701.0418(4)(c) 1. p. 49, ln. 11

\*\*\*\*NOTE: Did you intentionally use "government program" here to refer to more than Medical Assistance? The definition for a "trust for an individual with a disability" is limited to a trust the assets of which are not counted for purposes of Medical Assistance. As you can see, I modified standards with "specific or ascertainable." This change incorporates the definition of ascertainable standard from s. 701.0301.

RESPONSE: Yes, there are government programs that provide benefits for individuals with a disability that extend beyond Medical Assistance. Your reference in (c)2. to specific or ascertainable standards is ok.

19. 701.0418(4)(e) p. 50, ln. 4

\*\*\*\*NOTE: I do not think the 2nd sentence is necessary. As the first sentence only applies to a trustee who would benefit from the term.

RESPONSE: The first sentence is intended to apply with court approval. The second sentence does not require court approval. Perhaps this subdivision could be written more clearly:

*"(e) Notwithstanding par. (a), the trust instrument of the second trust may only include a term that would reduce the potential liability of a trustee, including a term that adopts or expands an exculpatory provision relating to the trustee, if*

Or Ins

- 1. The trustee of the first trust who would benefit for the adoption of the term in the second trust abstains from the consideration and the adoption of the term.
- 2. The court approves the trust instrument of the second trust or trustees of the first trust who would not benefit from the term adopt the trust instrument of the second trust."

3

20. 701.0418(5)(b)4. p. 51, ln. 11

\*\*\*\*NOTE: I removed the sentence about a trustee's notice having the same effect as a court order. It was not clear what "notice" would have the effect of a court order. Second, how would anyone put in a position to accept the "notice" know if anyone had delivered a written objection to the trustee? Please let me know if I am missing the purpose of that sentence. Put another way, please let me know in what situations, if any, the notice would be relied on as a court order. Also, please confirm that the changes I made to this paragraph are consistent with your intent.

The notice is binding on all persons who received notice + a person who received notice may not ask the court to

RESPONSE: Similar to language proposed in section 701.0111(4), the purpose of the sentence you deleted was to assure the trustee and any third party that the notice of the intent to "decant" is tantamount to a court order if no one objects. Put another way, an unobjected to notice is the same as if the persons who were given the notice were joined in a court proceeding seeking approval of the exercise of the power as described in the notice, none objected, and an order was entered. We request the sentence be added back, perhaps as a new subd. 5:

"5. If no objection is made to the notice provided under subd. 1., the notice has the effect of an order of the court. The trustee shall notify all of the parties notified in subd. 1. that there has been no objection to the notice and the trustee shall proceed as provided in the notice to appoint the assets from the first trust to the second trust."

Something about binding process

entitled to receive notice under

\* proceeding w or w/o court order

21. 701.0418(c)1. pp. 51 - 52, ln. 3

\*\*\*\*NOTE: Does "the manner in which the trustee intends to appoint the assets to a 2nd trust" make sense in this context?

= same effect

RESPONSE: First, on line 16 of page 51, replace the word "and" at the end of the line with a comma. In response to your question, the manner in which the trust intends to appoint the assets to a second trust is intended to describe the process by which the property would be transferred from one trust to another. However, since we did not require the manner to be described in the notice without a court order under (5)(b)2, perhaps this requirement should be deleted.

Yes OR No?

22. 701.0418(5)(c)2.b. p. 52, ln. 8

\*\*\*\*NOTE: Should this be expanded to the reasons for any objection made by an person entitled to receive notice under subd. 1.?

RESPONSE: Yes. Good catch.

23. 701.0418(8)(a) p. 53, ln. 17

\*\*\*\*NOTE: What is the purpose of this paragraph? Would it make more sense to include the appointment of assets under sub. (2) in a definition of "special power of appointment" somewhere? For example, you could create a definition of special power of appointment in s. 701.0103 that cross-references the definition in ch. 702 and that includes a reference to this section.

RESPONSE: The purpose is to make it clear that the trustee does not have a general power of appointment. LRB was considering adding a definition of power of appointment in section 701.0103 and that definition may include a reference to the definitions of general and special powers of appointment in ch. 702. If LRB thinks we should reference the power in section 701.0418 in the definition of special power of appointment, that's fine.

