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701.1004 ~~Article X, Section 1004~~ **Attorney fees and costs.** (1) In a

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judicial proceeding involving the administration of a trust, the court, as justice and

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equity may require, may award costs and expenses, including reasonable attorney

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fees, to any party, to be paid by another party or from the trust that is the subject of

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the controversy.

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(2) Subject to sub. (3), if a trustee defends or prosecutes any proceeding in good

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faith, whether successful or not, the trustee is entitled to receive from the trust the

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necessary expenses and disbursements, including reasonable attorney fees,

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incurred. This subsection may not preclude a court from ordering reimbursement

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of the trust for such expenses and disbursements from another party as provided in

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sub. (1).

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(3) (a) Payment of costs or attorney fees incurred in any proceeding from the

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~~assets of the trust~~ ^{property} may be made by the trustee without the approval of any person

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and without court authorization, unless the court orders otherwise as provided in

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par. (c).

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(b) If a claim or defense based upon a breach of trust is made against a trustee

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in a proceeding, the trustee shall provide notice to each qualified beneficiary of the

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trust whose share of the trust may be affected by the payment of attorney fees and

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costs of the intention to pay costs or attorney fees incurred in the proceeding from the

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trust prior to making payment. The notice shall inform each such qualified

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beneficiary of the right to apply to the court for an order prohibiting the trustee from

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paying attorney fees or costs from ~~trust assets~~ ^{property}. If a trustee is served with a motion

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for an order prohibiting the trustee from paying from the trust attorney fees or costs

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in the proceeding and the trustee pays attorney fees or costs from the trust before an

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order is entered on the motion, the trustee and the trustee's attorney who have been

SECTION 113

1 paid attorney fees or costs from trust ~~assets~~ ^{property} are subject to the remedies in pars. (c)
2 and (d).

3 (c) If a claim or defense based upon breach of trust is made against a trustee
4 in a proceeding, a party must obtain a court order to prohibit the trustee from paying
5 costs or attorney fees from trust ~~assets~~ ^{property}. To obtain an order prohibiting payment of
6 costs or attorney fees from trust ~~assets~~ ^{property}, a party must make a reasonable showing by
7 evidence in the record or by proffering evidence that provides a reasonable basis for
8 a court to conclude that there has been a breach of trust. The trustee may proffer
9 evidence to rebut the evidence submitted by a party. The court in its discretion may
10 defer ruling on the motion, pending discovery to be taken by the parties. If the court
11 finds that there is a reasonable basis to conclude that there has been a breach of
12 trust, unless the court finds good cause to allow attorney fees and costs to be paid
13 from the trust, the court shall enter an order prohibiting the payment of further
14 attorney fees and costs from ~~the assets of the trust~~ ^{property} and shall order attorney fees or
15 costs previously paid from ~~assets of the trust~~ ^{property} in such proceeding to be refunded. An
16 order entered under this paragraph may not limit a trustee's right to seek an order
17 permitting the payment of some or all of the attorneys fees or costs incurred in the
18 proceeding from trust ~~assets~~ ^{property}, including any fees required to be refunded, after the
19 claim or defense is finally determined by the court. If a claim or defense based upon
20 a breach of trust is withdrawn, dismissed, or resolved without a determination by the
21 court that the trustee committed a breach of trust, after the entry of an order
22 prohibiting payment of attorney fees and costs pursuant to this paragraph, the
23 trustee may pay costs or attorney fees incurred in the proceeding from the ~~assets of~~
24 ~~the trust~~ ^{property} without further court authorization.

1 (d) If the court orders a refund under par. (c), the court may enter such
2 sanctions as are appropriate if a refund is not made as directed by the court,
3 including striking defenses or pleadings filed by the trustee. Nothing in this
4 paragraph limits other remedies and sanctions the court may employ for the failure
5 to refund the trust in a timely manner.

6 (e) Subject to s. 701.1005, nothing in this subsection limits the power of the
7 court to review fees and costs or the right of any interested persons to challenge fees
8 and costs after payment, after an accounting, or after conclusion of the litigation.

9 (f) Notice under par. (b) is not required if the action or defense is later
10 withdrawn or dismissed by the party that is alleging a breach of trust or resolved
11 without a determination by the court that the trustee has committed a breach of
12 trust.

13 (4) A provision of a trust instrument drafted or caused to be drafted by a trustee
14 that modifies the application of this section in a manner favorable to the trustee and
15 potentially detrimental to a beneficiary is invalid with respect to the trustee unless
16 the trustee proves that the provision was fair under the circumstances existing at the
17 time the trust instrument was signed and that the existence and contents of the
18 provision were adequately communicated to the settlor.

19 SECTION 114. 701.1005 of the statutes is created to read:

20 **701.1005 Article X, Section 1005 — Limitation of action against trustee.**

21 (1) A beneficiary may not commence a proceeding against a trustee for breach of
22 trust more than one year after the date on which the beneficiary or a representative
23 of the beneficiary was sent a report that adequately disclosed the existence of a
24 potential claim for breach of trust.

1 (2) A report adequately discloses the existence of a potential claim for breach
2 of trust if it provides sufficient information so that the beneficiary or representative
3 knows of the potential claim or should have inquired into its existence.

4 (3) If sub. (1) does not apply, a proceeding by a beneficiary against a trustee for
5 breach of trust must be commenced within 5 years after the first to occur of the
6 following:

- 7 (a) The removal, resignation, or death of the trustee.
- 8 (b) The termination of the beneficiary's interest in the trust.
- 9 (c) The termination of the trust.

10 (4) Subsections (1) and (3) do not apply to a claim for fraud. The time for
11 asserting a claim for fraud is governed by applicable law.

12 SECTION 115. 701.1006 of the statutes is created to read:

13 **701.1006** Article X, Section 1006 — **Reliance on trust instrument.** A
14 trustee who acts in reasonable reliance on the terms of the trust as expressed in the
15 trust instrument is not liable to a beneficiary for a breach of trust to the extent the
16 breach resulted from the reliance.

17 SECTION 116. 701.1007 of the statutes is created to read:

18 **701.1007** Article X, Section 1007 — **Event affecting administration or**
19 **distribution.** If the happening of an event, including marriage, divorce,
20 performance of educational requirements, or death, affects the administration or
21 distribution of a trust, a trustee who has exercised reasonable care to ascertain the
22 happening of the event is not liable for a loss resulting from the trustee's lack of
23 knowledge.

24 SECTION 117. 701.1008 of the statutes is created to read:

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701.1008 ~~Article X, Section 1008~~ **Exculpation of trustee.** (1) A term

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of a trust relieving a trustee of liability for breach of trust is unenforceable to the

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extent that it does any of the following:

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(a) Relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of a beneficiary.

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(b) Was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship with the settlor.

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(2) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term was fair under the circumstances existing at the time the trust instrument was signed and that the existence and contents of the exculpatory term were adequately communicated to the settlor.

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SECTION 118. 701.1009 of the statutes is created to read:

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701.1009 ~~Article X, Section 1009~~ **Beneficiary's consent, release, or**

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ratification. A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless one of the following applies:

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(1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee.

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(2) At the time of the consent, release, or ratification, the beneficiary did not have knowledge of the beneficiary's rights or of the material facts relating to the breach.

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SECTION 119. 701.1010 of the statutes is created to read:

1 **701.1010** **Article X, Section 1010** — **Limitation on personal liability of**

2 trustee. (1) Except as otherwise provided in the contract, a trustee is not personally
3 liable on a contract properly entered into in the trustee's fiduciary capacity in the
4 course of administering the trust if the trustee in the contract disclosed the fiduciary
5 capacity.

6 (2) A trustee is personally liable for torts committed in the course of
7 administering a trust, or for obligations arising from ownership or control of trust
8 property, including liability for violation of environmental law, only if the trustee is
9 personally at fault.

10 SECTION 120. 701.1011 of the statutes is created to read:

11 **701.1011** **Article X, Section 1011** — **Interest as general partner. (1)**

12 Unless personal liability is imposed in the contract, a trustee who holds an interest
13 as a general partner in a general or limited partnership is not personally liable on
14 a contract entered into by the partnership after the trust's acquisition of the interest
15 if the fiduciary capacity was disclosed in the contract.

16 (2) A trustee who holds an interest as a general partner is not personally liable
17 for torts committed by the partnership or for obligations arising from ownership or
18 control of the interest unless the trustee is personally at fault.

