



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

Appendix A ... segment IV

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.

Uniform Trust Code	Wisconsin
<p>ARTICLE 10</p> <p>SECTION 1001. REMEDIES FOR BREACH OF TRUST.</p> <p>(a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.</p> <p>(b) To remedy a breach of trust that has occurred or may occur, the court may:</p> <ol style="list-style-type: none"> (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. 	
<p>SECTION 1002. DAMAGES FOR BREACH OF TRUST.</p> <p>(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:</p> <ol style="list-style-type: none"> (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. <p>(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.</p>	
<p>SECTION 1003. DAMAGES IN ABSENCE OF BREACH.</p> <p>(a) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.</p> <p>(b) 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.</p>	
<p>SECTION 1004. ATTORNEY'S FEES AND COSTS. In a judicial proceeding involving the administration of a trust, the court, as justice and</p>	

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<p>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</p>	
<p>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 and informed the beneficiary of the time allowed for commencing a proceeding. (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 judicial 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.</p>	
<p>SECTION 1006. RELIANCE ON TRUST INSTRUMENT. A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance</p>	
<p>SECTION 1007. EVENT AFFECTING ADMINISTRATION OR DISTRIBUTION. If the happening of an event, including 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</p>	
<p>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 is fair under the circumstances and that its enforcement and contents were adequately communicated to the settlor</p>	

<p>Uniform Trust Code</p> <p>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:</p> <p>(1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or</p> <p>(2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.</p>	<p>Wisconsin</p>
<p>SECTION 1010. LIMITATION ON PERSONAL LIABILITY OF TRUSTEE.</p> <p>(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.</p> <p>(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.</p> <p>(c) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.</p>	
<p>[SECTION 1011. INTEREST AS GENERAL PARTNER.</p> <p>(a) Except as otherwise provided in subsection (c) or 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].</p> <p>(b) Except as otherwise provided in subsection (c), 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.</p> <p>(c) The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by the trustee's spouse or one or more of the trustee's descendants, siblings, or parents, or the spouse of any of them.</p> <p>(d) If the trustee of a revocable trust holds an interest as a general partner, the</p>	

<p>Uniform Trust Code</p> <p>settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.]</p> <p>SECTION 1012. PROTECTION OF PERSON DEALING WITH TRUSTEE.</p> <p>(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.</p> <p>(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.</p> <p>(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.</p> <p>(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.</p> <p>(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.</p>	<p>Wisconsin</p> <p>701.19. Powers of trustees</p> <p>(11) Protection of third parties. With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust power and its proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers the trustee purports to exercise. A third person is not bound to assure the proper application of trust property paid or delivered to the trustee.</p>
<p>SECTION 1013. CERTIFICATION OF TRUST.</p> <p>(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:</p> <ol style="list-style-type: none"> (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; (7) the trust's taxpayer identification number; and (8) the manner of taking title to trust property. <p>(b) A certification of trust may be signed or otherwise authenticated by any trustee.</p> <p>(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.</p> <p>(d) A certification of trust need not contain the dispositive terms of a trust.</p> <p>(e) A rec() of a certification of trust may require the trustee to furnish</p>	

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<p>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.</p> <p>(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.</p> <p>(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.</p> <p>(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.</p> <p>(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.</p>	
<p>ARTICLE II</p>	
<p>SECTION 1101. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it</p>	
<p>SECTION 1102. ELECTRONIC RECORDS AND SIGNATURES. The provisions of this [Code] governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act</p>	
<p>SECTION 1103. SEVERABILITY CLAUSE. If any provision of this [Code] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this [Code] which can be given effect without the invalid provision or application, and to this end the provisions of this [Code] are severable</p>	
<p>SECTION 1104. EFFECTIVE DATE. This [Code] takes effect on</p>	
<p>SECTION 1105. REPEALS. The following Acts are repealed:</p> <ul style="list-style-type: none"> (1) Uniform Trustee Powers Act; (2) Uniform Probate Code, Article VII; (3) Uniform Trusts Act (1937); and (4) Uniform Prudent Investor Act 	

