

o/c w/ comment 11/9

UNIFORM TRUST CODE COMMITTEE

COMMENTS ON SUBCHAPTER XII (SECTIONS 123 - 185): LRB DRAFT #2

1. 701.1201(1)(a) PAGE 111 LINE 18

***NOTE: Please review the definitions of charitable trust and split-interest trust in this section. It is not clear to me that the cross-references to the Internal Revenue Code provide definitions. Additionally, s. 701.0103 (4) provides a different definition of "charitable trust" for the chapter. If it is your intention to override that definition for purposes of this section, I recommend adding a "notwithstanding s. 701.0103 (4)" to this section or "Except as provided in s. 701.1201," to s. 701.0103 (4).

We agree that IRC section 4947 describes rather than defines charitable trusts and split interest trusts that are subject to the excise taxes that apply to private foundations. We suggest this section and section 701.0103(4) be revised as follows:

(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 described in section 4947(a)(1) of the Internal Revenue Code, or a split-interest trust as described in section 4947(a)(2) of the Internal Revenue Code, all of the following acts shall be prohibited:

701.0103(4) Except as provided in s. 701.1201, "charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in s. 701.0405(1).

2. 701.1201(2) PAGE 112 LINE 19

Make the same reference to a "charitable trust as described in section 4947(a)(1) ..."

3. 701.1201(3) and (4) PAGE 112 Following LINE 23

Subsection (3) should be revised as follows and sub. (4) is not necessary.

(3) Subs. (1) and (2) shall ^{do} not apply to any trust to the extent that a court shall determine that ^{the} such application would be contrary to the terms of the trust and that the same may not properly be changed to conform to such subsections.

4. 701.1202 PAGE 113 Following LINE 6

We propose that your proposed section 701.1202 (Section 141, page 116, line 7) be moved to section 701.0417 (see item #10 below.) In its place we want to add the following as new section 701.1202. Please advise if you think this section is properly included in subchapter XII (as compared to subchapter I – general provisions and definitions or subchapter IV – creation of a trust.)

create ins.
rev. sub(4)

OK

Move to §.

Trustee duties?

701.1202 Article XII, Section 1202 – Presumptions regarding contributions to a trust.

(1) For purposes of this section, "marital deduction gift" means a gift intended to qualify for the marital deduction as indicated by the terms of the trust regardless of whether the trust instrument is ambiguous.

del marital deduction

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

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

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

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

(3) If a trust receives a marital deduction gift, the trust instrument shall be construed to comply with the marital deduction provisions of the Internal Revenue Code in every respect.

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

*Not -
passing
in trust?*

5. 701.1203 PAGE 113 LINE 14

****NOTE: This draft does not include Section 1103 of article 12. Section 990.001 (11) of the statutes provides that the provisions of the statutes are severable. The unconstitutionality of any provision of the statutes does not affect other provisions that can be given effect independently of the unconstitutional provision if severing the unconstitutional portion does not foil the legislature's manifest intent. Thus, it is the policy of the LRB not to insert a separate severability provision.

We agree with the deletion of the severability provision.

6. 701.1204 PAGES 113 - 114 LINE 19

****NOTE: I altered the uniformity language slightly to conform with other uniform laws in our statutes. See s. 881.01, the Uniform Prudent Investor Act, [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.]; s. 706.10, the uniform law on notarial acts, [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 states enacting it.]; and s. 766.96, marital property, [This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.]

We agree with your proposed change.

7. 701.1206(3)(b) PAGE 114 LINE 12

***NOTE: This provision seems to allow the courts to decide, on a case-by-case basis, what law applies to each judicial proceeding that was commenced before the effective date of this bill. Is this consistent with your intent?

Yes, this is our intent. According to the UTC comments on this section, the court has the ability on a case by case basis to decide what law applies to a judicial proceeding commenced before the effective date of this section.

8. 701.0205 PAGE 114 LINE 15 to PAGE 115 LINE 10

We commented on this section as part of our comments to subchapter II.

9. 701.0206 PAGE 115 LINE 11 to PAGE 116 top of page

We commented on this section as part of our comments to subchapter II.

10. 701.22 PAGE 116 LINE 17 to PAGE 117 top of page

We suggest that this section be added to section 701.0417 as new subsection (4). In addition to your proposed changes, the reference to trust assets should be changed to "trust property". Section 701.0417 would read:

701.0417 Article IV, Section 417 — Combination and division of trusts.

(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:

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

(2) Subject to the terms of the trust, the trustee may take into consideration differences in federal tax attributes and other pertinent factors in administering the trust property of any separate account or trust, in making applicable tax elections, and in making distributions. 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. The effective date of the severance may be retroactive to a date before the date on which the trustee exercises such power.

(3) If a trustee combines 2 or more trusts into a single trust, the trustee shall identify which trust is the surviving trust.

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

11. 701.1206(1) PAGE 117 LINE 14

****NOTE: This provision is based on section 1206 (a) and (c) of the language you provided me. It is LRB policy, to be as specific as possible when using the phrase "except as otherwise provided in." Sections 701.0602 (1) and 701.0813, as created by this bill, include in-text applicability provisions that provide that the respective provisions do not apply to trusts created before the effective date of the bill. Please let me know if there are any other sections that should be added to the "except as otherwise provided" clause.

I did not include section 1206 (a)(4) or (5) in this draft. First, to draft subsection (4), I will need a list of the sections that you consider to include "rules of construction" or "presumptions." Without citations to specific sections, it will be up to the reader and eventually a court to determine what is a presumption or rule of construction. I did not include section 1206 (5) because it seems to overlap with the other sections and create conflicts. Section 1206 (5) says that an act done before the effective date of the act is not affected by the chapter. "An act" is such a general term that is seems to overlap with the execution of a trust, the act of commencing a judicial proceeding, and any act taken by a trustee. Please let me know the intent of section 1206 (5) and how it should be reconciled with the other applicability paragraphs.

Unless you think we should add a reference to the changes in subchapter XI (see next comment), we have no additional subsections to add to the "except as otherwise provided" clause. We are ok with the changes that you are proposing. This means we will only be adopting section 1106(a)(1) of the UTC.

SECTION 1106. APPLICATION TO EXISTING RELATIONSHIPS.

(a) Except as otherwise provided in this chapter, on the effective date of this chapter, this chapter will apply to all trusts created before, on, or after [its effective date];

Following will not be included as a part of Wisconsin Trust Code section 1206:

(2) this [Code] applies to all judicial proceedings concerning trusts commenced on

1 see p. 114 line 2-12

or after [its effective date];

(3) this [Code] applies to judicial proceedings concerning trusts commenced before [its effective date] unless the court finds that application of a particular provision of this [Code] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this [Code] does not apply and the superseded law applies;

(4) any rule of construction or presumption provided in this [Code] applies to trust instruments executed before [the effective date of the [Code]] unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done before [the effective date of the [Code]] is not affected by this [Code].

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of the [Code]], that statute continues to apply to the right even if it has been repealed or superseded.

Comment

The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen. This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment. The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable. For a comparable uniform law effective date provision, see Uniform Probate Code § 8-101.

12. 701.1206(2) PAGE 118 LINE 12

***NOTE: In light of s. 701.20 being restructured as a subchapter, please confirm that the cross-references in the last sentence reflect your intent.