?

24. 701.0418(8)(b) p. 53, ln. 20

\*\*\*\*NOTE: What is the basis for the argument that a spendthrift clause or a provision that prohibits amendment or revocation would prevent the appointment of assets under sub. (2)? It is not clear to me why this paragraph is included.

RESPONSE: A spendthrift clause prohibits the voluntary or involuntary alienation of a beneficial interest in a trust. An argument could be made that the exercise of the decanting power in some instances could constitute alienation of a beneficial interest in a trust.

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25. 701.0418(8)(c) p. 54, ln. 4

\*\*\*\*NOTE: What does "to appoint property in further trust" mean?

RESPONSE: It means to appoint the property to another trust for the benefit of a beneficiary or class of beneficiaries. The words "in further trust" are used in various states' statutes and under the common law. A practitioner who practices trusts and estates law will understand these words.



**UNIFORM TRUST CODE COMMITTEE**

**COMMENTS ON SUBCHAPTER V (SECTIONS 53 – 61): LRB DRAFT #2**

✓ **1. Page 55, Lines 3 - 5: §701.0501(1)(b) and §701.0501(2)**

Agree with the proposed change.

**2. Page 55, Lines 9 15: §701.0502(1)**

Agree with the proposed change. Sub (1) would read:

✓ “(1) A spendthrift provision is valid only if one of the following applies:

✓ (a) The beneficiary is other than the settlor.

(b) The trust is a trust for an individual with a disability.”

✓ **3. Page 56, Lines 12 - 14: §701.0503(1) and Page 57, Lines 1 – 2: §701.0503(2)**

Agree with proposed change to remove “any provision in the trust instrument.”

**4. Page 56, Lines 18 - 21: §701.0503(1)(b)**

Agree with the proposed change, but want to clarify what you are proposing. We believe you are proposing that (b) be changed to read:

✓ (b) <sup>at the trustee's discretion</sup> If, under the terms of the trust, the beneficiary may receive income or principal, order the trustee to satisfy part or all of the claim out of part or all of any future payments of income or principal that are made pursuant to the exercise of the trustee's discretion in favor of the beneficiary.”

If we make this change in §701.0503(1)(b), we assume a similar change will also be made in §701.0503(1)(a), §701.0503(2)(a) and §701.0503(2)(b)1. \*

✓ **5. Page 58, Lines 1 - 2: §701.0503(5)**

Agree with the proposed change.

✓ **6. Page 58, Lines 15 - 18: §701.0504(3)**

Agree with the proposed change.

✓ **7. Page 59 – 60, Lines 24 - 25; §701.0505(1)(b)**

Agree with the proposed change.

**8. Page 60, Line 1: §701.0505(2)**

Agree with your comment following line 6. (2) should be revised to change “section” to “subchapter”:

*“(2) For purposes of this subchapter, all of the following apply:”*

**9. Page 61, Lines 13 - 14: §701.0505(2)(e)1.**

Agree with the proposed change. Sub (e)1 would read:

*“(e)1. Contributions to the following trusts are not considered to have been contributed by the settlor:”*

**10. Page 62, Lines 13 - 15: §701.0505(2)(e)3.**

Your assumption is correct. Line 14 also references a limited power of appointment. If we do not reference a limited power of appointment in our definition of power of appointment, the term “limited” should be changed to “special” to be consistent with the definitions in chapter 702 (see page 120, section 702.02(7)).

## UNIFORM TRUST CODE COMMITTEE

### COMMENTS ON SUBCHAPTER VI (SECTIONS 62 - 68; 80): LRB DRAFT #2

✓ 1. **701.0601 PAGE 63 LINES 22-25:**

Leave statute as is and unchanged. Provision is part of the uniform act and intent of committee is stay consistent absent reason to modify the act. While s. 701.0402(4) applies to both revocable and irrevocable trusts, scope of s. 701.0601 is broader to make clear that acts commonly associated with revocable trusts such as amendment and revocation are to be governed by same standards of capacity as required to make a will.

✓ 2. **701.0602(1) PAGE 64 LINES 2-6:**

Agree with comment by LRB to refer to effective date of the subsection.