<p>Uniform Trust Code</p> <p>SECTION 1106. APPLICATION TO EXISTING RELATIONSHIPS.</p> <p>(a) Except as otherwise provided in this [Code], on [the effective date of this [Code]]:</p> <p>(1) this [Code] applies to all trusts created before; on, or after [its effective date];</p> <p>(2) this [Code] applies to all judicial proceedings concerning trusts commenced on or after [its effective date];</p> <p>(3) this [Code] applies to judicial proceedings concerning trusts commenced before [its effective date] unless the court finds that application of a particular provision of this [Code] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this [Code] does not apply and the superseded law applies;</p> <p>(4) any rule of construction or presumption provided in this [Code] applies to trust instruments executed before [the effective date of the [Code]] unless there is a clear indication of a contrary intent in the terms of the trust; and</p> <p>(5) an act done before [the effective date of the [Code]] is not affected by this [Code].</p> <p>(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before [the effective date of the [Code]], that statute continues to apply to the right even if it has been repealed or superseded</p>	<p>Wisconsin</p>
<p>701.07. Living trusts</p> <p>(1) Validity. A living trust, otherwise valid, shall not be held invalid as an attempted testamentary disposition, a passive trust under s. 701.03, or a trust lacking a sufficient principal because:</p> <p>(a) It contains any or all of the following powers, whether exercisable by the settlor, another person or both:</p> <ol style="list-style-type: none"> 1. To revoke, modify or terminate the trust in whole or in part; 2. To exercise a power or option over property in the trust or over interests made payable to the trust under an employee benefit plan, life insurance policy, or otherwise; 3. To direct, during the lifetime of the settlor or another, the person to whom or on whose behalf the income or principal shall be paid or applied; 4. To control the administration of the trust in whole or in part; 5. To add property or cause additional employee benefits, life insurance, or other interests to be made payable to the trust at any time. <p>(b) The principal consists of a designation of the trustee as a primary or direct, secondary or contingent beneficiary under a will, employee benefit plan, life insurance policy or otherwise; or</p>	<p>ADDITIONAL SECTIONS NOT IN THE UTC</p>

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- (c) The principal consists of assets of nominal value.
- (2) Eligibility to receive assets. A living trust shall be eligible to receive property from any source.
- (3) Creditors' rights. If a settlor retains a power to revoke, modify or terminate which is exercisable in the settlor's favor, except when such power is exercisable only in conjunction with a person having a substantial adverse interest, the trust property to the extent it is subject to such power is also subject to the claim of a creditor of the settlor. This subsection shall not apply to trust property to the extent it is exempt from claims of creditors under other statutes.

701.08. Transfers to living trusts

- (1) Validity and effect. The order of execution of a living trust instrument and a will or other instrument purporting to transfer or appoint property to the trust evidenced by the trust instrument shall be disregarded in determining the validity of the transfer or appointment. No reference in any will to a living trust shall cause assets in such trust to be included in property administered as part of the testator's estate; nor shall it cause the trust or any portion thereof to be treated as a testamentary trust.
- (2) Governing terms. Property transferred or appointed by a will or by a beneficiary designation under an employee benefit plan, life insurance policy or other instrument permitting designation of a beneficiary to a living trust, the terms of which the testator or designator was the sole holder of a power to modify, shall be administered in accordance with the terms of the trust as they may have been modified prior to the testator's or designator's death, even though the will or beneficiary designation was not reexecuted or republished after exercise of the power to modify, unless the will or beneficiary designation expressly provides otherwise. Such property transferred or appointed to a living trust, which is subject to a power of modification requiring action or consent of a person other than the testator or designator, shall be administered in accordance with the terms of the trust instrument as they exist at the execution of the will or beneficiary designation, unless expressly otherwise provided. If the will or beneficiary designation expressly provides that the property shall be administered in accordance with the terms of the trust instrument as they may be modified thereafter, the will or beneficiary designation need not be reexecuted or republished after exercise of the power to modify.
- (3) Disposition when no existing living trust. If at the death of a testator a living trust has been completely revoked, or otherwise terminated, a provision in the testator's will purporting to transfer or appoint property to such trust shall have the following effect, unless the will provides otherwise:

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	<p>(a) If the testator was a necessary party to the revocation or other termination of such trust, the provision in the testator's will shall be invalid;</p> <p>(b) If the testator was not a necessary party to the revocation or other termination of such trust, the provision in the testator's will shall be deemed to create a testamentary trust upon the terms of the living trust instrument at the time the will was executed or as otherwise provided where sub. (2) is applicable.</p> <p>701.07. Living trusts</p> <p>(1) Validity. A living trust, otherwise valid, shall not be held invalid as an attempted testamentary disposition, a passive trust under s. 701.03, or a trust lacking a sufficient principal because:</p> <p>(a) It contains any or all of the following powers, whether exercisable by the settlor, another person or both:</p> <ol style="list-style-type: none"> 1. To revoke, modify or terminate the trust in whole or in part; 2. To exercise a power or option over property in the trust or over interests made payable to the trust under an employee benefit plan, life insurance policy, or otherwise; 3. To direct, during the lifetime of the settlor or another, the person to whom or on whose behalf the income or principal shall be paid or applied; 4. To control the administration of the trust in whole or in part; 5. To add property or cause additional employee benefits, life insurance, or other interests to be made payable to the trust at any time. <p>(b) The principal consists of a designation of the trustee as a primary or direct, secondary or contingent beneficiary under a will, employee benefit plan, life insurance policy or otherwise; or</p> <p>(c) The principal consists of assets of nominal value.</p> <p>(2) Eligibility to receive assets. A living trust shall be eligible to receive property from any source.</p> <p>(3) Creditors' rights. If a settlor retains a power to revoke, modify or terminate which is exercisable in the settlor's favor, except when such power is exercisable only in conjunction with a person having a substantial adverse interest, the trust property to the extent it is subject to such power is also subject to the claim of a creditor of the settlor. This subsection shall not apply to trust property to the extent it is exempt from claims of creditors under other statutes.</p> <p>701.08. Transfers to living trusts</p> <p>(1) Validity and effect. The order of execution of a living trust instrument and a will or other instrument purporting to transfer or appoint property to the trust evidenced by the trust instrument shall be disregarded in determining the validity of the transfer or appointment. No reference in any will to</p>

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trust shall cause assets in such trust to be included in property administered as part of the testator's estate; nor shall it cause the trust or any portion thereof to be treated as a testamentary trust.

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

(3) Disposition when no existing living trust. If at the death of a testator a living trust has been completely revoked, or otherwise terminated, a provision in the testator's will purporting to transfer or appoint property to such trust shall have the following effect, unless the will provides otherwise:

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

701.14. Circuit court procedure in trust proceedings

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

(2) Notice. If notice of a trust proceeding to a person interested in the trust, to the person's representative or guardian ad litem as provided in s. 701.15 or to other persons, is required by law or deemed necessary by the court, the court

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

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

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

Kuczenski, Tracy

From: Elizabeth A. Heiner [lheiner@boardmanlawfirm.com]
Sent: Thursday, September 01, 2011 9:50 AM
To: Kuczenski, Tracy
Cc: 'victor.schultz@micorp.com'; 'Wiensch, Adam J.'
Subject: Wisconsin Trust Code: Article Eight
Attachments: EIGHT, Clean Copy Article 8 from Randy Nelson (A1251142).DOCX

Hi Tracy-

I attached the draft Article Eight. There are still some minor changes to come on sections 808 and 818 (Section 818 is not included in this draft - I don't have it - it is still fluid.)

I spoke with Cale Battles, the government relations coordinator for the Wisconsin State Bar about getting another author for the Wisconsin Trust Code. He said that Risser is the drafting requestor (because Risser is on the Uniform Laws Committee), not necessarily the bill's author. Cale said that normally he does not need to get anyone else involved at this stage - but will follow up if it is advisable to in order for us to have drafting priority.

It was great to meet you.

Liz

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WI UTC ARTICLE 8

SECTION 801. DUTY TO ADMINISTER TRUST.

Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this Chapter.

SECTION 802. DUTY OF LOYALTY.

- (a) A trustee shall administer the trust solely in the interests of the beneficiaries.
- (b) Subject to the rights of persons dealing with or assisting the trustee as provided in Section 1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:
 - (1) the transaction was authorized by the terms of the trust;
 - (2) the transaction was approved by the court;
 - (3) the beneficiary did not commence a judicial proceeding within the time allowed by Section 1005;
 - (4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with Section 1009; or
 - (5) the transaction involves a contract entered into or claim acquired by the trustee before the person became trustee.
- (c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:
 - (1) the trustee's spouse;
 - (2) the trustee's descendants, siblings, parents, or their spouses;
 - (3) an agent or attorney of the trustee; or
 - (4) a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.
- (d) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.
- (e) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of Chapter 881. In addition to its compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment management services, the trustee must at least annually notify the persons

entitled under Section 813 to receive a copy of the trustee's annual report of the rate and method by which that compensation was determined.