***NOTE: Sections 701.1110 to 701.1135 are created in a separate draft that will be incorporated at a later time.

We believe this subsection should be incorporated into the scope provisions of subchapter XI (see our comments to subchapter XI.) Please advise whether you recommend that the subchapter XI changes be made effective retroactive to May 17, 2005 or whether it should apply effective when the new chapter becomes effective. Most of the subchapter XI changes are corrective rather than substantive.

Effective date of 12/17/05

13. 701.26 PAGE 118 LINE 19

We repealed current section 701.26, but request LRB to consider whether the provision that references section 854.13 should be incorporated into that section and whether the provision that references section 700.27 should be incorporated into that section.

14. 702.02(6) PAGE 120 LINE 120

****NOTE: Is the addition of "or authority" in the first sentence of this definition necessary? How does power differ, legally, from authority?

We agree with you that the addition of "or authority" in the first sentence is not necessary. We think the last sentence should reference a directing party and a trust protector.

A power of appointment does not include a power of sale, a power of attorney, a power of revocation, or a power exercisable by a trustee, a directing party, a trust protector, or other fiduciary in his or her fiduciary capacity.

15. 702.03 PAGES 120 – 121 LINES 19 to 16 of page 121

We think the references to "governing instrument, as defined in s. 854.01(2), or an inter vivos governing instrument, as defined in s. 700,27(1)(c)" (lines 21 – 22), "an instrument" (line 4), "instrument" (line 5) (line 8 –twice), should be changed to "creating instrument", which is a defined term in chapter 702.

16. 702.05(3) PAGE 122 LINES 7 and 12

We think the reference to "instrument" should be changed to "creating instrument".

17. 702.05(5) PAGE 123 LINE 4

****NOTE: The drafting instructions proposed that this subsection be written as one sentence. I divided the subsection into an introduction and two paragraphs. Please review the subsection carefully to ensure that I did not alter the meaning.

We agree with your proposed change.

18. 702.17 PAGE 126 SECTION 168

Wisconsin law addresses rights of a creditor in property subject to a power of appointment in section 702.17. Current law does not specifically address the rights of a creditor in property covered by a general power of appointment that is not currently exercisable. We would like to clarify this by adopting language similar to the New York statutes. This will require two new subsections to be added to s. 702.17 and subsection (3) to be amended.

What about Sub (2) references to instrument

If the donee has a special power of appointment,

Prepared 12/16/2012

() Creditors of the donee; special power of appointment. ^{(Notwithstanding sub.(1))} Property covered by a special power of appointment or general power of appointment that is exercisable solely for the support, maintenance, health and education of the donee within the meaning of section 2041 and 2514 of the Internal Revenue Code is not subject to the payment of the claims of creditors of the donee, the donee's estate, or the expenses of administering the donee's estate.

add exception to sub (1)

() Creditors of the donee; general power of appointment not presently exercisable. ^{that at the time it was created was not}

Property covered by a general power of appointment which, when created, is not presently exercisable ^{by the donee} is subject to the payment of the claims ^{treated as property of the donee} of the creditors of the donee, the donee's estate and the expenses of administering the donee's estate only if:

for purpose of satisfying claims of the donee's creditors

- (a) The power ^{of appointment} was created by the donee in favor of the donee.
- (b) A postponed power becomes exercisable in accordance with the terms of the creating instrument, except in the case of a testamentary general power of appointment.

(3) At death of donee. If the donee exercised a general power of appointment at the time of the donee's death, any creditor of the donee may reach any interest which the donee has appointed, to the extent that the claim of the creditor has been filed and allowed in the donee's estate but not paid because the assets of the estate are insufficient.

19. 766.575(1)(e) PAGE 127 LINE 15

****NOTE: Did you intend the new definition for trustee under s. 701.0103 (25) to replace the old definition in this section, or should I insert the old definition, "Trustee" means a person holding in trust title to or holding in trust a power over property," here?



Yes, we intend to use the new definition of "trustee".

20. 853.17(2) PAGE 128 LINE 7

****NOTE: I removed the cross-reference to s. 701.09 in this subsection; should it be replaced with s. 853.34, as created in this bill? Or some other provision?



We agree with your change and to delete the reference to section 701.09.

21. 853.34(3) PAGE 128 LINE 20

****NOTE: The first sentence of this subsection refers to "transfer of those assets," but there are no assets explicitly identified before this phrase. What are "those assets" referred to in this sentence? Would it be appropriate for that portion of the first sentence to read "transfer of any assets under that other governing instrument...?"

We agree with your proposed change to the first sentence. We understand this sentence will now read:

If a trustee of a trust created by a testator's will is designated as the beneficiary of a transfer under another governing instrument as defined in s. 854.01(2) at the death of the testator or at the death of a third party, transfer of any assets under that other governing instrument to the trustee shall not cause the transferred assets to be included in property administered as part of the testator's estate.

22. 853.61(2)(a) PAGE 129 LINE 2

***NOTE: Section 701.16 is repealed; should I also repeal this s. 853.61 (2) (a), or should I substitute some other section of the revised trust code in place of s. 701.16?

✓ The reference should be changed to sections 701.0815 and 701.0816.

23. 854.13 PAGE 129 LINES 8, 10 and 21 and PAGE 130 LINE 13

***NOTE: Please review the changes at the end of this sentence for accuracy.

There are various references to a power of appointment created by a "governing instrument". Should this be changed to "creating instrument" to be consistent with the definition in chapter 702? The other changes to this section have our approval.

This section under the def. in 854.01(2) for gov. inst. does that work?

24. 854.23(5)(b) PAGE 131 LINE 9

***NOTE: This bill repeals s. 701.19 (11); should some other cross-reference appear here, or should I amend the first sentence to read: "in addition to the protections afforded a financial institution under ss. 701.19 (11) and s. 710.05 and chs. 112 and 705..."?

The cross reference should be to s. 701.1012. ✓

25. 859.18(5)(a) PAGE 131 LINE 12

***NOTE: This bill repeals s. 701.07 (3); should anything replace it?

The cross reference should be to s. 701.0505(1). ✓

I think OK

26. 859.18(5) PAGE 132 LINE 3

***NOTE: This bill repeals s. 701.19 (11); should some other cross-reference appear here, or should I amend the first sentence to read: "in addition to the protections afforded a financial institution under ss. 701.19 (11) and s. 710.05 and chs. 112 and 705..."?

The cross reference should be to s. 701.1012.

27. 865.08(6) PAGE 132 LINE 14

***NOTE: This bill repeals s. 701.16 (2); what cross-reference should replace it?

The cross reference should be to s. 701.0702.

28. 879.47 PAGE 133 LINE 17

****NOTE: This bill repeals s. 701.16 (4) (d); what cross-reference should replace it?

We suggest the reference to s. 701.16(4)(d) be deleted and the first two sentences of this section be rewritten as follows:

The attorney for any person desiring to file any paper in court is responsible for the preparation of the paper. If the attorney represents a corporate trustee, the corporate trustee may submit accounts to a court in the format that the corporate trustee normally uses for accounts that are submitted to beneficiaries, provided that all information required by the court is included in the account statement. All papers shall be legibly written on substantial paper and shall state the title of the proceeding in which they are filed and the character of the paper.