19 (3) If the trustee of a revocable trust holds an interest as a general partner, the
20 settlor is personally liable for contracts and other obligations of the partnership as
21 if the settlor were a general partner.

22 SECTION 121. 701.1012 of the statutes is created to read:

23 **701.1012** **Article X, Section 1012** — **Protection of person dealing with**

24 trustee. (1) A person other than a beneficiary who in good faith assists a trustee,
25 or who in good faith and for value deals with a trustee, without knowledge that the

1 trustee is exceeding or improperly exercising the trustee's powers is protected from
2 liability as if the trustee properly exercised the power.

3 (2) A person other than a beneficiary who in good faith deals with a trustee is
4 not required to inquire into the extent of the trustee's powers or the propriety of their
5 exercise.

6 (3) A person who in good faith delivers assets to a trustee does not need to
7 ensure their proper application.

8 (4) A person other than a beneficiary who in good faith assists a former trustee,
9 or who in good faith and for value deals with a former trustee, without knowledge
10 that the trusteeship has terminated is protected from liability as if the former trustee
11 were still a trustee.

12 (5) Comparable protective provisions of other laws relating to commercial
13 transactions or transfer of securities by fiduciaries prevail over the protection
14 provided by this section.

15 SECTION 122. 701.1013 of the statutes is created to read:

16 701.1013 ~~Article X, Section 1013~~ Certification of trust. (1) Instead of
17 furnishing a copy of the trust instrument to a person other than a beneficiary, the
18 trustee may furnish to the person a certification of trust containing the following
19 information:

20 (a) That the trust exists and the date on which the trust instrument was
21 executed.

22 (b) The identity of the settlor.

23 (c) The identity and address of the currently acting trustee.

24 (d) The powers of the trustee.

1 (e) The revocability or irrevocability of the trust and the identity of any person
2 holding a power to revoke the trust.

3 (f) The authority of a cotrustee to sign or otherwise authenticate and whether
4 all cotrustees or less than all cotrustees are required to sign or otherwise
5 authenticate in order to exercise powers of the trustee.

6 (g) The manner in which title to trust property may be taken.

7 (2) A certification of trust may be signed or otherwise authenticated by any
8 trustee.

9 (3) A trustee shall include in a certification of trust that the trust has not been
10 revoked, modified, or amended in any manner that would cause the representations
11 contained in the certification of trust to be incorrect.

****NOTE: I altered sub. (3) to avoid the passive voice.

12 (4) A certification of trust does not need to contain the dispositive terms of a
13 trust.

14 (5) A recipient of a certification of trust may require the trustee to furnish
15 copies of those excerpts from the original trust instrument and later amendments
16 that designate the trustee and confer upon the trustee the power to act in the pending
17 transaction.

18 (6) A person who acts in reliance upon a certification of trust without
19 knowledge that the representations contained therein are incorrect is not liable to
20 any person for so acting and may assume without inquiry the existence of the facts
21 contained in the certification. Knowledge of the terms of the trust may not be inferred
22 solely from the fact that a copy of all or part of the trust instrument is held by the
23 person relying upon the certification.

(7) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(8) A person making a demand for copies of the trust instrument or excerpts from the trust instrument, other than those excerpts described in sub. (5), in addition to a certification of trust is liable for costs, expenses, reasonable attorney fees, and damages if the court determines that the person did not act in good faith in demanding the copies.

(9) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

SECTION 123. 701.105 of the statutes ^{(title), (1), (2) and (3)} ~~is~~ renumbered 701.1201, and 701.1201

^{(title), (1) and (2)} as renumbered, are amended to read:

701.1201 (title) Private Article XII, Section 1201 - Private foundations,

^{No (3)} (1) (a) In the administration of any trust which is a private foundation, as defined in section 509 of the ~~internal revenue code~~ Internal Revenue Code, a charitable trust, as defined ^{described} in section 4947 (a) (1) of the ~~internal revenue code~~ Internal Revenue Code, or a split-interest trust as defined ^{described} in section 4947 (a) (2) of the ~~internal revenue code~~ Internal Revenue Code, all of the following acts shall be prohibited:

***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).

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

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

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

9 4. Making any taxable expenditures as defined in section 4945 (d) of the
10 ~~internal revenue code~~ Internal Revenue Code, which would give rise to any liability
11 for the tax imposed by section 4945 (a) of the ~~internal revenue code~~ Internal Revenue
12 Code.

13 (b) This subsection shall not apply either to those split-interest trusts or to
14 amounts thereof which are not subject to the prohibitions applicable to private
15 foundations by reason of the provisions of section 4947 of the ~~internal revenue code~~
16 Internal Revenue Code.

17 (2) In the administration of any trust which is a private foundation as defined
18 in section 509 of the ~~internal revenue code~~ Internal Revenue Code, or which is a
19 charitable trust as defined ^{✓ described} in section 4947 (a) (1) of the ~~internal revenue code~~
20 Internal Revenue Code, there shall be distributed, for the purposes specified in the
21 trust instrument, for each taxable year, amounts at least sufficient to avoid liability
22 for the tax imposed by section 4942 (a) of the ~~internal revenue code~~ Internal Revenue
23 Code.

SECTION 124. 701.11 of the statutes is repealed.

SECTION 125. 701.115 of the statutes is repealed.

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from LRB
1-1110)

1 SECTION 126. 701.12 of the statutes is repealed.

2 SECTION 127. Subchapter XII (title) of chapter 701 [precedes 701.1201] of the
3 statutes is created to read:

4 CHAPTER 701

5 SUBCHAPTER XII

6 MISCELLANEOUS PROVISIONS

7 SECTION 128. 701.1203 of the statutes is created to read:

8 **701.1203** Article XII, Section 1203 — **Electronic records and signatures.**

9 The provisions of this chapter governing the legal effect, validity, or enforceability
10 of electronic records or signatures, and of contracts formed or performed with the use
11 of such records or signatures conform to the requirements of section 102 of the federal
12 Electronic Signatures in Global and National Commerce Act, 15 USC 7002, and
13 supersede, modify, and limit the federal Electronic Signatures in Global and
14 National Commerce Act, 15 USC 7001 to 7031.

***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.

15 SECTION 129. 701.1204 of the statutes is created to read:

16 **701.1204** Article XII, Section 1204 — **Uniformity of application and**

17 **construction.** This chapter shall be applied and construed to effectuate its general
18 purpose to make uniform the law with respect to the subject of this chapter among
19 states enacting it.

***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.]

1 SECTION 130. 701.1206 (3) of the statutes is created to read:

2 701.1206 (3) (a) Except as provided in par. (b), this chapter applies to a judicial
3 proceeding concerning a trust commenced before, on, or after the effective date of this
4 paragraph [LRB inserts date].

5 (b) If a court finds that application of a particular provision of this chapter to
6 a judicial proceeding commenced before the effective date of this paragraph [LRB
7 inserts date], will substantially interfere with the effective conduct of the judicial
8 proceedings or prejudice the rights of the parties, the particular provision of this
9 chapter does not apply to that judicial proceeding and the court shall apply ch. 701,
10 2011 stats., as the court finds to be necessary to prevent interference with the
11 effective conduct of the judicial proceeding and to avoid prejudicing the rights of the
12 parties.

***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?

13 SECTION 131. 701.13 of the statutes is repealed.

14 SECTION 132. 701.14 (title) and (1) of the statutes are repealed.

15 SECTION 133. 701.14 (2) of the statutes is renumbered 701.0205 and amended
16 to read:

17 701.0205 Article II, Section 205 — NOTICE. If notice of a judicial proceeding
18 involving a trust proceeding to ~~a~~ an interested person interested in the trust, to the
19 person's representative or guardian ad litem as provided in s. 701.15, or to other
20 persons, is required by law or deemed necessary by the court, the court shall order
21 such notice to be given as prescribed in s. 879.05 except that service by publication

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for an interested person
no strike
plain

1 shall not be required unless ordered by the court. The court may order both personal
2 service and service by publication on designated persons. Proof of service shall be
3 made as provided in s. 879.07. ~~Persons interested in the trust~~ Interested persons,
4 on behalf of themselves, or their representatives or guardians ad litem as provided
5 in s. 701.15, on behalf of themselves the representative and those whom they
6 represent the interested person the representative represents, may in writing waive
7 service of notice and consent to the hearing of any matter without notice. Waiver of
8 notice or an appearance by any interested person ~~interested in the trust~~ or the
9 interested person's representative or guardian ad litem as provided in s. 701.15 is
10 equivalent to timely service of notice.

