



# State of Wisconsin

LEGISLATIVE REFERENCE BUREAU



## Appendix A ... segment II



### LRB BILL HISTORY RESEARCH APPENDIX



The drafting file for 2011 LRB-2788 (For: Senator Risser)


has been transferred to the drafting file for

**2013 LRB-0010** (For: Senator Risser)



# **RESEARCH APPENDIX -** **PLEASE KEEP WITH THE DRAFTING FILE**

Date Transfer Requested: 10/09/2012 (Per: FFK)



The attached draft was incorporated into the new draft listed above. For research purposes the attached materials were added, as a appendix, to the new drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

## **ARTICLE 5**

### **CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS**

#### **SECTION 501. RIGHTS OF BENEFICIARY'S CREDITOR OR ASSIGNEE.**

(a) To the extent a beneficiary's interest is not protected by a spendthrift provision, the court may authorize a judgment creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances. This subsection (a) shall not apply to a trust for a disabled individual.

(b) A trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the beneficiary to the extent the

- (1) beneficiary's interest is protected by a spendthrift provision, or
- (2) trust is a trust for a disabled individual.

#### **SECTION 502. SPENDTHRIFT PROVISION.**

(a) A spendthrift provision is valid only if

- (1) it restrains either a voluntary or an involuntary transfer or both of a beneficiary's interest, and

(2) the beneficiary is other than the settlor, or

(3) the trust is a trust for a disabled individual.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a “spendthrift trust,” or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary’s interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this Article 5, a creditor or assignee of the beneficiary may not attach, garnish, execute on or otherwise reach the interest or a distribution by the trustee before its receipt by the beneficiary.

(d) Real property or tangible personal property that is owned by the trust but that is made available for a beneficiary’s use or occupancy in accordance with the trustee’s authority under the trust instrument shall not be considered to have been distributed by the trustee or received by the beneficiary for purposes of allowing a creditor or assignee of the beneficiary to reach the property.

#### **SECTION 503. EXCEPTIONS TO SPENDTHRIFT PROVISION.**

(a) **Claims for child support.** Notwithstanding any provision in the creating instrument or Section 502, upon application of a person having a valid order directing a beneficiary to make payment for support of the beneficiary’s child, the court may:

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

(2) in the case of a beneficiary under a discretionary trust, order the trustee to satisfy part or all of the claim out of part or all of future payments of income or principal which are to be made pursuant to the exercise of the trustee's discretion in favor of such beneficiary.

(b) **Claims for public support.** Notwithstanding any provision in the creating instrument or Section 502, if the settlor is legally obligated to pay for the public support of a beneficiary under s.46.10, 49.345, or 301.12 or the beneficiary is legally obligated to pay for the beneficiary's public support or that furnished the beneficiary's spouse or minor child under s. 46.10, 49.345, or 301.12, upon application by the appropriate state department or county official, the court may:

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

(2) Except as otherwise provided in subsection (3), in the case of a beneficiary under a discretionary trust, order the trustee to satisfy part or all of the liability out of part

or all of future payments of income or principal which are to be made pursuant to the exercise of the trustee's discretion in favor of such beneficiary;

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

(c) **Trust for a disabled individual.** Subsection (b) does not apply to any trust for a disabled individual.

(d) **Subsequent modification of court's order.** Any order entered by a court under subsection(a) or (b) is subject to modification upon application of an interested person.

(e) **Exempt assets.** Assets of a trust, to the extent they are exempt from claims of creditors under other statutes, shall not be subject to subsection (a) or (b).

#### **SECTION 504. DISCRETIONARY TRUSTS; EFFECT OF STANDARD.**

(a) For purposes of this Chapter, a beneficiary's interest in a trust that is subject to the trustee's discretion does not constitute an interest in property or an enforceable right even if the discretion is expressed in the form of a standard of distribution or the beneficiary is then serving as sole trustee or co-trustee.

(b) Except as provided in this Chapter, a creditor or other claimant may not attach present or future distributions from such an interest or right, obtain an order from a court forcing the judicial sale of the interest or compelling the trustee to make distributions, or reach the interest or right by any other means, even if the trustee has abused the trustee's discretion.