29. EFFECTIVE DATE SECTION 185 PAGE 133 LINE 19

****NOTE: This date is a place holder. Keep in mind that this date will not achieve your goal of giving practitioners 6 months to absorb the new law if the bill does not pass before July 1, 2013. To avoid the issue of when the bill may pass, you could structure the effective date as the first day of the 7th month after publication. This structure would ensure 6 months between publication and the effective date.

Let's continue to keep January 1, 2014 as the effective date.

Use current law

I don't think this reflects current law
Is this an intentional change?
Under 701.16(4)(d) - trustees or trustees could submit accounting
Corporate does not required
Also, this seems to be an exception to the

Knepp, Fern

From: victor.schultz@bmo.com
Sent: Sunday, December 16, 2012 9:19 PM
To: Knepp, Fern
Cc: Elizabeth A. Heiner; Wiensch, Adam J.
Subject: Re: Comments to subchapter XII
Attachments: UTC article 12 - comments to second draft by LRB.docx

Here are the comments on subchapter 12. Fern, we are specifically asking for some guidance from you on the following:

1. Should the proposed new section 701.1202 regarding presumptions regarding contributions to a trust be included in subchapter 12? (Comment #4) *IS this really a trustee duty?*
2. I am not sure if I clearly understand what is being proposed for section 701.1206 regarding application to existing relationships. Are you proposing that only UTC section 1106(a)(1) be included. Please review comment #11 and confirm your recommendation.
3. We think that the proposed section 701.1206(2) should be incorporated into subchapter 11. Please advise on what you recommend (Comment #12) *Why?*
4. We have recommended repealing current Wis Stat section 701.26. Do you recommend this provision be preserved and incorporated into existing sections 854.13 and 700.27? (Comment #13) *I don't understand the subst. effects - what is the issue?*
5. We want to clarify some of the creditor rights language in section 702.17. Do you have any issues with my proposed amendment to this section? (See comment #18) *is the issue?*
6. I propose that some of the references to "governing instrument" be changed to "creating instrument" in section 854.13. I want LRB to confirm that these changes make sense. (Comment #23) *probably no.*

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email: victor.schultz@bmo.com

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Knepp, Fern

From: victor.schultz@bmo.com
Sent: Sunday, December 16, 2012 8:00 PM
To: Knepp, Fern
Cc: Adam Wiensch; Randy S. Nelson
Subject: RE: Comments to Subchapter XI - Principal and Income Act
Attachments: UTC article 11 - comments to first draft of principal and income act - 701.20.docx

Here are the comments to subchapter 11. Pursuant to our telephone conversation, I want to highlight the following comments.

1. We are proposing that the scope of this subchapter be expanded as shown in s. 701.1101 and we ask that you consider if the effective date provision currently drafted as s. 701.1206(2) should be moved to this subchapter. (Comment 1)
NO - leave as is
2. At your suggestion, we added a definition of "separate account" to section 701.1123 (Comment 24) and accordingly revised s. 701.1123(3).
3. We also revised s. 701.1123(4) and hope that this now makes sense. Subsections (4) and (5) are intended to be savings provisions that override the other provisions in s. 701.1123. Do you suggest any additional language that clarifies that these subsections override the others?

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Knepp, Fern

From: victor.schultz@bmo.com
Sent: Sunday, December 16, 2012 6:04 PM
To: Knepp, Fern
Cc: Wiensch, Adam J.; MShiller@gklaw.com; Mark; Mark
Subject: Re: Wisconsin Trust Code - trust protector, section 701.0818
Attachments: UTC article 8 - revised trust protector statute section 818 - revised draft 12-12.docx

Fern, here is a revised format for the proposed trust protector statute. You indicated you will take this language and further revise it consistent with your drafting conventions. In response to our phone conversation and your follow-up comments about the relevant definitions, the attached draft attempts to incorporate the following:

1. A revised definition of "directing party" is shown based on your suggestions.
2. A revised definition of "trust protector" is shown based on your suggestions. Please compare this with the sample powers included in section 701.0818(3) to confirm that the definition is comprehensive to include all powers delineated in the statute.
3. A revised definition of "directed trust property" is shown to clarify the definition covers property that is invested or managed at the direction of the directing party.
4. You asked if the directing party's power to direct investment or distribution decisions overlaps the trust protector's power to consent to, veto or advise on investment or distribution decisions. It is not supposed to overlap. If there is a directing party, the trustee has no power over the specified investment or distribution decision and is expected to merely carry out the direction. If the trust protector has a power to consent to, veto or advise the trustee on an investment or distribution decision, the trustee is expected to make the investment or distribution decision and then work with the trust protector as directed in the document.

The net result of these two distinct concepts, is that a trustee may be able to offer a reduced fee directed investment or distribution decisions, but will likely charge a full fee for investment or distribution decisions that are subject to some type of review by a trust protector.

5. You asked if the phrase "for which the trustee has no investment or management responsibility" is intended to be substantive within the definition of directed trust property. The phrase is a necessary result of the first part of the definition. If a directing party is responsible for the investment or management of directed trust property, then a trustee has no investment or management responsibility for that property.
6. In section 701.0818, you suggested it might be helpful to add titles to each subsection. Starting with "Appointment", I added a proposed title to each subsection.
7. At your suggestion, I reorganized subsection (2) to cover the legal capacity of trust protector powers. Please proceed to revise this section consistent with your drafting conventions.
8. Subsection (3) now deals exclusively with trust protector powers. Please review to make sure you are comfortable that the specified powers are consistent with the definition of trust protector.
9. Subsection (4) now lists that powers that may not be exercised by a trust protector.
10. Subsection (5) deals with trust protector's relationship with the settlor. Should this section be consistent with s. 701.0808(1), which allows a settlor to direct a trustee while the trust is revocable? For example, "Unless the trust is revocable by the settlor, the settlor may not direct the trust protector and the settlor may not bring a cause of action against the trust protector." Please share your thoughts on the drafting of this subsection.

11. In subsection (7), I added "except as otherwise provided in this chapter" to deal with the revisions made in other subchapters to require notice to any trust protector in certain events, such as a nonjudicial settlement agreement, termination of trust or modification of the trust.

*Substantive
15 other
what
you want
I'll do more*

12. In subsection (8), you indicated you would offer revised language for the reference to "the applicable standard of care."

13. I added subsection (9) at your suggestion to specifically list all other trustee provision that also apply to a trust protector. This is in lieu of amending all of those sections to specify that the section applies to a trust protector.

14. Subsection (10) was modified at your suggestion.

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Knepp, Fern

From: victor.schultz@bmo.com
Sent: Sunday, December 16, 2012 4:57 PM
To: Knepp, Fern
Cc: Wiensch, Adam J.; Randy S. Nelson
Subject: Re: Wisconsin Trust Code - subchapter VIII
Attachments: UTC article 8 - comments to second draft by LRB.docx

Here are the comments to subchapter VIII. Based on our conversation, I made several additional changes to section 701.0808:

1. 701.0808(3)(b) - I added a reference to "except as otherwise provided in this chapter", because we made changes in other subchapters to require notice in various situations, such as nonjudicial settlement agreements, termination and modification of the trust.
2. 701.0808(5) and (6) - as you suggested, I modified (5) and added (6) to specifically list the other statute sections that apply to a directing party.
3. 701.0808(7) - I changed this section to model the language you suggested in the trust protector statute.