****NOTE: I attempted to conform this language to the language used throughout the UTC. Please confirm that this section reflects your intent.

11 SECTION 134. 701.14 (3) of the statutes is renumbered 701.0206 and amended
12 to read:

13 **701.0206 Article II, Section 206 — Attorney for person in military**
14 **service.** At the time of filing a petition for a trust judicial proceeding, involving a
15 trust, the petitioner shall file an affidavit ~~shall be filed~~ setting forth the name of any
16 interested person ~~interested in the proceeding~~ who is actively engaged in the military service
17 of the United States. Whenever it appears by the affidavit or otherwise that any
18 person in the active military service of the United States is ^{an} interested ~~in any trust~~
19 ~~in~~ judicial proceeding involving a trust ^{person} and is not represented by an attorney, or by an
20 attorney-in-fact who is duly authorized to act on the person's behalf in the matter,
21 the court shall appoint an attorney to represent the interested person and protect the person's
22 interest.

****NOTE: Your instructions suggested that this language be included in Article 3 as section 306. Because the substance of the provision pertains to judicial proceedings and specifically to what a person bringing an action involving a trust must file as part of

the proceeding, I renumbered s. 701.14 (3) to Article 2. If this is not consistent with your intent, please let me know. I also assumed that there could be persons interested in the proceeding who are not "interested persons" as that term is used throughout the chapter. If this assumption is incorrect, I recommend replacing the phrase "any person interested in the proceeding" with an "interested person."

1 SECTION 135. 701.14 (4) of the statutes is repealed.

(title) and

2 SECTION 136. 701.15 of the statutes is repealed.

3 SECTION 137. 701.16 of the statutes is repealed.

(title), (1), (2), (3), (4) (a) to (c), (5) and (6)

Ins 116-3

4 SECTION 138. 701.17 of the statutes is repealed.

5 SECTION 139. 701.18 of the statutes is repealed.

Ins 116-6

6 SECTION 140. 701.19 of the statutes is repealed.

from LRB -1110, 7

7 SECTION 141. 701.22 of the statutes is renumbered 701.1202 and amended to

701.0417 (4)

8 read:

701.0417 (4) (B)

9 **701.1202 Distributions Article XII, Section 1202 — Distributions in**
10 **kind by trustees; marital bequests.** In case of a division of trust assets into 2 or
11 more trusts or shares, any distribution or allocation of assets as an equivalent of a
12 dollar amount fixed by formula or otherwise shall be made at current fair market
13 values unless the governing trust instrument expressly provided that another value
14 may be used. If the governing trust instrument requires or permits a different value
15 to be used, all assets available for distribution, including cash, shall, unless
16 otherwise expressly provided, be so distributed that the assets, including cash,
17 distributed as such an equivalent will be fairly representative of the net appreciation
18 or depreciation in the value of the available property on the date or dates of
19 distribution. A provision in the governing trust instrument that the trustee may fix
20 values for purposes of distribution or allocation does not of itself constitute
21 authorization to fix a value other than current fair market value.

****NOTE: I changed "governing instrument" to "trust instrument" to be consistent with the remainder of the bill. If this is not consistent with your intent, please let me

know. I also removed "marital bequest" from the title. There doesn't seem to be anything specific about marital bequests in this section. However, under s. 990.001 (6), titles are not part of the statute so if you would like to keep "marital bequest" in the title it isn't a problem.

1 SECTION 142. 701.23 of the statutes is repealed.

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Fix component

SECTION 143. 701.24 (title) of the statutes is renumbered 701.1206 (title) and amended to read:

701.1206 (title) Applicability Article XII, Section 1206 — Applicability.

5 SECTION 144. 701.24 (1) of the statutes is renumbered 701.1206 (1) and
6 amended to read:

7 701.1206 (1) Except as otherwise provided in sub. (3) (2) and s. 701.19 (9) (a),
8 ss. 701.01 to 701.19, 701.21, 701.22, and 701.23 are ss. 701.0602 and 701.0813, this
9 chapter is applicable to a trust existing on July 1, 1971 the effective date of this
10 subsection ... [LRB inserts date], as well as a trust created after such date, and shall
11 govern trustees acting under such trusts. If application of any provision of ss. 701.01
12 to 701.19, 701.21, 701.22, and 701.23 this chapter to a trust in existence on August
13 1, 1971 the effective date of this subsection ... [LRB inserts date], is unconstitutional,
14 it shall not affect application of the provision to a trust created after that date.

Insert 3/17-14

***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.

Finally, I did not include section 1206 (b). Are there a specific statutes that are being repealed or superseded that this paragraph is meant to address? What is this paragraph intended to preserve?

1 SECTION 145. 701.24 (2) of the statutes is renumbered 701.1206 (2) and
2 amended to read:

3 701.1206 (2) ~~Section 701.20 Subchapter XI of this chapter~~ applies to every a
4 trust or decedent's estate existing on ~~May 17, 2005~~ the effective date of this
5 subsection ... [LRB inserts date], and to every a trust or decedent's estate created or
6 coming into existence after that date, except as otherwise expressly provided in s.
7 ~~701.20 subch. XI~~ or by the decedent's will or the terms of the trust. With respect to
8 a trust or decedent's estate existing on ~~May 17, 2005,~~ s. ~~701.20 (5) to (30)~~ the effective
9 date of this subsection ... [LRB inserts date], ss. 701.1110 to 701.1135 shall apply at
10 the beginning of the trust's or estate's first accounting period, as defined in s. ~~701.20~~
11 ~~701.1125 (2) (a),~~ that begins on or after ~~May 17, 2005~~ the effective date of this
12 subsection ... [LRB inserts date].

***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.

13 SECTION 146. 701.24 (3) of the statutes is repealed.

14 Fix component
15 read:
16 plain to strike
~~701.1205 Applicability Article XII, Section 1205 — Applicability of
17 general transfers at death provisions. Chapter 854 applies to transfers at death
18 under trust instruments.~~

19 SECTION 148. 701.26 of the statutes is repealed.

20 SECTION 149. 702.01 (intro.) of the statutes is renumbered 702.02 (intro.).

1 **SECTION 150.** 702.01 (1) of the statutes is renumbered 702.02 (2) and amended
2 to read:

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

5 **SECTION 151.** 702.01 (2) of the statutes is renumbered 702.02 (4) and amended
6 to read:

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

10 **SECTION 152.** 702.01 (3) of the statutes is renumbered 702.02 (5) and amended
11 to read:

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

19 **SECTION 153.** 702.01 (4) of the statutes is renumbered 702.02 (6) and amended
20 to read:

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

1 or the shares or the interests in which it shall be received; it. A power of appointment
2 does not include a power of sale, a power of attorney, a power of revocation, or a power
3 exercisable by a trustee [✓] ~~or other fiduciary in his or her fiduciary capacity.~~ *a directing party, as defined in s. 701.0103 (7), a trust protector, as defined in s. 701.0103 (8)*

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

score → *s. 701.0103 (8)*

4 SECTION 154. 702.01 (5) of the statutes is renumbered 702.02 (7) and amended
5 to read:

6 702.02 (7) "Special power of appointment" means a power of appointment
7 exercisable only in favor of one or more persons not including the donee, the donee's
8 estate, the donee's creditors, or the creditors of the donee's estate and, when
9 exercisable in favor of a class, so limited in size by description of the class that in the
10 event of nonexercise of the power a court can make distribution to persons within the
11 class if the donor has failed to provide for this contingency.

12 SECTION 155. 702.01 (6) of the statutes is repealed.

13 SECTION 156. 702.02 (1) of the statutes is created to read:

14 702.02 (1) "Appointee" means the person to whom an interest is appointed.

15 SECTION 157. 702.02 (3) of the statutes is created to read:

16 702.02 (3) "Donee" means the person in whom the power of appointment is
17 created or reserved.

18 SECTION 158. 702.03 of the statutes is amended to read:

19 702.03 **Manifestation of intent to exercise powers a power of**
20 **appointment.** (1) Unless the person who executed it had a contrary intention, if
21 a ~~governing~~ ^{creating} instrument, ~~as defined in s. 854.01 (2), or an inter vivos governing~~ ^{strike}
22 ~~instrument, as defined in s. 700.27 (1) (c),~~ creates a power of appointment that
23 expressly requires that the power be exercised by any type of reference to the power

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

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

17 **SECTION 159.** 702.05 of the statutes is amended to read:

18 **702.05 Exercise of powers a power of appointment.** (1) CAPACITY TO
19 EXERCISE A POWER OF APPOINTMENT. A power of appointment can be exercised only by
20 a person who would have the capacity to transfer the property covered by the power
21 of appointment.