(c) Subsections (a) and (b) shall not apply if a beneficiary is acting as sole trustee of a trust for his or her benefit and his or her discretion to make distributions to such beneficiary is not limited by an ascertainable standard or the consent of a party holding an adverse interest to the beneficiary.

(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution; provided, however, this right may not be exercised by a creditor for the beneficiary.

#### **SECTION 505. CREDITOR'S CLAIM AGAINST SETTLOR.**

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust that is not a trust for a disabled individual, upon application of a judgment creditor of the settlor, the court may, if the

terms of the instrument require or authorize the trustee to make payments of income or principal to or for the settlor, order the trustee to satisfy part or all of the judgment out of part or all of the payments of income or principal as they are due, presently or in the future, or which are payable in the trustee's discretion. If a trust has more than one settlor, the amount the judgment creditor of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.

(4) Assets of a trust, to the extent they are exempt from claims of creditors under other statutes, shall not be subject to this subsection (a).

(b) For purposes of this section:

(1) During the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

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

(A) A power described under subsection (3);

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

(i) The amount referenced in Section 2041(b)(2) or 2514(e), Internal Revenue Code of 1986;

(ii) The amount referenced in Section 2503(b), Internal Revenue Code of 1986, for each individual (other than the beneficiary) who makes a transfer to the trust or who is deemed to make a transfer to the trust pursuant to an election to split gifts under Section 2513(a), Internal Revenue Code of 1986; and

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



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

(i) Exercisable only with the consent of another person holding an interest adverse to the beneficiary's interest.

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

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

(C) A testamentary power of appointment.

(D) A presently exercisable right described in subsection(b)(2).

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

(5) Any order entered by a court under this section is subject to modification upon application of an interested person.

#### **SECTION 506. OVERDUE DISTRIBUTION.**

(a) In this section, “mandatory distribution” means a distribution of income or principal which the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. The term does not include a distribution subject to the exercise of the trustee’s discretion even if (1) the discretion is expressed in the form of a standard of distribution, or (2) the terms of the trust authorizing a distribution couple language of discretion with language of direction.

(b) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

**SECTION 507. PERSONAL OBLIGATIONS OF TRUSTEE.** Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

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**ARTICLE 6  
REVOCABLE TRUSTS**

**SECTION 601. CAPACITY OF SETTLOR OF REVOCABLE TRUST.**

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

**SECTION 602. REVOCATION OR AMENDMENT OF REVOCABLE TRUST.**

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before the effective date of this section.

(b) If a revocable trust is created or funded by more than one settlor:

(1) to the extent the trust consists of marital or community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses;

(2) to the extent the trust consists of property other than marital or community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution; and

(3) upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.

(c) The settlor may revoke or amend a revocable trust:

(1) by substantial compliance with a method provided in the terms of the trust; or

(2) if the terms of the trust do not provide a method, by:

(A) a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or

(B) any other method manifesting clear and convincing evidence of the settlor's intent.

(d) Upon revocation of a revocable trust, the trustee shall transfer the trust property as the settlor directs. However, with respect to marital or community property, the trustee shall transfer the property to both spouses as marital or community property unless the governing instrument specifically states otherwise.

(e) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the power of attorney.

(f) A guardian of the estate or conservator of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the guardianship or conservatorship.

(g) A trustee who does not know that a trust has been revoked or amended is not liable for distributions made and other actions taken on the assumption that the trust had not been amended or revoked, or for distributions made pursuant to subsection (e).

**SECTION 603. SETTLOR'S POWERS; POWERS OF WITHDRAWAL.**

(a) While a trust is revocable , rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors.

(c) During the period a power of withdrawal may be exercised, the holder of the power has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

**SECTION 604. LIMITATION ON ACTION CONTESTING VALIDITY OF REVOCABLE TRUST; DISTRIBUTION OF TRUST PROPERTY.**

(a) A person must commence a judicial proceeding to contest the validity of a trust that was revocable immediately before the settlor's death within the earlier of:

(1) one year after the settlor's death; or

(2) four months after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

(b) Upon the death of the settlor of a trust that was revocable immediately before the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

(1) the trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within 60 days after the contestant sent the notification.