✓ 3. **701.0602(4) PAGE 65 LINE 8**

Change "governing instrument" to "trust instrument".

✓ 4. **701.0602(6) PAGE 65 LINES 12-14**

We have added a definition of guardian of the estate to the definition section in 701.0103. Therefore change "guardian" back to "guardian of the estate".

✓ 5. **701.0603 (1) and (2) PAGE 65 LINE 22 and PAGE 66 LINE 1**

Add a reference to directing party and trust protector to these subsections so that (1) and (2) read:

✓ (1) *While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee and any directing party and trust protector are owed exclusively to, the settlor.*

(2) *If a revocable trust has more than one settlor, the duties of the trustee and any directing party or trust protector are owed to all of the settlors.*

✓ 6. **701.0605 PAGE 67 LINE 5:**

Agree with LRB insertion. LRB has inserted current s. 701.065 as new s. 70.0605 of subchapter VI. Our only suggested change is to section 701.0605(1)(a)2, in order to reference a claim from any state:

*take out phrase unless the trust trusts provisions otherwise*

Or. Ins. 67-5

“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 any state or any of its subdivisions, 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.”

7. 701.0606 PAGE 73 LINE 24 (to be inserted as the last section of subchapter VI at PAGE 67).

Ins.  
73-2  
x

LRB has suggested that current s. 701.08 (Transfers to living trusts) be inserted as a new 701.0606 at the end of subchapter VI. Since subchapter VI deals with revocable trusts, change the reference from “living” trust to “revocable” trust as set forth in the redlined version of current s. 701.08. The clause at the end of (1) can be deleted since the Code no longer provides any special treatment for testamentary trusts.

701.08 Transfers to living revocable trusts

(1) VALIDITY AND EFFECT. The order of execution of a living revocable 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 revocable 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 revocable trust, the terms of which the testator or designator was the sole holder of a power to modify, shall be administered in accordance with the terms of the trust as 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 revocable trust, which is subject to a power of modification requiring action or consent of a person other than the testator or designator, shall be administered in accordance with the terms of the trust instrument as they exist at the execution of the will or beneficiary designation, unless expressly otherwise provided. If the will or beneficiary designation expressly provides that the property shall be administered in accordance with the terms of the trust instrument as they may be modified thereafter, the will or beneficiary designation need not be reexecuted or republished after exercise of the power to modify.

(3) DISPOSITION WHEN NO EXISTING LIVING + REVOCABLE TRUST. If at the death of a testator a living revocable 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 revocable trust instrument at the time the will was executed or as otherwise provided where sub. (2) is applicable.

UNIFORM TRUST CODE COMMITTEE

COMMENTS ON SUBCHAPTER VII (SECTIONS 69 - 79): LRB DRAFT #2

*-Recommend  
in  
701.0808 or  
701.0818*

1. 701.0701 PAGE 68, Following LINE 8:

Neither section 701.0808 or 701.0818 deal with how a directing party or trust protector accepts or declines an appointment. We propose adding a new subsection (4):

*“(4) If the trust instrument designates a directing party or trust protector, the provisions of this section that apply to a trustee shall also apply to the designated directing party or trust protector when accepting or declining the appointment as directing party or trust protector.”*

*Sec 80-1  
TUS*

2. 701.0702(3) PAGE 68 LINES 16 - 19:

Agree with the proposed change by LRB to change this to active voice: “A court may not require a bond from a trust company bank, state bank, or national bank ....” subsection.

3. 701.0703(1) PAGE 68 LINES 21 -22

Agree with the proposed change by LRB to say: “Cotrustees may act only by majority decision.”

4. 701.0704(3)(b) PAGE 70 LINES 16 - 19

Change the language in this section as follows:

*“(b) By a person appointed by unanimous agreement of the qualified beneficiaries, except that if the trust is a trust for an individual with a disability, the person appointed may not be the individual with the disability, his or her spouse, or a relative legally responsible for his or her support.”*

5. 701.0704(4) PAGE 70 LINES 21 - 23

Replace the reference to special fiduciary to a reference to directing party or trust protector:

*(4) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee, directing party, or trust protector whenever the court considers the appointment necessary for the administration of the trust.*

**6. 701.0705(1)(a) PAGE 71 LINE 4:**

I think a resigning trustee should also be required to give notice to any directing party or trust protector. In subchapter IV, we require notice be given to the settlor if living and not under incapacity. I suggest this subparagraph be revised:

✓“(a) Upon at least 30 days’ notice to the qualified beneficiaries, the settlor, if living and not under incapacity, all cotrustees, and any directing party or trust protector.”