22 (2) KIND OF INSTRUMENT AND FORMALITIES OF EXECUTION. A donee can exercise
23 a power of appointment only by an instrument which meets the intent of the donor
24 as to kind of instrument and formalities of execution. If the power of appointment
25 is exercisable by will, this means a will executed with the formalities necessary for

1 a valid will. A written instrument signed by the donee is sufficient if the donor fails
2 to require any additional formalities or fails to indicate a will, but if the power of
3 appointment is to appoint interests in land, it can be exercised only by an instrument
4 executed with sufficient formalities for that purpose.

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

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

19 SECTION 160. 702.05 (5) of the statutes is created to read:

20 702.05 (5) PRESUMPTION OF NONEXERCISE OF A POWER OF APPOINTMENT. A personal
21 representative, trustee, or other fiduciary who holds property subject to a power of
22 appointment may administer that property as if the power of appointment was not
23 exercised if the personal representative, trustee, or other fiduciary has no notice of
24 the existence of any of the following within 6 months after the death of the donee of
25 the power of appointment:

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

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

***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.

5 **SECTION 161.** 702.07 of the statutes is amended to read:

6 **702.07 Powers Power of appointment to be construed as exclusive.** The
7 donee of any power of appointment may appoint the whole or any part of the
8 appointive assets to any one or more of the permissible appointees and exclude
9 others, except to the extent that the donor specifies either a minimum share or
10 amount to be appointed to each permissible appointee or to designated appointees,
11 or a maximum share or amount appointable to any one or more appointees.

12 **SECTION 162.** 702.08 of the statutes is amended to read:

13 **702.08 Disclaimer of powers a power of appointment.** The donee of any
14 power of appointment may disclaim all or part of the power of appointment as
15 provided under s. 700.27 or 854.13.

16 **SECTION 163.** 702.09 (title), (1) and (3) (a), (b) and (c) of the statutes are
17 amended to read:

18 **702.09 (title) Release of powers a power of appointment.** (1) Except as
19 Unless the creating instrument expressly provides that the power of appointment
20 cannot be released or expressly restricts the time, manner, or scope of release, the
21 donee of any power of appointment may do any of the following:

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

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

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

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

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

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

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

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

14 SECTION 164. 702.11 of the statutes is amended to read:

15 **702.11 Irrevocability of creation, exercise and release of powers a**
16 **power of appointment**. The creation, exercise or release of a power of appointment
17 is irrevocable unless the power to revoke is reserved in the creation, exercise or
18 release of the power of appointment.

19 SECTION 165. 702.13 (title), (1) (intro.), (a), (b) and (c) and (2) of the statutes
20 are amended to read:

21 **702.13 (title) Recording instruments relating to powers a power of**
22 **appointment**. (1) (intro.) Any of the following instruments relating to powers a
23 power of appointment is entitled to be recorded as a conveyance upon compliance
24 with s. 706.05 (1):

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

1 (b) An instrument expressing consent to exercise;

2 (c) A disclaimer;

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

5 **SECTION 166.** 702.15 (intro.), (1) and (2) of the statutes are amended to read:

6 **702.15 Disposition when a special power of appointment is**
7 **unexercised.** (intro.) If the donee of a special power of appointment fails to exercise
8 effectively the special power of appointment, the interests which might have been
9 appointed under the special power of appointment pass in one of the following ways:

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

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

18 **SECTION 167.** 702.15 (3) of the statutes is renumbered 702.15 (3) (a) and
19 amended to read:

20 702.15 (3) (a) If Except as provided in par. (b), if the creating instrument
21 contains no express gift in default and clearly indicates that the permissible
22 appointees are to take only if the donee exercises the special power of appointment,
23 then by reversion to the donor or the donor’s estate. ~~But if~~

24 (b) If the creating instrument expressly states that there is no reversion in the
25 donor, then any language in the creating instrument indicating or stating that the

1 permissible appointees are to take only if the donee exercises the special power of
 2 appointment is to be disregarded and the interests shall pass in accordance with sub.
 3 (2).

4 **SECTION 168.** 702.17 (1), (2), (3) and (5) of the statutes are amended to read:

5 702.17 (1) GENERAL POLICY. If the donee has ^{mw} either a general power or an
 6 unclassified power which is unlimited as to permissible appointees except for
 7 exclusion of the donee, the donee's estate, the donee's creditors and the creditors of
 8 the donee's estate, or a substantially similar exclusion of appointment, any interest
 9 which the donee has power to appoint or has appointed is to be treated as property
 10 of the donee for purposes of satisfying claims of the donee's creditors, as provided in
 11 this section.

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

21 (3) AT DEATH OF THE DONEE. If the donee has ^{exercised a general power of appointment} at the time of his or her death a
 22 general power of the kinds specified in sub. (1) appointment, ^{the donee's} whether or not the
 23 ~~donee exercises the~~ general power of appointment, ^{strike} any creditor of the donee may
 24 reach any interest which the donee could have appointed or has appointed, to the

1 extent that the claim of the creditor has been filed and allowed in the donee's estate
2 but not paid because the assets of the estate are insufficient.

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

INS
127-8

9 SECTION 169. 702.21 of the statutes is amended to read:

10 702.21 **Applicability of chapter.** The provisions of this chapter are
11 applicable to any power of appointment existing on May 16, 1965, as well as a power
12 of appointment created after such date.

13 SECTION 170. 766.575 (1) (e) of the statutes is amended to read:

14 766.575 (1) (e) "Trustee" has the meaning given under s. 701.01(8) 701.0103
15 (25).

****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?

16 SECTION 171. 840.01 (1) of the statutes is amended to read:

17 840.01 (1) Except as provided in sub. (2), "interest in real property" includes
18 estates in, powers of appointment under ch. 702 over, present and future rights to,
19 title to, and interests in real property, including, without limitation by enumeration,
20 security interests and liens on land, easements, profits, rights of appointees under
21 powers of appointment, rights under covenants running with the land, powers of
22 termination, and homestead rights. The interest may be an interest that was

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

3 SECTION 172. 853.17 (2) of the statutes is amended to read:

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

****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?

8 SECTION 173. 853.32 (3) of the statutes is amended to read:

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

12 SECTION 174. 853.34 (3) of the statutes is created to read:

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

16

18

****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..."?

21 SECTION 175. 853.61 (2) (a) of the statutes is amended to read:

NO
Please confirm that this ^{subsection} is consistent with your intent.

1 853.61 (2) (a) In addition to any powers conferred upon trustees by law, the
trustee shall have all the powers listed in ~~s. 701.16~~ ^{SS. 701.0815 and 701.0816} ~~(missing ref)~~ ← score

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?

3 **SECTION 176.** 854.13 (1) (c), (2) (a) 2. and (d), (4) (e), (5) (b), (7) (a) and (10) (a)
4 of the statutes are amended to read:

5 854.13 (1) (c) "Power of appointment" has the meaning given in s. 702.01 (4)
6 702.02 (6).

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

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

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

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

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

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

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

1 SECTION 177. 854.23 (5) (b) of the statutes is amended to read:

2 854.23 (5) (b) Notwithstanding sub. (2), in addition to the protections afforded
3 a financial institution under ss. [✓]701.19 (11) ~~(missing x-ref.)~~ ^{701.1012 ✓} and 710.05 and chs. 112
4 and 705 a financial institution is not liable for having transferred an account to a
5 beneficiary designated in a governing instrument who, under this chapter, is not
6 entitled to the account, or for having taken any other action in reliance on the
7 beneficiary's apparent entitlement under the terms of a governing instrument,
8 regardless of whether the financial institution received written notice of a claimed
9 lack of entitlement under this chapter.

****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..."?

score
↓

10 SECTION 178. 859.18 (5) (a) of the statutes is amended to read:

✓ 701.0505(1)

11 859.18 (5) (a) The availability of a trust described under s. 701.07 (3) ~~(missing~~
12 ~~x-ref.)~~ is subject to s. [✓]701.07 (3) ~~(missing x-ref.)~~ ^{701.0505(1) ← score}

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

13 SECTION 179. 859.18 (5) (b) of the statutes is amended to read:

14 859.18 (5) (b) The availability of a spendthrift trust described under s. 701.06
15 subch. V of ch. 701 is subject to s. 701.06 subch. V of ch. 701.