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Make Ins 90-22

Section 818. Trust Protector

(1) APPOINTMENT. A settlor or a court may appoint a trust protector in a trust instrument, whether referred to as a trust protector, another title or no title. A trust protector has the powers delineated in the trust instrument.

granted to the trust protector

(2) LEGAL CAPACITY OF TRUST PROTECTOR POWERS. (a) A settlor or a court may specify in a trust instrument whether a particular power granted to a trust protector is required to be exercised in a fiduciary, non-fiduciary, or personal capacity.

(b) If a trust protector's power is exercisable in a fiduciary capacity and the trust protector exercises the power, all of the following apply:

- 1. The trust protector shall exercise the power in a manner that is consistent with the terms of the trust.
- 2. With respect to the exercise of the power, the trust protector has fiduciary duties and obligations to the beneficiaries of the trust that are similar to the fiduciary duties and obligations that a trustee of the trust has to the beneficiaries.
- 3. The trust protector may be held liable for any damage associated with the violation of the duties described under subd. 2.

(c) If a trust protector's power is exercisable in a non-fiduciary capacity, all of the following apply:

- 1. The trust protector may exercise the power in a manner that is inconsistent with the terms of the trust but must exercise the power in good faith.
- 2. With respect to the power, the trust protector does not ~~any~~ ^{has no} fiduciary duties or obligations to the beneficiaries of the trust or any other party.
- 3. The trust protector may be held liable for damages associated with any of the following:
 - a. The exercise or non-exercise of the power if it is proved that the trust protector's exercise or non-exercise of non-fiduciary powers was not in good faith
 - b. The actions or inactions of a fiduciary over whom the trust protector has a power of removal if it is proved that the failure of the trust protector to exercise the power of removal was not in good faith.

trust protector's

(d) If a trust protector's power is exercisable in a personal capacity, all of the following apply:

- 1. The trust protector may exercise the power in a manner that is inconsistent with the terms of the trust.
- 2. With respect to the power, the trust protector has no fiduciary duties to the beneficiaries or any other party.

to

3. The trust protector is not subject to any standard of care with respect to the exercise or non-exercise of the power, including an obligation to act in good faith.

4. The trust protector is not liable for the exercise or non-exercise of the power or for the actions or inactions of a fiduciary over whom the trust protector has a power of removal.

Except as provided in par. (c) 3.
of the trust protector's
(d) A trust protector does not have a duty to exercise its powers and does not have a duty to monitor the conduct of the trustees or any directing party, nor a duty to monitor changes in the law or circumstances of the beneficiaries.

Note

(3) TRUST PROTECTOR POWERS

(a) Except as provided in pars. (b) to (d), if a trust instrument does not specify whether a particular power is required to be exercised in a fiduciary, nonfiduciary, or personal capacity, the power is to be exercised in a nonfiduciary capacity, including the power to do any of the following:

1. Modify or amend the trust instrument to respond to opportunities related to, or changes in, restraints on alienation or other state laws restricting the terms of a trust, the distribution of trust property or the administration of the trust.

2. Modify or amend the trust instrument to achieve a different tax status or to respond to changes in federal or state law.

3. Change the principal place of administration, the tax situs of the trust, or the governing law of the trust.

4. Eliminate or modify the interests of a beneficiary or add a new beneficiary or class of beneficiaries, provided, however, the trust protector shall not modify any beneficial interest of a trust that qualified for a marital deduction or charitable deduction from federal or state estate tax in a manner that would have caused such trust not to qualify for such deduction.

5. Modify the terms of a power of appointment granted under the trust, provided, however, such modification may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument.

6. Remove, replace or appoint a trustee, trust protector, or directing party.

How is this different than 9?
7. Terminate the trust.

8. Appoint assets to a new trust under section 701.0418.
9. Appoint a successor trust protector, trustee, or directing party.
10. Advise the trustee on matters concerning a beneficiary.
11. Advise the trustee on the exercise of a trustee duty or power, including the duty to provide notification to qualified beneficiaries under s. 701.0813.
12. Except as provided in sub. (b) 5., consent to or veto specified actions of a trustee or a directing party.

(b) If a trust instrument grants a trust protector the power to do any of the following actions and the trust instrument does not specify whether the power is to be exercised in the trust protector's fiduciary, nonfiduciary or personal capacity, the power is to be exercised in a fiduciary capacity:

1. Interpret terms of the instrument at the request of the trustee.
2. Correct errors or ambiguities in the terms of the trust that might otherwise require court construction or defeat the settlor's intent.
3. Review and approve a trustee's reports or accounting.
4. Resolve disputes between the trustee or a directing party and a beneficiary.
5. Consent to or veto distributions to a beneficiary.

(c) A trust protector who is also the settlor or a qualified beneficiary shall exercise any power granted to the trust protector in a personal capacity.

(d) A trust protector who is also serving as a trustee or a directing party shall exercise any power granted to the trust protector in a fiduciary capacity.

(e) A trust protector may resign or release any power granted to the trust protector by giving written notice to the trustee and to any successor trust protector.

Note →

Could a trust protector be both a trustee and a directing party?

ACTIONS gl

(4) PROHIBITED EXERCISE OF POWERS. A trust protector may not exercise its powers to do any of the following:

(a) Create or expand any beneficial interest, power of appointment, right of withdrawal, or right to receive trust property as a result of the exercise of a power of appointment in favor of the trust protector, the trust protector's estate, the trust protector's creditors, or creditors of the trust protector's estate.

(b) Modify or amend a trust in order to:

1. Remove a requirement pursuant to 42 U.S.C. 1396p (d) (4) to pay back a governmental entity for benefits provided to the permissible beneficiary at the death of that beneficiary.

2. Reduce or eliminate an income interest of the income beneficiary of any of the following trusts:

a. A trust for which a marital deduction has been taken for federal income tax purposes under section 2056 or 2523 of the Internal Revenue Code or for state tax purposes under any comparable provision of applicable state law, during the life of the settlor's spouse.

b. A charitable remainder trust under section 664 of the Internal Revenue Code, during the life of the noncharitable beneficiary.

c. A grantor retained annuity trust under section 2702 of the Internal Revenue Code, during any period in which the settlor is a beneficiary.

d. A trust for which an election as a qualified Subchapter S Trust under section 1361(d) is currently in place.

(c) Cause the trust property to be included in the trust protector's gross estate for federal or state tax purposes.

(5) SETTLOR RIGHTS. A trust protector is not subject to the direction of the settlor and the settlor may not bring a cause of action against the trust protector. A trust protector may consider a settlor's goals, objectives, and philosophies in establishing the trust and the trust's structure when exercising the powers granted to the trust protector and may do so regardless of whether the settlor is deceased.

(6) TRUSTEE AND DIRECTING PARTY RESPONSIBILITIES. (a) A trustee and any directing party are not liable for any loss that results from the

trustee or the directing party taking actions that are consistent with a modification of the trustee's or the directing party's powers, authority, or discretion as a result of the action of a trust protector unless the trustee or the directing party breaches a duty owed for the exercise of the power, authority or discretion, as modified by the trust protector.