(c) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

(d) This section does not impose a duty upon the trustee to give notice under this section.

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## ARTICLE 7

### OFFICE OF TRUSTEE

#### SECTION 701. ACCEPTING OR DECLINING TRUSTEESHIP.

(a) Except as otherwise provided in subsection (c), a person designated as trustee accepts the trusteeship:

(1) by substantially complying with a method of acceptance provided in the terms of the trust; or

(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(b) A person designated as trustee who has not yet accepted the trusteeship may decline the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have rejected the trusteeship.

(c) A person designated as trustee, without accepting the trusteeship, may:

(1) act to preserve the trust property if, within a reasonable time after acting, the person sends a declination of the trusteeship in writing to the settlor or, if the settlor is dead or lacks capacity, to the designated co-trustee, or, if none, to the successor trustee, or, if none, to a distributee or a permissible distributee; and

(2) inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

## **SECTION 702. TRUSTEE'S BOND.**

(a) A trustee shall give bond to secure performance of the trustee's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.

(b) The court may specify the amount of a bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond at any time.

(c) No bond shall be required of a trust company bank, state bank or national banking association which is authorized to exercise trust powers and which has complied with s. 220.09 or 223.02 nor shall a bond be required of a religious, charitable or educational corporation or society.

## **SECTION 703. CO-TRUSTEES.**

(a) Co-trustees shall act by majority decision.

(b) If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust.

(c) A co-trustee must participate in the performance of a trustee's function unless the co-trustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the co-trustee has properly delegated the performance of the function to another trustee.

(d) If a co-trustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary



to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust.

(e) A trustee may delegate to a co-trustee a function unless the delegation is expressly prohibited by the trust terms. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

(f) Except as otherwise provided in subsection (g), a trustee who does not join in an action of another trustee is not liable for the action.

(g) Each trustee shall exercise reasonable care to:

- (1) prevent a co-trustee from committing a material breach of trust; and
- (2) compel a co-trustee to redress a material breach of trust.

(h) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified all co-trustees of the dissent at or before the time of the action is not liable for the action unless the action is a material breach of trust.

#### **SECTION 704. VACANCY IN TRUSTEESHIP; APPOINTMENT OF SUCCESSOR.**

(a) A vacancy in a trusteeship occurs if:

- (1) a person designated as trustee declines the trusteeship;
- (2) a person designated as trustee cannot be identified or does not exist;
- (3) a trustee resigns;
- (4) a trustee is disqualified or removed;
- (5) a trustee dies; or
- (6) a guardian or conservator is appointed for an individual serving as trustee.

(b) If one or more co-trustees remain in office, a vacancy in a trusteeship need not be

filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

(c) A vacancy in a trusteeship that is required to be filled must be filled in the following order of priority:

- (1) by a person designated in the terms of the trust to act as successor trustee;
- (2) by a person appointed by unanimous agreement of the qualified beneficiaries other than a disabled individual who is a beneficiary of a trust for a disabled individual or his or her spouse; or
- (3) by a person appointed by the court.

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

#### **SECTION 705. RESIGNATION OF TRUSTEE.**

- (a) A trustee may resign:
  - (1) upon at least 30 days' notice to the qualified beneficiaries, the settlor, if living, and all co-trustees; or
  - (2) with the approval of the court.
- (b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.
- (c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

## **SECTION 706. REMOVAL OF TRUSTEE.**

(a) The settlor, a co-trustee, or a qualified beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

(1) the trustee has committed a material breach of trust;

(2) lack of cooperation among co-trustees substantially impairs the administration of the trust;

(3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under Section 1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

## **SECTION 707. DELIVERY OF PROPERTY BY FORMER TRUSTEE.**

(a) Unless a co-trustee remains in office or the court otherwise orders, and until the

trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the co-trustee, successor trustee, or other person entitled to it.