**7. 701.0708(4) and 701.0709(3) PAGE 73 following LINES 5 and 14**

Neither section 701.0808 or 701.0818 deal with whether a directing party or trust protector is entitled to compensation or reimbursement of expenses. We propose the following provision be added at the end of each of these sections:

“701.0708(4)/701.0709(3 ) The provisions of this section that apply to a trustee shall also apply to any directing party or trust protector.”

OIC  
1-9-13  
Except trust protector statute is separate

UNIFORM TRUST CODE COMMITTEE

COMMENTS ON SUBCHAPTER VIII (SECTIONS 81 – 103): LRB DRAFT #2

1. 701.0802(5) PAGE 76 LINE 2:

✓ Your cross-reference to s. 701.0813(3) is correct. Since s. 701.0813(3) refers to a “report” and not an “annual report”, you could change the reference in this section to “report”.

✓ 2. 701.0802(7)(c) PAGE 76 LINES 15:

There are multiple custodian relationships under the law, not just custodians under the uniform transfers to minors act. We do not believe a cross reference is necessary, but request the reference to “guardianship” should be changed to “*guardianship of the estate*” to be consistent with our definition of “guardian of the estate.”

✓ 3. 701.0802(8) PAGE 76 LINE 19

Change “special fiduciary” to “*trustee, directing party, or trust protector*”.

4. 701.0807(5) PAGE 78 LINE 18

✓ We agree with your proposed change.

5. 701.0808 PAGES 78 – 80 (Section 89)

We have revised this section as follows:

**SECTION 89.** *701.0808 of the statutes is created to read:*

**701.0808 Article VIII, Section 808 — Powers to direct.** (1) *While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.*

(2) *The trust instrument may appoint a directing party to direct the trustee on investment or distribution decisions or to make investment or distribution decisions regarding directed trust property. If the trustee acts in accordance with the direction of the directing party or fails to act due to lack of direction, then, except for acts or omissions as a result of willful misconduct, the trustee is not liable for any loss resulting directly or indirectly from any action taken or omitted with respect to the specified action.*

(3) *A trustee does not have a duty to do any of the following:*

(a) *Provide advice to, consult with, monitor, or evaluate the directing party's*

Title change



conduct.

(b) Except as otherwise provided in this chapter, provide information to the directing party, except for information requested by the directing party that is related to the power granted to the directing party.

(c) Inform or warn a beneficiary, a 3rd party, or the directing party that the trustee disagrees with any of the directing party's actions or directions.

(d) Prevent the directing party from giving a direction or taking any action.

(e) Compel the directing party to redress a breach of the directing party's duties.

(4) The administrative actions of a trustee related to matters within the scope of a directing party's power, including confirming that the directing party's directions have been carried out and recording and reporting actions taken pursuant to the directing party's direction, do not constitute either monitoring the directing party's actions or participating in the actions of the directing party.

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

\* what does similar fiduciary duties mean

(6) The following sections of this chapter apply to a directing party as if the directing party was the trustee.

(a) Section 701.0701 regarding accepting or declining the appointment as directing party.

(b) Section 701.0708 regarding compensation of a directing party.

(c) Section 701.0709 regarding reimbursement of expenses.

(d) Section 701.1001 regarding remedies for breach of trust.

(e) Section 701.1002 regarding damages for breach of trust.

(f) Section 701.1003 regarding damages in absence of breach.

(g) Section 701.1004 regarding the awarding and payment of attorney fees and costs.

(h) Section 701.1005 regarding limitation of actions against a directing party.

(i) Section 701.1006 regarding reliance on trust instrument.

(j) Section 701.1007 regarding events affecting administration or distributions.

(k) Section 701.1008 regarding exculpation of a directing party.