INS
31-15
LAW
1110

16 SECTION 180. 861.11 (5) (b) of the statutes is amended to read:

17 861.11 (5) (b) Notwithstanding sub. (2), in addition to the protections afforded
18 a financial institution under ss. ^{score → 701.1012 ✓}701.19 (11) ~~(missing x-ref.)~~ and 710.05 and chs. 112
19 and 705 a financial institution is not liable for having transferred an account
20 included in the augmented deferred marital property estate under s. 861.03 to a
21 beneficiary designated in a governing instrument, or for having taken any other
22 action in reliance on the beneficiary's apparent entitlement under the terms of a

1 governing instrument, regardless of whether the financial institution received
2 written notice of an intent to file, or the filing of, a petition for the deferred marital
3 property elective share amount.

****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..."?

4 SECTION 181. 865.08 (6) of the statutes is amended to read:

5 865.08 (6) If the will of the decedent provides for a testamentary trust, letters
6 of trust shall be issued by the probate registrar to the trustee upon admission of the
7 will to informal probate at the same time that letters are granted to the personal
8 representative. The probate registrar shall determine if bond shall be required and,
9 if so, the amount thereof, and for such purpose the probate registrar shall have the
10 authority granted to the court by, and shall proceed pursuant to s. 701.16 (2)

11 [missing x-ref.] Thereafter, the trustee shall continue to be interested in the
12 estate, and beneficiaries of the testamentary trust shall cease to be interested in the
13 estate except under s. 851.21 (3). The trust shall be administered under supervision
14 of the court under ch. 701.

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

15 SECTION 182. 867.03 (2g) of the statutes is amended to read:

16 867.03 (2g) OBLIGATION OF AFFIANT. By accepting the decedent's property under
17 this section the heir, trustee, or guardian assumes a duty to apply the property
18 transferred for the payment of obligations according to priorities established under
19 s. 859.25 and to distribute any balance to those persons designated in the
20 appropriate governing instrument, as defined in s. 854.01, of the decedent or if there
21 is no governing instrument, according to the rules of intestate succession under ch.
22 852. An heir or guardian may publish a notice to creditors in the same manner and

1 with the same effect as a trustee under s. ~~701.065~~ 701.0605. This subsection does
2 not prohibit any appropriate person from requesting administration of the
3 decedent's estate under s. 856.07 or ch. 865.

4 **SECTION 183.** 879.03 (2) (c) of the statutes is amended to read:

5 879.03 (2) (c) The attorney general where a charitable trust, as defined in s.
6 701.01 (2) ~~701.0103~~ (4), is involved, and in all cases mentioned in s. 852.01 (3).

7 *Fix component* **SECTION 184.** 879.47 of the statutes is amended to read: *renumbered 879.47 (1.) and*

8 *No* **879.47 Papers, preparation and filing.** (1) The attorney for any person

9 desiring to file any paper in court is responsible for the preparation of the paper.

10 Except as provided in s. ~~701.16~~ (4) (d) *Strike* **(missing x-ref.)**, all papers shall be legibly

11 written on substantial paper and shall state the title of the proceeding in which they

12 are filed and the character of the paper. Either uniform forms or

13 computer-generated forms, if the forms exactly recreate the original forms in

14 wording, format and substance, shall be used. If papers are not so written or if

15 uniform forms or computer-generated forms that exactly recreate the original forms

16 in wording, format and substance are not used, the court may refuse to receive and

17 file them. The court shall show on all papers the date of their filing.

INS
133-17A
From 11-4324

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

18 **SECTION 185. Effective date.**

INS
133-17B

19 (1) This act takes effect on January 1, 2014.

****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.

*If the attorney general...
to be...
done...*

ANALYSIS INSERT

* This bill replaces current law related to trusts with the Wisconsin Trust Code (the Code), a modified version of the Uniform Trust Code (UTC). The Code is primarily a set of basic default rules that apply to trusts in this state. With certain exceptions, the terms of a trust may override or modify the terms of the Code. There are however some mandatory provisions in the Code that may not be overridden or modified by the terms of a trust, including the requirements for creating a trust, the duty of a trustee to act in good faith, the effect of a spendthrift provision, the power of the court to take certain actions, and the trustee's duty to keep certain individuals informed about matters relating to the trust. The Code also includes default rules that are not included in the UTC, including rules related to decanting trusts, trust protectors, and directing parties.

* The UTC consists of the following 11 articles: Article 1, General Provisions and Definitions; Article 2, Judicial Proceedings; Article 3, Representation; Article 4, Creation, Validity, Modification, and Termination of a Trust; Article 5, Creditor's Claims; Spendthrift and Discretionary Trusts; Article 6, Revocable Trusts; Article 7, Office of Trustee; Article 8, Duties and Powers of a Trustee; Article 9, The Uniform Prudent Investor Act; Article 10, Liability of Trustees and Rights of Persons Dealing with Trustee; and Article 11, Miscellaneous Provisions. Under this bill, articles of the UTC are created as subchapters of the Code. Two differences in the structure of the UTC and the Code are: 1) the Uniform Prudent Investor Act remains outside of the Code, and 2) the Uniform Principal and Income Act is recreated as Subchapter 11 of the Code. The following is an overview of each subchapter of the Code:

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

plain Subsub no scoring A
Subchapter 2: Judicial Proceedings. Subchapter 2 addresses the role of the court in administering a trust. A court may intervene in the administration of a trust to the extent that its jurisdiction is invoked by an interested person or as otherwise provided by law. However, a trust is not subject to continuing judicial supervision unless ordered by the court in response to a petition requesting the supervision. This subchapter also addresses procedural issues such as personal jurisdiction, subject jurisdiction, and venue for judicial proceedings related to trusts.

SUB SUB plain A
Subchapter 3: Representation. Subchapter 3 allows a person to be represented and bound by another person for purposes of determining whether notice has been

received and whether consent has been given in a transaction or proceeding relating to a trust. Under the Code, notice, information, accountings, or reports given to a person who has the power to bind another person have the same effect as if the notice, information, accountings, or reports were given to the person entitled to receive the particular information. A trustee is not required to provide such information to a beneficiary if the trustee provides the information to the beneficiary's representative. This subchapter also specifically allows a minor, incapacitated person, unborn individual, or a person whose identity is not known, to be represented by and legally bound by a person who has a substantially identical interest with respect to the particular question or dispute to the extent there is no conflict of interest in that representation.

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

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

This subchapter provides default rules for when a trust may be modified or terminated. For example, under the Code, a trust may be modified or terminated if the settlor and beneficiaries consent to the termination or modification or if the beneficiaries' consent and the court concludes that the trust or a particular provision of the trust not necessary to achieve a material purpose of the trust. For purposes of terminating a trust, the Code increases the value of what qualifies as an uneconomic trust to a trust with a value of \$100,000 or less as adjusted for inflation.

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

Finally, this subchapter includes a concept not addressed in the UTC, the authority of a trustee of an irrevocable trust to appoint trust assets to the trustee of another trust (a "second trust") under certain circumstances. This authority is commonly referred to as decanting. Under the Code, subject to certain requirements, a trustee who has the power to invade trust principal for the benefit of a beneficiary may appoint trust property to a second trust provided that the appointment does not reduce any fixed income, annuity, or unitrust interest of the beneficiary. If a trustee's power to invade trust principal under the first trust is limited by a standard, the second trust may not grant the trustee a power to invade trust principal that is broader than the standard included in the first trust and the beneficiaries of the first

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trust must be the same as the beneficiaries of the second trust. A trustee may appoint assets to a second trust without court approval by providing notice to certain interested persons.

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

Subchapter 5 addresses the validity of a spendthrift provision and the rights of a creditor of a settlor or beneficiary to reach trust assets. The Code defines a spendthrift provision as a provision that restrains either the voluntary or involuntary alienation of a beneficiary's interest in a trust. In general, the Code preserves current law related to spendthrift provisions and creditors' rights.

Under the Code, a creditor may reach the assets of a revocable trust during the lifetime of the settlor. If the trust is a self-settled irrevocable trust, a creditor may reach the maximum amount that can be distributed to or for the settlor's benefit presently or in the future or which are payable in the trustee's discretion. The Code also specifies that a beneficiary's use of real or tangible property owned by a trust does not subject the property to the claims of the beneficiary's creditors and eliminates a distinction under current law between a discretionary distribution standard that is modified by a standard and a distribution standard that is absolute.