#### **SECTION 708. COMPENSATION OF TRUSTEE.**

(a) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

(b) If the terms of a trust specify the trustee's compensation or refer to another ascertainable source for determining that compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:

(1) the duties of the trustee are substantially different from those contemplated when the trust was created; or

(2) the compensation specified by the terms of the trust would be unreasonably low or high.

(c) If the trustee has rendered other services in connection with the administration of the trust, the trustee shall also be allowed reasonable compensation for the other services rendered, in addition to reasonable compensation as trustee.

#### **SECTION 709. REIMBURSEMENT OF EXPENSES.**

(a) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:

- (1) expenses that were properly incurred in the administration of the trust; and
- (2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

(b) An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

**UTC ARTICLE 10 (CLEAN FINAL VERSION AFTER 6/17/2011 MEETING)**

**SECTION 1001. REMEDIES FOR BREACH OF TRUST.**

(a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:

- (1) compel the trustee to perform the trustee's duties;
- (2) enjoin the trustee from committing a breach of trust;
- (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
- (4) order a trustee to account;
- (5) appoint a special fiduciary to take possession of the trust property and administer the trust;
- (6) suspend the trustee;
- (7) remove the trustee as provided in Section 706;
- (8) reduce or deny compensation to the trustee;
- (9) subject to Section 1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
- (10) order any other appropriate relief whether provided elsewhere in this Code, available at common law or under equity principles.

## **SECTION 1002. DAMAGES FOR BREACH OF TRUST.**

(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or

(2) the profit the trustee made by reason of the breach.

(b) Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

## **SECTION 1003. DAMAGES IN ABSENCE OF BREACH.**

Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

## **SECTION 1004. ATTORNEY'S FEES AND COSTS.**

(a) In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable

attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

(b) Subject to subsection (c), if a trustee defends or prosecutes any proceeding in good faith, whether successful or not, the trustee is entitled to receive the necessary expenses and disbursements, including reasonable attorney's fees, incurred. This subsection (b) shall not preclude a court from ordering reimbursement of the trust for such expenses and disbursements from another party as provided in subsection (a).

(c) Payment of costs or attorney's fees incurred in any proceeding from the assets of the trust may be made by the trustee without the approval of any person and without court authorization, unless the court orders otherwise as provided in paragraph (c)(2).

(1) If a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee shall provide notice to each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the intention to pay costs or attorney's fees incurred in the proceeding from the trust prior to making payment. The notice shall inform each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the right to apply to the court for an order prohibiting the trustee from paying attorney's fees or costs from trust assets. If a trustee is served with a motion for an order prohibiting the trustee from paying attorney's fees or costs in the proceeding and the trustee pays attorney's fees or costs before an order is entered on the motion, the trustee



and the trustee's attorneys who have been paid attorney's fees or costs from trust assets to defend against the claim or defense are subject to the remedies in paragraphs (c)(2) and (c)(3).

(2) If a claim or defense based upon breach of trust is made against a trustee in a proceeding, a party must obtain a court order to prohibit the trustee from paying costs or attorney's fees from trust assets. To obtain an order prohibiting payment of costs or attorney's fees from trust assets, a party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence submitted by a party. The court in its discretion may defer ruling on the motion, pending discovery to be taken by the parties. If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court shall enter an order prohibiting the payment of further attorney's fees and costs from the assets of the trust and shall order attorney's fees or costs previously paid from assets of the trust in such proceeding to be refunded. An order entered under this paragraph shall not limit a trustee's right to seek an order permitting the payment of some or all of the attorney's fees or costs incurred in the proceeding from trust assets, including any fees required to be refunded, after the claim or defense is finally determined by the court. If a claim or defense based upon a breach of trust is withdrawn, dismissed, or resolved without a determination by the court that the trustee committed a breach of trust after the entry of an order prohibiting

payment of attorney's fees and costs pursuant to this paragraph, the trustee may pay costs or attorney's fees incurred in the proceeding from the assets of the trust without further court authorization.