(f) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(g) This section does not preclude the following transactions, if fair to the beneficiaries:

- (1) an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;
- (2) payment of reasonable compensation to the trustee;
- (3) a transaction between a trust and another trust, decedent's estate, or [conservatorship] of which the trustee is a fiduciary or in which a beneficiary has an interest;
- (4) a deposit of trust money in a regulated financial-service institution operated by the trustee; or
- (5) an advance by the trustee of money for the protection of the trust.

(h) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

SECTION 803. IMPARTIALITY.

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests and the purposes and terms of the trust.

SECTION 804. PRUDENT ADMINISTRATION.

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

SECTION 805. COSTS OF ADMINISTRATION.

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, the skills of the trustee, and the complexity of the trust administration.

SECTION 806. TRUSTEE'S SKILLS.

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

SECTION 807. DELEGATION BY TRUSTEE.

- (a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:
- (1) selecting an agent;
 - (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
 - (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
- (b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
- (c) A trustee who complies with subsection (a) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.
- (d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State even if the terms of the delegation provide for a different jurisdiction or venue.
- (e) This section shall not apply to the delegation of investment and management functions which are governed by subsection 881.01(10).

SECTION 808. POWERS TO DIRECT.

- (a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.
- (b) If the trust instrument gives a directing party the power to direct or consent to specified actions and the excluded trustee acts in accordance with the direction or consent of a directing party or fails to act due to lack of direction or consent, then the excluded trustee shall not be liable for any loss resulting directly or indirectly from any action taken or omitted with respect to the specified action.
- (c) An excluded trustee shall have no duty to communicate with or warn or apprise any beneficiary or third party concerning instances in which the excluded trustee would or might have exercised the excluded trustee's own discretion in a manner different than the directing party. In addition, an excluded trustee shall have no duty to provide advice to, consult with, monitor or evaluate the propriety of the conduct of the directing party.
- (d) The actions of an excluded trustee pertaining to matters within the scope of a directing party's authority (such as confirming the directing party's directions have been carried out and recording and reporting actions taken at the directing party's direction), shall be deemed to be administrative actions taken by the excluded trustee solely to allow the excluded trustee to perform those duties assigned to the excluded trustee under the trust instrument and such administrative actions shall not be deemed to constitute an undertaking by the excluded trustee to monitor the directing party or otherwise participate in actions within the scope of the directing party's authority.

- (e) The trust instrument may confer upon a trustee or other person a power to direct the modification or termination of the trust.
- (f) A directing party is a fiduciary with respect to its powers to direct or consent to specified actions. A directing party may not exonerate itself from its fiduciaries duties and will be liable for any loss that results from a breach of such duties.
- (g) Any directing party who accepts an appointment under a trust subject to the laws of this State submits to the jurisdiction of the courts of this State with respect to matters involving the trust, regardless of any term to the contrary in any other agreement or the trust instrument.
- (h) To the extent of any inconsistency with the foregoing, a directing party who is acting as a trust protector is subject to the provisions of section 818 and a directing party with respect to investments is subject to the provisions of section 902.
- (i) This section does not protect the excluded trustee from liabilities for acts or omissions taken in bad faith or as a result of willful misconduct.

SECTION 809. CONTROL AND PROTECTION OF TRUST PROPERTY.

A trustee shall take reasonable steps to take control of and protect the trust property.

SECTION 810. RECORDKEEPING AND IDENTIFICATION OF TRUST PROPERTY.

- (a) A trustee shall keep adequate records of the administration of the trust.
- (b) A trustee shall keep trust property separate from the trustee's own property.
- (c) Except as otherwise provided in subsection (d), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.
- (d) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

SECTION 811. ENFORCEMENT AND DEFENSE OF CLAIMS.

A trustee shall take reasonable steps to enforce claims of the trust known to the trustee and to defend claims against the trust known to the trustee.

SECTION 812. COLLECTING TRUST PROPERTY; DUTIES AND LIABILITIES OF SUCCESSOR TRUSTEES.