(b) A trustee and any directing party may refuse to act consistently with a trust protector's modification if the trustee or the directing party knows the modification is manifestly contrary to the terms of the trust or would constitute a serious breach of any duty owed by the trust protector.

(c) A trustee and any directing party do not have a duty to monitor the conduct of the trust protector, provide advice to or consult with the trust protector, or communicate with, warn, or apprise any beneficiary concerning instances in which the trustee or the directing party would or might have exercised the trustee's or the directing party's discretion in a manner different from the manner exercised by the trust protector.

(7) **RIGHT TO INFORMATION.** A trust protector may request information about the trust from the trustee and, if such information is related to the exercise or nonexercise of a power expressly granted to the trust protector in the trust instrument, the trustee shall provide the requested information to the trust protector. Except as otherwise provided in this chapter, a trustee does not have an obligation to provide any information to the trust protector that the trust protector does not request. If a trustee is bound by any confidentiality restrictions with respect to information requested by a trust protector, the trustee may require that the trust protector agree to be bound by the confidentiality restrictions before delivering such information to the trust protector.

(8) **REIMBURSEMENT OF ATTORNEY FEES AND COSTS.** A trustee shall provide to a trust protector, from the trust property for which the trust protector is acting, reimbursement of attorney's fees and expenses, including the cost of defending any claim made against the trust protector arising from the acts or omissions of the trust protector, unless the trust protector was not acting in accordance with the applicable standard of care.

(9) **APPLICATION OF OTHER SECTIONS TO TRUST PROTECTORS.** Sections 701.0701, 701.0708, 701.0709, 701.1003, 701.1005, 701.1006, 701.1007, 701.1008, 701.1009, and 701.1010 apply to a trust protector as if the trust protector is the trustee. Sections 701.1001 and 701.1002 apply to a trust protector who is acting a fiduciary or nonfiduciary capacity as if the trust protector is the trustee ~~and do~~ not apply to a trust protector who is acting in a personal capacity.

↑ but

(10) JURISDICTION. A person who accepts an appointment to serve as a trust protector of a trust having its principal place of administration in this state submits to the jurisdiction of the courts of this state, as provided in s. 701.0202(1), with respect to matters involving the trust.

December 16, 2012 Draft

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

"Trust protector" means a person who, in a trust instrument, is granted any of the following powers in a capacity other than as a trustee or a directing party:

- Terminology?*
What's the issue?
- (a) The power to modify or interpret the terms of the trust.
 - (b) The power to consent to or veto a trustee's or directing party's decision regarding the investment, distribution, or administration of trust property.
 - (c) The power to advise a trustee or directing party regarding the investment, distribution, or administration of trust property.
 - (d) The power to direct decisions, other than investment or distribution decisions, about the administration of the trust.
 - (e) The power to remove and replace a trustee or any directing party or trust protector, or appoint a successor.

"Directed trust property" means all or any portion of the property of a trust that is invested or managed by, or at the direction of, a directing party and for which the trustee has no investment or management responsibility.

Section 818. Trust Protector

(1) **APPOINTMENT** A settlor or a court may appoint a trust protector in a trust instrument, whether referred to as a trust protector, another title or no title. A trust protector has the powers delineated in the trust instrument.

(2) **LEGAL CAPACITY OF TRUST PROTECTOR POWERS** A settlor or a court may specify in a trust instrument whether a particular power granted to a trust protector is required to be exercised in a fiduciary, non-fiduciary, or personal capacity.

(a) A trust protector with powers exercisable in a fiduciary capacity must exercise such powers consistent with the terms of the trust and shall have similar fiduciary duties and obligations to the beneficiaries of the trust as a trustee would. Subject to subsection (f), a trust protector, with respect to powers exercisable in a fiduciary capacity, may likewise be held liable for any damage associated with the violation of such duties.

(b) A trust protector with powers exercisable in a non-fiduciary capacity has no fiduciary duties to the beneficiaries or any other party, may exercise such powers in a manner which is inconsistent with the terms of the trust, but must act in good faith. A trust protector may be held liable (1) if it is proved that the trust protector's exercise or non-exercise of non-fiduciary powers was not in good faith or (2) for the actions or

inactions of a fiduciary over whom the trust protector has a power of removal if it is proved that the failure to exercise such power of removal was not in good faith.

(c) A trust protector with powers exercisable in a personal capacity has no fiduciary duties to the beneficiaries or any other party and may exercise such powers in a manner which is inconsistent with the terms of the trust. A trust protector with powers exercisable in a personal capacity is not subject to any standard of care with respect to the exercise or non-exercise of such powers, including an obligation to act in good faith, and may not be held liable for the exercise or non-exercise of any such powers or for the actions or inactions of a fiduciary over whom the trust protector has a power of removal exercisable in a personal capacity.

(d) A trust protector shall have no duty to exercise its powers and shall have no duty to monitor the conduct of the trustees or any directing party, nor any duty to monitor changes in the law or circumstances of the beneficiaries.

(3) TRUST PROTECTOR POWERS

(a) Except as provided in pars. (b) – (d), if a trust instrument does not specify whether a particular power is required to be exercised in a fiduciary, nonfiduciary or personal capacity, the power is to be exercised in a nonfiduciary capacity, including the power to do any of the following:

1. Modify or amend the trust instrument to respond to opportunities related to, or changes in, restraints on alienation or other state laws restricting the terms of a trust, the distribution of trust property or the administration of the trust.

2. Modify or amend the trust instrument to achieve a different tax status or to respond to changes in federal or state law.

3. Change the principal place of administration, the tax situs of the trust, or the governing law of the trust.

4. Eliminate or modify the interests of a beneficiary or add a new beneficiary or class of beneficiaries, provided, however, the trust protector shall not modify any beneficial interest of a trust that qualified for a marital deduction or charitable deduction from federal or state estate tax in a manner that would have caused such trust not to qualify for such deduction.

5. Modify the terms of a power of appointment granted under the trust, provided, however, such modification may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument.

6. Remove, replace, or appoint a trustee, trust protector, or directing party.

↓
how is this different than 9.

- 2
7. Terminate the trust.
 8. Appoint assets to a new trust under section 701.0418.
 9. Appoint a successor trust protector, trustee, or directing party.
 10. Advise the trustee on matters concerning a beneficiary.
 11. Advise the trustee on the exercise of a trustee duty or power, including the duty to provide notification to qualified beneficiaries under s. 701.0813.
 12. Except as provided in sub. (b)5., consent to or veto specified actions of a trustee or a directing party.

administration? (e)

invest, distr, of adm

11 administrative

(b) If a trust instrument grants a trust protector the power to do any of the following actions and the trust instrument does not specify whether the power is to be exercised in the trust protector's fiduciary, nonfiduciary or personal capacity, the power is to be exercised in a fiduciary capacity:

1. Interpret terms of the instrument at the request of the trustee.
2. Correct errors or ambiguities that might otherwise require court construction or defeat the settlor's intent.
3. Review and approve a trustee's reports or accounting.
4. Resolve disputes between the trustee or a directing party and a beneficiary.
5. Consent to or veto distributions to a beneficiary.

not sure what power this fits under

(c) A trust protector who is also the settlor or a qualified beneficiary shall exercise any power granted to the trust protector in a personal capacity.