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

(4) Nothing in subsection (c) limits the power of the court to review fees and costs or the right of any interested persons to challenge fees and costs after payment, after an accounting, or after conclusion of the litigation.

(5) Notice under paragraph (c)(1) is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust.

(d) A provision drafted or caused to be drafted by the trustee modifying the application of this section in a manner favorable to such trustee and potentially detrimental to one or more beneficiaries is invalid with respect to such trustee unless such trustee proves that such provision was fair under the circumstances existing at the time the trust instrument was signed and that its existence and contents were adequately communicated to the settlor.

**SECTION 1005. LIMITATION OF ACTION AGAINST TRUSTEE.**

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

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

(c) If subsection (a) does not apply, a proceeding by a beneficiary against a trustee for breach of trust must be commenced within five years after the first to occur of:

- (1) the removal, resignation, or death of the trustee;
- (2) the termination of the beneficiary's interest in the trust; or
- (3) the termination of the trust.

(d) Subsection (a) and subsection (c) shall not apply to a claim for fraud as to which the period shall be governed by applicable law.

**SECTION 1006. RELIANCE ON TRUST INSTRUMENT.** A trustee who acts in reasonable reliance on the express provisions of the trust is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

**SECTION 1007. EVENT AFFECTING ADMINISTRATION OR**

**DISTRIBUTION.** If the happening of an event, including without limitation marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

**SECTION 1008. EXCULPATION OF TRUSTEE.**

(a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(1) 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 the beneficiaries;  
or

(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(b) 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 its existence and contents were adequately communicated to the settlor.

**SECTION 1009. BENEFICIARY'S CONSENT, RELEASE, OR**

**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:

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

(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.

**SECTION 1010. LIMITATION ON PERSONAL LIABILITY OF TRUSTEE.**

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

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

**SECTION 1011. INTEREST AS GENERAL PARTNER.**

(a) Unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the Uniform Partnership Act or Uniform Limited Partnership Act.

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

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

#### **SECTION 1012. PROTECTION OF PERSON DEALING WITH TRUSTEE.**

(a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

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

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

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

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

#### **SECTION 1013. CERTIFICATION OF TRUST.**

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

- (1) that the trust exists and the date the trust instrument was executed;
- (2) the identity of the settlor;
- (3) the identity and address of the currently acting trustee;
- (4) the powers of the trustee;
- (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- (6) the authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; and
- (7) the manner in which title to trust property may be taken.

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

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

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

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

(g) 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.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for costs, expenses, reasonable attorneys' fees



and damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) 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.

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**Kuczenski, Tracy**

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**From:** Elizabeth A. Heiner [lheiner@boardmanlawfirm.com]

**Sent:** Wednesday, August 17, 2011 8:51 AM

**To:** Kuczenski, Tracy

Tracy –

This if from Victor Schultz regarding the Wisconsin Trust Code:

“It is our intention to repeal and create a new section 701. All of section 701 should go. To the extent something is in 701 and has not been addressed, we would include it in article 12 - miscellaneous. We can discuss what this might include on Thursday.”

Liz

Elizabeth A. Heiner  
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**Kuczenski, Tracy**

**From:** Elizabeth A. Heiner [lheiner@boardmanlawfirm.com]  
**Sent:** Tuesday, August 23, 2011 10:32 AM  
**To:** Kuczenski, Tracy  
**Cc:** 'Christina Olson'; 'victor.schultz@micorp.com'  
**Subject:** Wisconsin Trust Code  
**Attachments:** NINE. Initial Draft from Victor dated 8-23-2011 (A1251575).DOC

Hi Tracy –

I probably covered most of this when we spoke on Monday. However, here is a summary of what was discussed at the last Study Group meeting.