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Subchapter 6: Revocable Trusts

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

The Code provides that while the settlor of a revocable trust is alive and is not incapacitated, a trustee owes its duties exclusively to the settlor. If the settlor becomes incapacitated or dies, the trust is no longer revocable and the duties of the trustee shift to the beneficiaries. The Code limits the time period for when a person may challenge the validity of a revocable trust to the earlier of one year after the settlor's death or 4 months after the trustee sends the potential trust contestant a copy of the trust and notice of the time allowed for commencing a proceeding.

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Subchapter 7: Office of Trustee

Subchapter 7 specifies numerous default procedural rules that are applicable to the office of the trustee, including rules related to acceptance or declination of a trusteeship, requiring a bond, the rights and obligations of co-trustees, the resignation of a trustee, the grounds for removing a trustee, duties of a former trustee to deliver trust property, trustee compensation, and the reimbursement trustee expenses. This subchapter also clarifies that property that is titled in the name of the trust places legal title in the name of the trustee.

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Subchapter 8: Duties and Powers of the Trustee. Subchapter 8 sets forth the fiduciary obligations of a trustee, except for those included in the Uniform Prudent Investor Act. Under the Code, a trustee must administer the trust in good faith, solely in the interests of the beneficiaries, impartially, and prudently, incurring only reasonable costs and using any special skills or expertise the trustee may have. A trustee must take reasonable steps to take control of and protect trust property, to maintain adequate records that clearly identify separate trust interests, to enforce claims of the trust and defend claims against the trust, to collect trust property and to redress breaches of former trustees, and to exercise its discretion in good faith and in accordance with the terms of the trust. A trustee has a duty to inform and report and must provide requested trust accountings to certain beneficiaries.

Under the Code, a trustee may delegate certain duties and powers, but is held to a prudent person standard when delegating a duty or power. An agent who accepts a delegation of duty or power from a trustee is held to the fiduciary standard of the trustee with regard to the appointment. A trustee, who uses reasonable care, skill, and caution in selecting an agent, establishing the scope of the delegation, and reviewing the agent's actions, is not liable to the beneficiaries for actions taken by the agent.

Subchapter 8 provides that a trustee has broad authority to achieve proper investment, management, and distribution of the trust property including all the powers that an unmarried, competent owner has over individually owned property. In addition, this subchapter enumerates the powers that a trustee has absent contrary provisions in the trust instrument.

As an addition to the UTC, the Code specifically allows a settlor to appoint two types of special fiduciaries: directing parties and trust protectors. A directing party is a person who is granted a power, in a capacity other than as a trustee or a trust protector, to make or to direct the trustee to make investment and distribution decisions. A directing party is a fiduciary and is subject to the same duties and standards as the trustee. The trustee has no duty to monitor the directing party and is not liable for taking action that are consistent with the direction of a directing party or for actions taken directly by a directing party.

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

Subsub

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Subchapter 9: Investment Management of Trusts. Subchapter 9 provides that, subject to certain exceptions, the investment management of trust property is governed by the Uniform Prudent Investor Act, which has been adopted in this state.

An exception to this general rule relates to who is responsible for investments under a trust with a directed party. The Code provides that a trustee who has no power over directed trust property does not have a duty to monitor the conduct or investment performance of the directing party. The Code also limits the application of the Uniform Prudent Investor Act to life insurance trusts. If the principal purpose of a trust is to hold a life insurance contract, a trustee does not have a duty to take certain actions that would otherwise be required under the Uniform Prudent investor Act, such as determining whether the contract is or remains a proper investment or investigating the financial strength of the company maintaining the contract. *

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Subchapter 10: Liability of Trustees and Rights of Persons Dealing with the Trustee Subchapter 10 identifies the remedies for breach of trust, discusses how damages are determined for a breach of trust, reaffirms the courts power to award costs and attorney fees, specifies potential defenses, and addresses trustee relations with and liability to persons other than beneficiaries. Under the Code, a trust instrument may not waive or vary the obligation of good faith or exculpate the trustee for reckless indifference. The Code also provides that an exculpatory term in a trust is not enforceable if the inclusion of the term is the result of an abuse of the settlor's confidential relationship with the trustee. *

4

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

Under the Code, a trustee is protected from liability if there is no breach of trust, if the trustee acted in reasonable reliance on the express provisions of the trust, if the trustee failed to ascertain unknown external facts if the trustee exercised reasonable care to ascertain such information, or if the beneficiary provided consent, release, or ratification for the trustee's action. A trustee is also protected from personal liability on a contract entered into in a fiduciary capacity and from contracts and torts entered into by a partnership in which the trustee holds an general partnership interest if the other party was on notice of the fiduciary relationship.

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

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Subchapter 11: The Uniform Principal and Income Act Subchapter 11 incorporates the Uniform Principal and Income Act, which has been adopted in this state, into the Code. *

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Subchapter 12: Miscellaneous

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



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INS 9-18

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

INS 9-18

INS. 10-4

8 (9) "General power of appointment" has the meaning given in s. 702.02 (5).

END INS. 10-4

INS 10-7

9 (10m) "Guardian of the person" means a person appointed by a court as a
10 guardian of the person of a minor or adult individual under s. 54.10. "Guardian of
11 the person" does not include a guardian ad litem.

END INS. 10-7

INS. 11-13

12 (16m) "Power of appointment" has the meaning given in s. 702.02 (6).

END INS. 11-13

INS 12-16

13 (21m) "Special power of appointment" has the meaning given in s. 702.02 (7).

END INS 12-16

INS 13-13



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

3 (a) The power to modify or interpret the terms of the trust.

4 (b) The power to consent to or veto a trustee's or directing party's decision
5 regarding the investment, distribution, or administration of trust property.

6 (c) The power to advise a trustee or directing party regarding the investment,
7 distribution, or administration of trust property.

8 (d) The power to direct the trustee's decisions, other than investment or
9 distribution decisions, about the administration of the trust.

10 (e) The power to remove and replace a trustee, directing party, or trust
11 protector, or to appoint a successor trustee, directing party, or trust protector.

* **NOTE: Please confirm that this definition is consistent with proposed s.
701.0818.

END INS 13-13

INS. 50-1

12 1. A trustee of the first trust who would benefit from the adoption of the term
13 in the 2nd trust abstains from the consideration and adoption of the term and the
14 trustees of the first trust who would not benefit from the adoption of the term adopt
15 the trust instrument of the 2nd trust.

16 2. A court approves the trust instrument of the 2nd trust.

END INS. 50-1

INS. 51-11

17 5. If the trustee does not receive a written objection from any person entitled
18 to receive notice under subd. 1., the trustee shall notify each person entitled to



1 receive notice under subd. 1. that the trustee did not receive an objection to the notice
 2 and that the trustee will appoint the assets from the first trust to the ^{e 2nd} second trust,
 3 as provided in the notice. Notice under this subdivision[✓] is binding and precludes a
 4 recipient from requiring court approval of the appointment of assets to a 2nd trust.[✓]

***NOTE: Is this language consistent with your intent?

END INS. 51-11

INS. 67-5

5 ^{701.0605} (1) (a) 2. Except as provided in pars. (b) and (c), if the trustee satisfies the
 6 requirements for the publication of the notice under subd. 1., all claims, including
 7 claims of the any state and any ~~subdivision thereof~~ of its subdivisions,[✓] whether due
 8 or to become due, absolute or contingent, liquidated or unliquidated, are barred
 9 against the trustee, the trust property and any recipient of trust property unless filed
 10 with the trustee on or before the date specified in the notice under subd. 1.

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

END INS. 67-5

INS. 70-15

11 (b) By a person appointed by unanimous agreement of the qualified
 12 beneficiaries, except that ^{if} if the trust is a trust for an individual with a disability, the
 13 person appointed under this paragraph may not be the individual with a disability,
 14 his or her spouse, or a relative of the individual with a disability who is legally
 15 responsible for his or her support.[✓]

END INS. 70-15

INS 73-21

16 SECTION 1. 701.08 of the statutes is renumbered 701.0606 and amended to
 17 read:



1 **701.0606 Transfers to living revocable trusts.** (1) VALIDITY AND EFFECT.