(d) A trust protector who is also serving as a trustee or a directing party shall exercise any power granted to the trust protector in a fiduciary capacity.

(e) A trust protector may resign or release any power granted to the trust protector by giving written notice to the trustee and to any successor trust protector.

Can you be more specific?

(4) POWERS THAT MAY NOT BE EXERCISED

A trust protector may not exercise its powers to *do any of the following*

(a) Create or expand any beneficial interest, power of appointment, right of withdrawal or right to receive Trust property as a result of the exercise of a power of appointment in favor of the trust protector, his or her estate, his or her creditors, or creditors of his or her estate.

(b) Modify or amend a trust in order to:

1. Remove a requirement pursuant to 42 U.S.C. section 1396p(d)(4) to pay back a governmental entity for benefits provided to the permissible beneficiary at the death of that beneficiary.

2. Reduce or eliminate an income interest of the income beneficiary of any of the following trusts:

a. A trust for which a marital deduction has been taken for federal income tax purposes under section 2056 or 2523 of the Internal Revenue Code or for state tax purposes under any comparable provision of applicable state law, during the life of the settlor's spouse.

b. A charitable remainder trust under section 664 of the Internal Revenue Code, during the life of the noncharitable beneficiary.

c. A grantor retained annuity trust under section 2702 of the Internal Revenue Code, during any period in which the settlor is a beneficiary.

d. A trust for which an election as a qualified Subchapter S Trust under section 1361(d) is currently in place.

(c) Cause the trust property to be included in the trust protector's gross estate for federal or state tax purposes.

(5) SETTLOR RIGHTS A trust protector is not subject to the direction of the settlor and the settlor may not bring a cause of action against the trust protector. A trust protector may consider a settlor's goals, objectives and philosophies in establishing the trust and the trust's structure when exercising the powers granted to the trust protector and may do so regardless of whether the settlor is deceased.

(6) TRUSTEE AND DIRECTING PARTY RESPONSIBILITIES A trustee and any directing party are not liable for any loss that results from the trustee or the directing party taking actions that are consistent with a modification of the trustee's or the directing party's powers, authority, or discretion as a result of the action of a trust protector unless the trustee or the directing party breaches a duty owed for the exercise of the power, authority or discretion, as modified by the trust protector. A trustee and any directing party may refuse to act consistently with a trust protector's

modification if the trustee or the directing party knows the modification is manifestly contrary to the terms of the trust or would constitute a serious breach of any duty owed by the trust protector. A trustee and any directing party have no duty to monitor the conduct of the trust protector, provide advice to or consult with the trust protector, or communicate with, warn, or apprise any beneficiary concerning instances in which the trustee or the directing party would or might have exercised the trustee's or the directing party's discretion in a manner different from the manner exercised by the trust protector.

(7) RIGHT TO INFORMATION A trust protector has the right to request information about the trust from the trustee and, provided such information is related to the exercise or nonexercise of a power expressly granted to the trust protector in the trust instrument, the trustee has the duty to provide the requested information. Except as otherwise provided in this chapter, the trustee has no obligation to provide any information to the trust protector that the trust protector does not request. If the trustee is bound by any confidentiality restrictions with respect to the information requested, the trustee may require that the trust protector agree to be bound by the confidentiality restrictions before delivering such information to the trust protector.

(8) REIMBURSEMENT OF ATTORNEY FEES AND COSTS A trustee shall provide to a trust protector, from the assets of the trust for which the trust protector is acting, reimbursement of attorney's fees and expenses, including the cost of defending any claim made against the trust protector arising from the acts or omissions of the trust protector acting in that capacity, unless it is established that the trust protector was not acting in accordance with the applicable standard of care.

(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.

Fid, non-fid or personal capacity

*ch. 125
125.545(3)(a)*

193.315

- (k) Section 701.1009 regarding a beneficiary's consent, release or ratification.
- (L) Section 701.1010 regarding personal liability of a directing party.

(10) JURISDICTION If a person accepts an appointment to serve as a trust protector 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.

Knepp, Fern

From: Henkel, Matt
Sent: Monday, October 07, 2013 11:37 AM
To: Knepp, Fern
Subject: RE: Draft review: LRB -0010/2 Topic: Uniform Trust Code

Yes, that's ok.

-Matt

Matthew Henkel
Office of Senator Paul Farrow
Room 323 South, State Capitol
(608) 266-9174

From: Knepp, Fern
Sent: Friday, October 04, 2013 11:50 AM
To: Henkel, Matt
Subject: RE: Draft review: LRB -0010/2 Topic: Uniform Trust Code

Sorry. Matt. One more housekeeping item. Do I have your permission to continue speaking with the State Bar Uniform Trust Code committee (Victor Schultz) and to Leg Council about the draft?

Thanks,
Fern

From: Henkel, Matt
Sent: Friday, October 04, 2013 11:24 AM
To: Knepp, Fern
Cc: Tuschen, Terry
Subject: RE: Draft review: LRB -0010/2 Topic: Uniform Trust Code

Terry forwarded me the /2 earlier this morning so I have that. Yes, you have permission to keep the Risser office up to speed with any changes.

-Matt

Matthew Henkel
Office of Senator Paul Farrow
Room 323 South, State Capitol
(608) 266-9174

From: Knepp, Fern
Sent: Friday, October 04, 2013 11:15 AM
To: Henkel, Matt
Subject: RE: Draft review: LRB -0010/2 Topic: Uniform Trust Code

Matt:

Do I have your permission to send future versions of the bill to Risser's office? Also, would you like me to send you the most recent copy of the draft? A /2 version went out this morning.

Fern

From: Tuschen, Terry
Sent: Friday, October 04, 2013 11:11 AM
To: Knepp, Fern
Cc: Henkel, Matt; Tuschen, Terry
Subject: FW: Draft review: LRB -0010/2 Topic: Uniform Trust Code

Hi Fern, Senator Risser is going to let Senator Farrow take the lead on this bill from this point forward. If you could keep us in the loop on any new changes I would appreciate that. Matt Henkel in Senator Farrow's office is the point of contact for this draft.

Thanks very much for all of your hard work on this....we're almost there.

Terry

Terry Tuschen
Office of State Senator Fred Risser
130 South, State Capitol
Madison, WI 53707-7882
608.266.1627
Terry.Tuschen@legis.wisconsin.gov

From Farnew's
office

DHS

Department of Health Services
Proposed Statutory Language Request
October 4, 2013

Estate Recovery Program

Decision Needed

Should the State seek statutory changes to amend or repeal statutory language that was not approved for implementation by JFC?