1. August 31 Meeting. Please feel free to bring whoever you think should attend the 8/31 meeting with Adam and Victor. Also, if you think that the current draft study group comments would be helpful to you, let me know. I would be happy to give you what I have...although they are not in final form.
2. Drafting Goal. It is the Committee's intention to repeal and recreate chapter 701. If there are sections in current chapter 701 that are not addressed by the Uniform Trust Code, we will include these sections in the new chapter – most likely as part of Article Twelve. We hope for a completed initial draft within two months (by 11/1). We also hope that this is introduced and passed in the spring.
3. Changes. At the 8/18 meeting, we made the following changes to the Articles that you have in hand:
  - ✓ a. Article One: Delete 102(m). (Endowment care funds established by cemetery authorities;) (There is a disconnect between 102(m) and 409(2).)
  - ✓ b. Article Four, Section 418: Revise 418(d)(12) to the following:
 

" (12) modifying investment provisions, including without limitation those relating to permissible investments, use of investment advisors, directed trust property, or self-dealing transactions"
4. Future Meetings. The future meetings of the Study Group for the Wisconsin Trust Code are as follows:
  - a. September 15 at 2 pm
  - b. Thursday, October 13 at 2
  - c. Wednesday, November 16 at 1:30.

The meetings take place at various offices in Milwaukee with many people joining by phone. I generally listen in at the M&I office downtown. If you have drafting questions, it may make sense to discuss them at the meeting.

5. Article Eight. I will give you Article Eight by the 8/31 meeting. I have the "final" version from the Study Group – but two sections may be altered based upon a meeting on 8/26. I'll hold Article Eight until it becomes final.
6. Rough Article Nine. I attach a rough draft of Article Nine that Victor says you can use as a placeholder. It shows that Article Nine is meant to incorporate ch. 881 with some tweaking to address directed trust accounts.
7. Article Eleven. Article Eleven will be a renumbering of current 701.20-22 (the Principal and Income Act).
8. Article Twelve. Article Twelve will include both the miscellaneous provisions from existing chapter 701 and effective dates for the new law. There is a study group this is supposed to meet to review current chapter 701.

Thanks for your work on this. Good luck!

Liz

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## **Initial Draft of Article 9**

### **Article 9 – Investment Management of Trusts**

#### **Section 901. Application of the Wisconsin Prudent Investor Act.**

Except as otherwise provided in this Article, the investment management of trust property shall be governed by Chapter 881 (the Wisconsin Prudent Investor Act.)

#### **Section 902. Directed Trust Property.**

(a) Unless the trust instrument provides otherwise, a directing party with respect to directed trust property has the power and duty to:

- (1) Direct the excluded trustee on the retention, purchase, sale, exchange, tender, encumbrance, or any other investment transaction of the directed trust property and the investment and reinvestment of principal and income;
- (2) Direct the excluded trustee with respect to the management, control and voting powers, including voting proxies;
- (3) Select and determine reasonable compensation of one or more outside investment advisors, managers, consultants or counselors, which may include the excluded trustee, and delegate investment authority to them pursuant to the investment delegation provisions under section 881.01(10); and
- (4) Determine the frequency and methodology for valuing directed trust property for which there is no readily available market value.

(b) Unless the trust instrument provides otherwise, an excluded trustee with respect to directed trust property has no duty to:

- (1) Prepare or review investment policy statements;
- (2) Perform investment or suitability reviews, inquiries or investigations;
- (3) Determine or verify the value of directed trust property for which there is no readily available market value; or
- (4) Monitor the conduct or investment performance of the directing party.

#### **Section 903. Life insurance contracts owned by trusts.**

Insert language modeled after Florida statute section 736.0902. ]

*prudent investor act →*

**Kuczenski, Tracy**

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**From:** Elizabeth A. Heiner [lheiner@boardmanlawfirm.com]  
**Sent:** Wednesday, August 31, 2011 9:35 AM  
**To:** 'Wiensch, Adam J.'; victor.schultz@micorp.com; Kuczenski, Tracy  
**Subject:** Wisconsin Trust Code: Meeting today at 1:30

Hi Victor, Adam and Tracy-

I just want to confirm that we have a meeting scheduled for 1:30 today at the Boardman Law Firm, 4<sup>th</sup> floor of the US Bank Building. You can park under the building, entering on Webster and we will validate your parking.

Victor – do you have the final changes to Article Eight?

Liz

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ADAM J. WIENSCH

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