2 The order of execution of a living revocable trust instrument and a will or other
3 instrument purporting to transfer or appoint property to the trust evidenced by the
4 trust instrument shall be disregarded in determining the validity of the transfer or
5 appointment. No reference in any will to a living revocable trust shall cause assets
6 in such trust to be included in property administered as part of the testator's estate;
7 ~~nor shall it cause the trust or any portion thereof to be treated as a testamentary~~
8 ~~trust.~~

9 (2) GOVERNING TERMS. Property transferred or appointed by a will or by a
10 beneficiary designation under an employee benefit plan, life insurance policy, or
11 other instrument permitting designation of a beneficiary to a living revocable trust,
12 the terms of which the testator or designator was the sole holder of a power to modify,
13 shall be administered in accordance with the terms of the trust as they may have
14 been modified prior to the testator's or designator's death, even though the will or
15 beneficiary designation was not reexecuted or republished after exercise of the power
16 to modify, unless the will or beneficiary designation expressly provides otherwise.
17 Such property transferred or appointed to a living revocable trust, which is subject
18 to a power of modification requiring action or consent of a person other than the
19 testator or designator, shall be administered in accordance with the terms of the
20 trust instrument as they exist at the execution of the will or beneficiary designation,
21 unless expressly otherwise provided. If the will or beneficiary designation expressly
22 provides that the property shall be administered in accordance with the terms of the
23 trust instrument as they may be modified thereafter, the will or beneficiary
24 designation need not be reexecuted or republished after exercise of the power to
25 modify.



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

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

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

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

END INS 73-21

INS. 80-1

13 (6) Sections 701.0701, 701.0708, 701.0709, and 701.1001 to 701.1010 apply to
 14 a directing party as if the directing party was a trustee.

END INS. 80-1

INS 90-22

15 **SECTION 2.** 701.0818 of the statutes is created to read:

16 **701.0818 Trust protectors.** (1) APPOINTMENT. A settlor or a court may
 17 appoint a trust protector in a trust instrument, whether referred to as a trust
 18 protector, another title, or no title. A trust protector has the powers granted to the
 19 trust protector in the trust instrument.



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

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

6 1. The trust protector shall exercise the power in a manner that is consistent
7 with the terms of the trust.

8 2. With respect to the exercise of the power, the trust protector has fiduciary
9 duties and obligations to the beneficiaries that are similar to the fiduciary duties and
10 obligations that the trustee has to the beneficiaries.

11 3. The trust protector may be held liable for damages associated with a violation
12 of a duty or obligation described under subd. 2.

13 (c) If a power is exercisable in a nonfiduciary capacity, all of the following apply:

14 1. The trust protector may exercise the power in a manner that is inconsistent
15 with the terms of the trust but shall exercise the power in good faith.

16 2. With respect to the power, the trust protector does not have fiduciary duties
17 or obligations to the beneficiaries or to any other party.

18 3. The trust protector may be held liable for damages associated with any of the
19 following:

20 a. The exercise or nonexercise of the power if the trust protector's exercise or
21 nonexercise of a nonfiduciary power was not in good faith

22 b. The actions or inactions of a fiduciary over whom the trust protector has a
23 power of removal if the trust protector's failure to exercise the power of removal was
24 not in good faith.

25 (d) If a power is exercisable in a personal capacity, all of the following apply:



1 1. The trust protector may exercise the power in a manner that is inconsistent
2 with the terms of the trust. ✓

3 2. With respect to the power, the trust protector does not have fiduciary duties
4 or obligations to the beneficiaries or to any other party. ✓

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

7 4. The trust protector is not liable for the exercise or nonexercise of the power
8 or for the actions or inactions of a fiduciary over whom the trust protector has a power
9 of removal. ✓

10 (e) Except as provided in par. (c) 3, ✓ a trust protector does not have a duty to
11 exercise its powers and does not have a duty to monitor the conduct of the trustees
12 or any directing party, nor a duty to monitor changes in the law or circumstances of
13 the beneficiaries.

****NOTE: I included an exception for par. (c) 3, ✓ because under that subdivision a *
trust protector may be held liable for damages associated with the nonexercise of a power
if the nonexercise was not in good faith. Please confirm that this subsection is consistent *
with your intent. e sub. (2)

14 (3) TRUST PROTECTOR POWERS. ✓ (a) Except as provided in ✓ pars. (b) to (d), if a
15 trust instrument does not specify that a trust protector is required to exercise a
16 particular power in a fiduciary, nonfiduciary, or personal capacity, the trust protector
17 shall exercise the power in a nonfiduciary capacity, including the power to do any of
18 the following: ✓

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

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



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

3 4. Eliminate or modify the interests of a beneficiary or add a new beneficiary
4 or class of beneficiaries. ✓

 ***NOTE: Subdivisions 4. and 5. ✓ contained language about actions that a trust
protector could not take in exercising a power. I moved this language to sub. ✓(4) because
it did not follow the introductory language for this list of powers, which relates to what
powers must be exercised in a nonfiduciary capacity. ✓

5 5. Modify the terms of a power of appointment granted under the trust. ✓

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

 ***NOTE: How is this power different that the power described in subd. 9? ✓

7 7. Terminate the trust.

8 8. Appoint assets to a new trust under s. 701.0418. ✓

9 9. Appoint a successor trustee, trust protector, or directing party. ✓

10 10. Advise the trustee on matters concerning a beneficiary. ✓

11 11. Advise the trustee on the exercise of a trustee duty or power, including the
12 duty to provide notification to qualified beneficiaries under s. 701.0813. ✓

13 12. Except as provided in ^{e par.} (sub.) (b) 5., ✓ consent to or veto specified actions of a
14 trustee or a directing party.

15 (b) If a trust instrument grants a trust protector the power to do any of the
16 following actions and the trust instrument does not specify that the trust protector
17 power is required to exercise the power in a fiduciary, nonfiduciary, or personal
18 capacity, the trust protector shall exercise the power in a fiduciary capacity: ✓

19 1. Interpret terms of the instrument at the request of the trustee.

20 2. Correct errors or ambiguities in the terms of the trust that might otherwise
21 require court construction or defeat the settlor's intent. ✓

22 3. Review and approve the trustee's reports or accounting. ✓



1 4. ✓ Resolve disputes between the trustee or a directing party and a beneficiary.

2 5. ✓ Consent to or veto distributions to a beneficiary.

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

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

****NOTE: Could the same trust protector be described in both pars. (c) and (d)? If
so, in what capacity would the trust protector be required to exercise his or her powers?

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

9 (4) PROHIBITED ACTIONS. ✓ A trust protector may not exercise a power granted to
10 the trust protector to do any of the following: ✓

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

15 (b) Modify or amend a trust in order to do any of the following: ✓

16 1. Remove a requirement pursuant to 42 USC 1396p (d) (4) to pay back a
17 governmental entity for benefits provided to the permissible beneficiary at the death
18 of that beneficiary. ✓

19 2. ✓ Reduce or eliminate an income interest of the income beneficiary of any of
20 the following:

21 a. A trust for which a marital deduction has been taken for federal income tax
22 purposes under section 2056 or 2523 of the Internal Revenue Code ✓ or for state tax



1 purposes under any comparable provision of applicable state law, during the life of
2 the settlor's spouse.

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

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

7 d. A trust for which an election as a qualified Subchapter S Trust under section
8 1361(d) of the Internal Revenue Code is currently in place.

9 (c) Modify any beneficial interest of a trust that qualified for a marital
10 deduction or charitable deduction from federal or state estate tax in a manner that
11 would have caused such trust not to qualify for the deduction

****NOTE: This paragraph is based on the substantive restriction that was included
in your proposed sub. (3) (a) 4. Please confirm that this placement, particularly the
introduction, is consistent with your intent.

12 (d) Grant a beneficial interest to any individual or class of individuals not
13 specifically provided for under the trust instrument.

****NOTE: This paragraph is based on the substantive restriction that was included
in your proposed sub. (3) (a) 5. Please confirm that this placement, particularly the
introduction, is consistent with your intent.

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

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

****NOTE: Section 701.0818 (1), which you asked about in your drafting
instructions, allows a trustee to follow the direction of a settlor that is contrary to the
terms of the trust while the trust is revocable. As a drafting matter, there is not a conflict



sub-section

between s. 701.0818 and this subdivision. Currently, a trust protector is not subject to the direction of the settlor, but could arguably, if he or she desired, follow the direction of the settlor under this provision. Whether or not the trust protector could take actions that are inconsistent with the terms of the trust will depend on the legal capacity under which the trust protector is acting. See sub. (2). Please let me know if you would like to make any changes to this section.

*

1 (6) RESPONSIBILITIES OF TRUSTEES AND DIRECTING PARTIES. (a) A trustee and a
2 directing party are not liable for any loss that results from the trustee or the directing
3 party taking an action that is consistent with a modification of the trustee's or the
4 directing party's powers, authority, or discretion as a result of an action taken by a
5 trust protector unless the trustee or the directing party breaches a duty owed for the
6 exercise of the power, authority, or discretion, as modified by the trust protector.