Background

1. The Wisconsin Medicaid Estate Recovery Program seeks repayment for the cost of certain long term care services paid for by Medicaid on behalf of recipients. Recovery is made from the estates of recipients and from liens placed on their homes. The money recovered is returned to the Medicaid Program and used to fund Medicaid benefits.
2. Section 1917 (b) of the Social Security Act requires states to establish an estate recovery program that pursues recovery of benefits payments from the probate estates of permanently institutionalized Medicaid recipients of any age and certain benefits received by all Medicaid participants over the age of 55. Under 42 U.S.C. 1396p (b)(4)(b), federal law also allows states to include non-probate assets in their definition of estate for recovery purposes. Wisconsin currently recovers from those assets that are part of the probate estate, as well as certain non-probate assets.
3. The Department proposes changes to the Estate Recovery Program:
 - a. Eliminate the term 'living trust' from the definition of 'property of a decedent';
 - b. Eliminate the Department's authority to file notices of encumbrance and potential claims;
 - c. Eliminate the notice and reporting requirements applicable to trusts;
 - d. Rescind the Department's authority to void unrecorded and certain other real property transfers;
 - e. Allow hardship waivers to apply to the estate of a surviving spouse; and
 - f. Limit the types of recoverable property to that in which the recipient had a marital interest.
4. Section 1917(c) of the Social Security Act requires that a person who disposes of assets for less than fair market value become ineligible for Medicaid payment of long term care services for a period of time.

5. The Department proposes changes to divestment provisions.
 - a. In determining a divestment, do not look at the transfer of assets that, if retained, are excluded under federal law.
 - b. In determining a divestment, eliminate the provision that states a promissory note to a presumptive heir of the lender is considered to be cancelled upon the death of the lender.
6. Section 1902(a)(71) requires states to establish an asset verification program to match records at financial institutions against persons on Medicaid.
7. The Department proposes to change the current definition of a financial institution for Medicaid asset verification.

Current Language

1. Current estate recovery statutes are under Wis. Stat. §§ 46.27, 49.496, 49.682, and 49.849; 49.4962, 49.848; 59.43(1)(w), and trusts statutes under § 701.065.
2. Current divestment provisions are under Wis. Stat. § 49.453.
3. Current asset verification program provisions are under Wis. Stat. § 49.45(4m).

Proposed Change

1. Attachment 1 provides drafting instructions enumerating the proposed changes.

Desired Effective Date: See Attachment 2.
Agency: DHS/OLC
Agency Contact: Jesús ("Jesse") G.Q. Garza and Shelley Malofsky
Phone: (608) 266-9202 and (608) 266-0387

Attachment 1. Drafting Instructions

Estate Recovery

Section 46.27 (7g)(a)5.a. (Community Options Program definition of 'property of a decedent')

1. Amend subd. par. a. to make the following deletion:

"Property of a decedent" means all real and personal property to which the client held any legal title or in which the client had any legal interest immediately before death, to the extent of that title or interest, including assets transferred to a survivor, heir, or assignee through joint tenancy, tenancy in common, survivorship, life estate, ~~living trust,~~ or any other arrangement.

Section 46.27 (7g)(a)5.b. (Community Options Program definition of 'property of a decedent')

1. Amend subd. par. b. to make the following deletions:

Notwithstanding subd. 5. a., "property of a decedent" includes all real and personal property in which ~~the nonclient surviving spouse had an ownership interest at the client's death and in which~~ the client had a marital property interest with that ~~nonclient surviving spouse~~ at any time within 5 years before the client applied for long-term community support services funded under sub. (7) or during the time that the client was eligible for long-term community support services funded under sub. (7)

Section 46.27 (7g)(e)2m.b. (Community Options Program marital property presumption)

1. Amend subd. par. b. to read as follows:

There is a presumption, ~~which may be rebutted by clear and convincing evidence,~~ consistent with s. 766.31, that all property in the estate of the nonclient surviving spouse was marital property held with the client and that 100 percent of the property in the estate of the nonclient surviving spouse is subject to the department's claim under subd. 1.

Section 46.27 (7g)(g) (Community Options Program hardship waiver)

1. Amend par. (g) to make the following deletions to allow hardship waivers to apply to the estate of a surviving spouse:

The department shall promulgate rules establishing standards for determining whether the application of this subsection would work an undue hardship in individual cases. If the department determines that the application of this subsection would work an undue hardship in a particular case, the department shall waive application of this subsection in that case. ~~This paragraph does not apply with respect to claims against the estates of nonclient surviving spouses.~~

Section 46.286 (7) (Family Care Program)

1. Amend sub. (7) as follows, which deletes reference to repealed section:

The department shall apply to the recovery from persons who receive the family care benefit, including by liens and affidavits and from estates, of correctly paid family care benefits, the applicable provisions under ss. 49.496, ~~49.848~~, and 49.849.

Section 49.496(1)(cm)1. (Medicaid definition of 'property of a decedent')

1. Amend subd. 1. to make the following deletion:

"Property of a decedent" means all real and personal property to which the recipient held any legal title or in which the recipient had any legal interest immediately before death, to the extent of that title or interest, including assets transferred to a survivor, heir, or assignee through joint tenancy, tenancy in common, survivorship, life estate, ~~living trust~~, or any other arrangement.

Section 49.496(1)(cm)2. (Medicaid definition of 'property of a decedent')

1. Amend subd. 2. to make the following deletions:

Notwithstanding subd. 1., "property of a decedent" includes all real and personal property in which ~~the nonrecipient surviving spouse had an ownership interest at the recipient's death and in which the recipient had a marital property interest with that nonrecipient surviving spouse at any time within 5 years before the recipient applied for medical assistance or during the time that the recipient was eligible for medical assistance.~~

Section 49.496(3)(aj)2. (Medicaid marital property presumption)

1. Amend subd. 2. to read as follows:

There is a presumption, ~~which may be rebutted by clear and convincing evidence, consistent with s. 766.31,~~ that all property in the estate of a nonrecipient surviving spouse was marital property held with the recipient and that 100 percent of the property in the estate of the nonrecipient surviving spouse is subject to the department's claim under par. (a).

Section 49.496(6m) (Medicaid hardship waiver)

1. Amend sub. (6m) to make the following deletions to allow hardship waivers to apply to the estate of a surviving spouse:

The department shall promulgate rules establishing standards for determining whether the application of this section would work an undue hardship in individual cases. If the department determines that the application of this section would work an undue hardship in a particular case, the department shall waive application of this section in that case. ~~This~~

~~subsection does not apply with respect to claims against the estates of nonrecipient surviving spouses.~~

Section 49.682(1)(e)1. (Wisconsin Chronic Disease Program definition of 'property of a decedent')

1. Amend subd. 1. to make the following deletion:

"Property of a decedent" means all real and personal property to which the client held any legal title or in which the client had any legal interest immediately before death, to the extent of that title or interest, including assets transferred to a survivor, heir, or assignee through joint tenancy, tenancy in common, survivorship, life estate, ~~living trust~~, or any other arrangement.

Section 49.682(1)(e)2. (Wisconsin Chronic Disease Program definition of 'property of a decedent')

1. Amend subd. 2. to make the following deletions:

Notwithstanding subd. 1., "property of a decedent" includes all real and personal property in which ~~the nonclient surviving spouse had an ownership interest at the client's death and in which the client had a marital property interest with that nonclient surviving spouse at any time within 5 years before the client applied for aid under s. 49.68, 49.683, or 49.685 or during the time that the recipient was eligible for aid under s. 49.68, 49.683, or 49.685.~~

Section 49.682(2)(bm)2. (Wisconsin Chronic Disease Program marital property presumption)

1. Amend subd. 2. to read as follows as:

There is a presumption, ~~which may be rebutted by clear and convincing evidence, consistent with s. 766.31,~~ that all property in the estate of the nonclient surviving spouse was marital property held with the client and that 100 percent of the property in the estate of the nonclient surviving spouse is subject to the department's claim under par. (a).