(L) Section 701.1009 regarding a beneficiary's consent, release or ratification.

(m) Section 701.1010 regarding personal liability of a directing party.

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

6. 701.0812(1) PAGE 81 LINE 12:

Change "other fiduciary" to "any directing party or trust protector".

2

This is repetitive

Do you just want a x-ref

**7. 701.0813(1) PAGE 81 LINE 21:**

The terms “distributee” and “permissible distributee” are used in the definition of qualified beneficiary. The comments to the UTC describe these parties as the beneficiaries currently eligible to receive a distribution from the trust. We do not believe any further definition is necessary.

**8. 701.0814(2) PAGE 84 LINE 2**

✓ This language tracks the model UTC language and we do not wish to change the model language.

**9. 701.0814(2)(a) and (b) and (3) PAGE 84 LINES 3 – 12**

Add a reference to directing party or trust protector to these subsections:

✓ *“(2) (a) A person other than a settlor who is a beneficiary and trustee, directing party or trust protector of a trust that confers on the trustee, directing party or trust protector a power to make discretionary distributions to or for the trustee’s, directing party’s or trust protector’s personal benefit may exercise the power only in accordance with an ascertainable standard.*

✓ *(2) (b) A trustee, directing party or trust protector may not exercise a power to make discretionary distributions to satisfy a legal obligation or support that the trustee, directing party or trust protector personally owes another person.*

✓ *(3) A power whose exercise is limited or prohibited by sub. (2) may be exercised by a majority of the remaining trustees, directing parties or trust protectors whose exercise of the power is not so limited or prohibited. If the power of all trustees, directing parties or trust protectors is so limited or prohibited, the court may appoint a directing party, trust protector or special trustee with authority to exercise the power.”*

✓ **10. 701.0814(4)(a) PAGE 84 LINE 14**

Add a reference to directing party or trust protector to this line:

*(a) A power held by the settlor’s spouse who is the trustee, directing party or trust protector of a trust for which a marital deduction, ....”*

**11. 701.0816(11) PAGE 87 LINE 2**

Add a reference to directing party or trust protector to this line:

“(11) ..... the trustee, the trustee’s agents, any directing party or trust protector, and beneficiaries against liability arising from .....”

**12. 701.0816(15) PAGE 87 LINE 24**

Add a reference to directing party or trust protector to this line:

✓ “(15) Pay taxes, assessments, compensation of the trustee, any directing party or trust protector, and of employees and ....”

✓ **13. 701.0816(18) PAGE 88 LINE 9**

Your proposed change is OK.

**14. 701.0816(21)(a) PAGE 88 LINE 20**

✓ We added a definition for “guardian of the estate” so change this back to “the beneficiary’s guardian of the estate.”

**15. 701.0816(21)(c) PAGE 89 LINE 8**

✓ We added a definition for “guardian of the estate” so change the reference to “guardian” back to “guardian of the estate.”

**16. 701.0816(24) and (25) PAGE 89 LINES 18 – 22**

Add a reference to directing party and trust protector to these provisions:

✓ “(24) Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property ~~and~~ the trustee and any directing party or trust protector in the performance of the trustee’s, directing party’s or trust protector’s duties.

✓ (25) Sign or deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee’s, directing party’s or trust protector’s powers.”

Should this be an  
error

**17. 701.0818 PAGES 90 – 97 (Section 99)**

We have rewritten this section and provided you with revised language by separate memo.

**18. 853.34(1) PAGE 98 LINES 1 - 4**

Reinstate the deleted language referenced in lines 1 – 4.

**19. CURRENT S. 701.09(3) – (5) PAGE 98 LINE 6**

You are correct; we want to repeal these subsections. These subsections are covered in section 853.34(3), which is created in section 174 on page 128.