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

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

17 (7) RIGHT TO INFORMATION. A trust protector may request information about
18 the trust from the trustee and, if such information is related to the exercise or
19 nonexercise of a power expressly granted to the trust protector in the trust
20 instrument, the trustee shall provide the requested information to the trust
21 protector. Except as otherwise provided in this chapter, a trustee does not have an
22 obligation to provide any information to the trust protector that the trust protector



1 does not request. If a trustee is bound by any confidentiality restrictions with respect
2 to information requested by a trust protector, the trustee may require that the trust
3 protector agree to be bound by the confidentiality restrictions before delivering such
4 information to the trust protector. ✓

5 (8) REIMBURSEMENT OF COSTS AND FEES. ✓ From the trust property for which the
6 trust protector is acting, a trustee shall provide to a trust protector reimbursement
7 of attorney(s) fees and expenses, including the cost of defending any claim made
8 against the trust protector arising from the acts or omissions of the trust protector,
9 unless the trust protector was not acting in accordance with the applicable legal
10 capacity, as described in sub. (2). ✓

***NOTE: Please confirm that this is consistent with your intent.

11 (9) APPLICATION OF OTHER SECTIONS TO TRUST PROTECTORS. ✓ Sections ✓ 701.0701,
12 701.0708, ✓ 701.0709, ✓ 701.1003, ✓ 701.1005, ✓ 701.1006, ✓ 701.1007, ✓ 701.1008, ✓ 701.1009,
13 and 701.1010 apply to a trust protector as if the trust protector is the trustee.
14 Sections 701.1001 ✓ and 701.1002 ✓ apply to a trust protector who is acting ⁱⁿ a fiduciary
15 or nonfiduciary capacity as if the trust protector is the trustee but do not apply to a
16 trust protector who is acting in a personal capacity. ✓

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

21 SECTION 3. 701.0819 ✓ of the statutes is created to read:

22 **701.0819 Presumptions about trust contributions.** ✓ (1) For purposes of
23 this section, "marital deduction gift" means a gift intended to qualify for the marital



1 deduction as indicated by the terms of the trust regardless of whether the trust
2 instrument is ambiguous. ✓

****NOTE: If the trust instrument is ambiguous, how does it indicate the required intent? *

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

7 (a) The settlor intended to take maximum advantage of tax deductions,
8 exemptions, exclusions, and credits. ✓

9 (b) The settlor intended that any gift made to a spouse outright and free of trust
10 qualify for the gift or estate tax marital deduction and ^{is} ~~be~~ a marital deduction gift. ✓

11 (c) If the trust instrument refers to a trust as a marital trust, qualified terminal
12 interest property trust, or spousal trust, or refers to qualified terminable interest
13 property, qualified terminal interest property, section 2044, 2056, or 2523 of the
14 Internal Revenue Code, ✓ or similar provisions of applicable state law, the settlor
15 intended the trust and property passing to the trust to qualify for the applicable gift
16 or estate tax marital deduction, and for the gift to qualify for the marital deduction
17 for federal and state gift or estate tax purposes.

****NOTE: The language you provided included the phrase "or refers to qualified terminable interest property, QTIP, or QTIP property." Because QTIP is defined as qualified terminal interest property in the proposed language, I eliminated QTIP property from this list. Please let me know if I inadvertently eliminated a substantive reference. *

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

****NOTE: This provision is written in the passive voice. Who is required to construe the trust instrument as provided in this subsection?



1 (4) If a trust receives a marital deduction gift, the trustee has all the powers,
 2 duties, and discretionary authority necessary to comply with the marital deduction
 3 provisions of the Internal Revenue Code. The trustee shall not take any action or
 4 have any power that may impair the availability of the marital deduction, but this
 5 does not require the trustee to make the election under either section 2056 (b) (7) or
 6 2523(f) of the Internal Revenue Code.

****NOTE: What does it mean that the trustee shall not have any power that may
 impair the availability of a deduction? Also, how would the trustee not taking an action
 or not having a power, require the trustee to make an election for tax purposes?

****NOTE: Please confirm that this is the appropriate place for this provision within
 the chapter.

END INS 90-22

INS 112-23

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

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

SECTION 4. 701.105 (4) of the statutes is repealed.

END INS 112-23

INS 116-3

12 **SECTION 5.** 701.16 (4) (d) of the statutes is renumbered 879.47 (2) and amended
 13 to read:

14 879.47 (2) ~~Notwithstanding s. 879.47, trustees~~ Trustees and cotrustees may
 15 submit to courts accounts in the format that they normally use for accounts



1 submitted to beneficiaries under this subsection, if all of the information required by
2 the court is included.

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

END INS 116-3

INS 117-14

****NOTE: Your drafting instructions provided conflicting information regarding the inclusion of certain applicability language, specifically provisions related to judicial proceedings. Please confirm that the initial applicability provisions included in this bill are consistent with your intent. As drafted, s. 701.1206 (1) provides that, except for subch. XI and certain sections, the chapter applies to any trust that exists on the effective date of the bill and any trust created after that date (and to any trustee acting under such a trust). Section 701.1206 (2) provides that subch. XI applies to a trust or estate existing on the effective date of the bill and to a trust or estate created after that date. Section 701.1206 (3) provides that ch. 701 applies to a judicial proceeding that is commenced before, on, or after the effective date of the bill unless the court finds that the application of a certain provision will substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of parties. Okay?

END INS 117-14

INS 127-8

3 **SECTION 6.** 702.17 (2d) and (2m) of the statutes are created to read:
4 702.17 (2d) CREDITORS OF THE DONEE; SPECIAL POWER OF APPOINTMENT.
5 Notwithstanding sub. (1), property covered by a special power of appointment or
6 general power of appointment that is exercisable solely for the support,
7 maintenance, health, and education of the donee within the meaning of section 2041
8 (b) (1) (A) or 2514 (c) (1) of the Internal Revenue Code is not subject to the payment
9 of the claims of creditors of the donee, the donee's estate, or the expenses of
10 administering the donee's estate.
11 (2m) CREDITORS OF THE DONEE; GENERAL POWER OF APPOINTMENT NOT PRESENTLY
12 EXERCISABLE. Notwithstanding sub. (1), property covered by a general power of
13 appointment that is not presently exercisable when it is created is subject to the



1 payment of the claims of the creditors of the donee, the donee's estate, and the
2 expenses of administering the donee's estate only if any of the following apply: *applies*

3 (a) The power of appointment was created by the donee in favor of the donee.

4 (b) The power of appointment becomes exercisable in accordance with the
5 terms of the creating instrument, except in the case of a testamentary general power
6 of appointment.

****NOTE: Please confirm that this subsection [✓] is consistent with your intent.

END INS 127-8

INS. 133-17B

History: 1977 c. 449; 1987 a. 220; 1993 a. 130.

7 **SECTION 7.** 881.01 (1) (b) [✓] of the statutes is amended to read:

8 881.01 (1) (b) "Fiduciary" means a personal representative, trustee,
9 conservator, ~~or~~ guardian of the estate, a directing party, as defined in s. 701.0103 (7),
10 who has the power to direct the trustee's investment decisions, a trust protector, as
11 defined in s. 701.0103 (28), [✓] who has power over the investment of trust assets, and
12 any other person to whom a court appoints a power over the investment of the assets
13 of a decedent's estate, a trust, a conservatorship, or a guardianship of the estate. [✓]

****NOTE: Please confirm that this ^{paragraph} is consistent with your intent. *

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.

14 **SECTION 8.** 881.01 (4) [✓] of the statutes is renumbered 881.01 (4) (a) and amended
15 to read:

16 881.01 (4) (a) [✓] A fiduciary shall diversify investments unless the fiduciary
17 reasonably determines that, because of special circumstances, the purposes of the
18 estate, trust, conservatorship, or guardianship are better served without
19 diversifying.

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.



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~~SECTION 9.~~ 881.01 (4) (a) (title) of the statutes is created to read:

~~881.01 (4) (a) (title) General rule~~

~~SECTION 10.~~ 881.01 (4) (b) of the statutes is created to read:

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

2. Notwithstanding par. (a), a fiduciary may retain an asset that is collected by the fiduciary 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 an asset that is 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 subd. 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.

SECTION 11. 881.05 of the statutes is repealed.