Section 49.682(5) (Wisconsin Chronic Disease Program hardship waiver)

1. Amend subsection (5) to make the following deletions to allow hardship waivers to apply to the estate of a surviving spouse:

The department shall promulgate rules establishing standards for determining whether the application of this section would work an undue hardship in individual cases. If the department determines that the application of this section would work an undue hardship in a particular case, the department shall waive application of this section in that case. ~~This subsection does not apply with respect to claims against the estates of nonclient surviving spouses.~~

Section 49.848 (Treatment of real property owned by certain public assistance recipients)

1. Repeal section in its entirety.

Added in Budget

Section 49.849(1)(d)1. (Estate Recovery Affidavit Process definition of 'property of a decedent')

1. Amend subd. 1. to make the following deletion:

"Property of a decedent" means all real and personal property to which the recipient held any legal title or in which the recipient had any legal interest immediately before death, to the extent of that title or interest, including assets transferred to a survivor, heir, or assignee through joint tenancy, tenancy in common, survivorship, life estate, living trust, or any other arrangement.

Section 49.849(1)(d)2. (Estate Recovery Affidavit Process definition of 'property of a decedent')

1. Amend subd. 2. to make the following deletions:

Notwithstanding subd. 1., "property of a decedent" includes all real and personal property in which the nonrecipient surviving spouse had an ownership interest at the recipient's death and in which the recipient had a marital property interest with that nonrecipient surviving spouse at any time within 5 years before the recipient applied for public assistance or during the time that the recipient was eligible for public assistance.

Section 49.849(2)(c) (Estate Recovery Affidavit Process marital property presumption)

1. Amend par. (c) to read as follows:

There is a presumption, ~~which may be rebutted by clear and convincing evidence, consistent with s. 766.31,~~ that all property of the deceased nonrecipient surviving spouse was marital property held with the recipient and that 100 percent of the property of the deceased nonrecipient surviving spouse is subject to the department's claim under par. (a).

Section 49.849(7) (Estate Recovery Affidavit Process hardship waiver)

1. Amend subsection (7) to make the following deletions to allow hardship waivers to apply to the estate of a surviving spouse:

The department shall promulgate rules establishing standards to determine whether the application of this section would work an undue hardship in individual cases. If the department determines that the application of this section would work an undue hardship in a particular case, the department shall waive the application of this section in that case. ~~This subsection does not apply with respect to collecting from the property of a decedent if the decedent is a deceased nonrecipient surviving spouse.~~

Section 49.4962 (Voiding certain transfers of real property)

1. Repeal section in its entirety.

Section 59.43(1)(w) (Record and index of certain documents by register of deeds)

1. Repeal par. (w) in its entirety.

Section 701.065(5) (Trusts)

1. Repeal subsection (5) in its entirety.

Divestment

Section 49.453(2)(a) and (b) (Divestment of excluded assets)

1. Amend paragraphs (a) and (b) to remove assets excluded under 42 USC § 1396p for purposes of determining divestment.

Section 49.453(4c)(c) (Promissory notes with presumptive heirs)

1. Repeal paragraph (c) in its entirety.

Asset Verification

Section 49.45(4m)(a)3. b. and d. (Definition of financial institution)

1. Repeal subparagraphs b. and d. in their entirety.

b. An institution - affiliated party, as defined in 12 USC 1813 (u)
or a depository institution under subd. 3. a.

d. An institution - affiliated party, as defined in 12 USC 1786 (f)
or a credit union under subd. 3. c.

Attachment 2. Effective Dates

The department may not take any action to enforce any transactions or requirements under these provisions that are dated on or after October 1, 2013, to the effective date of these statutory changes.

The divestment and asset verification changes should be effective back to July 7, 2013.

Kahler, Pam

From: Henkel, Matt
Sent: Monday, October 21, 2013 3:53 PM
To: Kahler, Pam
Subject: RE: trust code

Pam, I know you're out today but tomorrow morning could you make one change to the trust code bill? Per your recommendation in the second paragraph of your drafter's note, please add "rebuttable" before "presumption." We'll leave the rest as it.

-Matt

Matthew Henkel
Office of Senator Paul Farrow
Room 323 South, State Capitol
(608) 266-9174

From: Henkel, Matt
Sent: Friday, October 18, 2013 4:07 PM
To: Kahler, Pam
Subject: RE: trust code

Perfect. Thanks.

Matthew Henkel
Office of Senator Paul Farrow
Room 323 South, State Capitol
(608) 266-9174

From: Kahler, Pam
Sent: Friday, October 18, 2013 3:14 PM
To: Henkel, Matt
Subject: RE: trust code

I will be out on Monday, but I can do anything that needs to be done on Tuesday real fast.

From: Henkel, Matt
Sent: Friday, October 18, 2013 2:58 PM
To: Kahler, Pam
Subject: trust code

Pam, I was hoping to have an answer to your questions on the trust code bill today but at this point I'm not counting on hearing back from people. I'll be in touch on Monday morning.

Have a good weekend.

-Matt

Matthew Henkel
Office of Senator Paul Farrow
Room 323 South, State Capitol
(608) 266-9174

Dodge, Tamara

From: Kahler, Pam
Sent: Tuesday, October 22, 2013 2:29 PM
To: Dodge, Tamara
Subject: FW: trust code

Tami:

He says tomorrow is fine. LRB-0010, in case you don't know, but that's not very likely.

From: Henkel, Matt
Sent: Tuesday, October 22, 2013 2:28 PM
To: Kahler, Pam
Subject: RE: trust code

Tomorrow is fine. Thanks.

Matthew Henkel
Office of Senator Paul Farrow
Room 323 South, State Capitol
(608) 266-9174

From: Kahler, Pam
Sent: Tuesday, October 22, 2013 2:27 PM
To: Henkel, Matt
Cc: Dodge, Tamara
Subject: RE: trust code

Matt:

I'm forwarding this to Tami – it is actually a provision that she drafted. Do you still need the draft today, or is tomorrow okay?

Pam

From: Henkel, Matt
Sent: Tuesday, October 22, 2013 2:22 PM
To: Kahler, Pam
Subject: RE: trust code

Pam, I thought we were done but one more change came up today. Could you add the following to page 18 of the bill?

49.45 (4m)(a)3. e. of the statutes, as created by the 2013 Wisconsin Act 20, is repealed.

-Matt

Matthew Henkel
Office of Senator Paul Farrow
Room 323 South, State Capitol
(608) 266-9174

From: Kahler, Pam
Sent: Tuesday, October 22, 2013 9:26 AM
To: Henkel, Matt
Subject: RE: trust code

Will do. Thanks.

From: Henkel, Matt
Sent: Monday, October 21, 2013 3:53 PM
To: Kahler, Pam
Subject: RE: trust code

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-Matt

Matthew Henkel
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Room 323 South, State Capitol
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Subject: RE: trust code

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Matthew Henkel
Office of Senator Paul Farrow
Room 323 South, State Capitol
(608) 266-9174

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To: Henkel, Matt
Subject: RE: trust code

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From: Henkel, Matt
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Subject: trust code

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-Matt

Matthew Henkel
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