**UNIFORM TRUST CODE COMMITTEE**

**COMMENTS ON SUBCHAPTER IX (SECTIONS 104 - 108): LRB DRAFT #2**

**1. 701.0902(1)(a) PAGE 98, LINE 20**

Change "excluded trustee" to "*trustee*". ✓

**2. 701.0902(1)(b) PAGE 99 LINE 1**

Change "excluded trustee" to "*trustee*". ✓

**3. 701.0903(1)(c) PAGE 99 LINE 5**

Change "excluded trustee" to "*trustee*". ✓

**4. 701.0903(2) PAGE 99 LINE 10**

Change "An excluded trustee" to "*A trustee*". ✓

**5. 701.0903(2) PAGE 100 LINE 12**

Yes, our intent is not to provide protection for a trustee who attempts to undertake an action listed in (1). A trustee who decides to take action assumes responsibility to act appropriately.

OK  
no questions  
12-17

## UNIFORM TRUST CODE COMMITTEE

### COMMENTS ON SUBCHAPTER X (SECTIONS 109 - 122): LRB DRAFT #2

#### 1. 701.1001 to 701.1013 PAGES 101- 111 SECTIONS 110 to 122

LRB has suggested that instead of revising each section in subchapter X to deal with the concepts of a directing party or trust protector, we revise the sections on a directed trust (701.0808) and trust protector (701.0818) to specifically reference the other chapter sections that apply to either a directing party or a trust protector. Accordingly we have suggested the following revisions to those sections.

**(6)** *The following sections of this chapter apply to a directing party as if the directing party was the trustee.*

- (a) *Section 701.0701 regarding accepting or declining the appointment as directing party.*
- (b) *Section 701.0708 regarding compensation of a directing party.*
- (c) *Section 701.0709 regarding reimbursement of expenses.*
- (d) *Section 701.1001 regarding remedies for breach of trust.*
- (e) *Section 701.1002 regarding damages for breach of trust.*
- (f) *Section 701.1003 regarding damages in absence of breach.*
- (g) *Section 701.1004 regarding the awarding and payment of attorney fees and costs.*
- (h) *Section 701.1005 regarding limitation of actions against a directing party.*
- (i) *Section 701.1006 regarding reliance on trust instrument.*
- (j) *Section 701.1007 regarding events affecting administration or distributions.*
- (k) *Section 701.1008 regarding exculpation of a directing party.*
- (L) *Section 701.1009 regarding a beneficiary's consent, release or ratification.*
- (m) *Section 701.1010 regarding personal liability of a directing party.*

**(9)** ***APPLICATION OF OTHER SECTIONS TO TRUST PROTECTORS*** *The following sections of this chapter apply to a trust protector as if the trust protector was the trustee.*

- (a) *Section 701.0701 regarding accepting or declining the appointment as trust protector.*
- (b) *Section 701.0708 regarding compensation of trust protector.*
- (c) *Section 701.0709 regarding reimbursement of expenses.*
- (d) *Section 701.1001 regarding remedies for breach of trust by a trust protector acting in a fiduciary or nonfiduciary capacity.*
- (e) *Section 701.1002 regarding damages for breach of trust by a trust protector acting in a fiduciary or nonfiduciary capacity.*

- (f) Section 701.1003 regarding damages in absence of breach.
- (g) Section 701.1005 regarding limitation of actions against a directing party.
- (h) Section 701.1006 regarding reliance on trust instrument.
- (i) Section 701.1007 regarding events affecting administration or distributions.
- (j) Section 701.1008 regarding exculpation of a directing party.
- (k) Section 701.1009 regarding a beneficiary's consent, release or ratification.
- (L) Section 701.1010 regarding personal liability of a directing party.

**2. 701.1001(2)(e) PAGE 101 LINE 17**

✓ We decided in our review of earlier statutes to not use the term "special fiduciary" or "other fiduciary". Change "a special fiduciary" to "*an additional trustee, directing party or trust protector*".

**3. 701.1002(3) PAGE 102 LINES 18 - 19**

✓ We discussed making changes to this subsection.

*"(3) A successor trustee is not liable for the acts and omissions of a former trustee or for the acts or omissions of any directing party or trust protector taken before the appointment of the successor trustee."*

**4. 701.1004 PAGES 103 - 104 SECTION 113**

*do a search*

✓ In multiple places we refer trust assets or assets of the trust. Throughout the Code we refer to trust property instead of trust assets (property is a defined term.) Where the context applies in this section, change "assets" to "*property*."

**5. 701.1013(3) PAGE 110 LINE 11**

Your proposed change is OK.