- (a) A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee or other fiduciary of the trust.
- (b) A successor trustee shall not have a duty to examine the accounts of a former trustee and shall not be liable for the acts and omissions of a former trustee or other fiduciary of the trust.

SECTION 813. DUTY TO INFORM AND REPORT.

(a) A trustee shall keep the distributees or permissible distributees of trust income or principal, and other qualified beneficiaries who so request, reasonably informed about the administration of the trust. Unless unreasonable under the circumstances, a trustee shall promptly respond to a qualified beneficiary's request for information related to the administration of the trust.

(b) A trustee:

- (1) upon request of a qualified beneficiary, shall promptly furnish to the qualified beneficiary either a copy of the portions of the trust instrument relating to the interest of the qualified beneficiary or a copy of the trust instrument, in the discretion of the trustee;
- (2) within a reasonable period of time after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;
- (3) within a reasonable period of time after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the documentation referred to in subsection (b)(1), of the right to request information under subsection (a), and of the right to a trustee's report as provided in subsection (c); and
- (4) shall notify the distributees or permissible distributees of trust income or principal, and other qualified beneficiaries who so request, of any change in the method or rate of the trustee's compensation.

(c) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

(d) A qualified beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A qualified beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

(e) Subsections (b)(2), (b)(3), and (c) do not apply to a trustee who accepts a trusteeship before the effective date of this Chapter, to an irrevocable trust created before the effective date of this Chapter, or to a revocable trust that becomes irrevocable before the effective date of this Chapter.

SECTION 814. DISCRETIONARY POWERS; TAX SAVINGS.

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute", "sole", or "uncontrolled", the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. A court shall not determine that a trustee abused its

discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion.

(b) Subject to subsection (d), and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:

- (1) a person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard; and
- (2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(c) A power whose exercise is limited or prohibited by subsection (b) may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(d) Subsection (b) does not apply to:

- (1) a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or 2523(e) of the Internal Revenue Code of 1986, as in effect on the effective date of this Chapter, or as later amended, was previously allowed;
- (2) any trust during any period that the trust may be revoked or amended by its settlor; or
- (3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code of 1986, as in effect on the effective date of this Chapter, or as later amended.

SECTION 815. GENERAL POWERS OF TRUSTEE.

(a) A trustee, without authorization by the court, may exercise:

- (1) powers conferred by the terms of the trust; and
- (2) except as limited by the terms of the trust:
 - (A) all powers over the trust property which an unmarried competent owner has over individually owned property;
 - (B) any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and
 - (C) any other powers conferred by this Chapter.

(b) The exercise of a power is subject to the fiduciary duties prescribed by this Chapter.

SECTION 816. SPECIFIC POWERS OF TRUSTEE.

Without limiting the authority conferred by Section 815, a trustee may:

- (1) collect trust property and accept or reject additions to the trust property from a settlor or any other person;
- (2) acquire or sell property, for cash or on credit, at public or private sale;
- (3) exchange, partition, or otherwise change the character of trust property;
- (4) deposit trust money in an account in a regulated financial-service institution;
- (5) borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

- (6) with respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;
- (7) with respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:
 - (A) vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;
 - (B) hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;
 - (C) pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and
 - (D) deposit the securities with a depository or other regulated financial-service institution;
- (8) with respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;
- (9) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;
- (10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;
- (11) insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust;
- (12) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;
- (13) with respect to possible liability for violation of environmental law:
 - (A) inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;
 - (B) take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;
 - (C) decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;
 - (D) compromise claims against the trust which may be asserted for an alleged violation of environmental law; and

- (E) pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;
 - (14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;
 - (15) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;
 - (16) exercise elections with respect to federal, state, and local taxes;
 - (17) select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;
 - (18) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;
 - (19) pledge trust property to guarantee loans made by others to the beneficiary;
 - (20) appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;
 - (21) pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:
 - (A) paying it to the beneficiary's conservator or the guardian of the beneficiary's estate;
 - (B) paying it to the beneficiary's custodian under the Uniform Transfers to Minors Act or custodial trustee under the Uniform Custodial Trust Act, and, for that purpose, creating a custodianship or custodial trust;
 - (C) if the trustee does not know of a conservator, guardian of the estate, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary or the guardian of the person of the beneficiary, to be expended on the beneficiary's behalf; or
 - (D) managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;
 - (22) on distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;
 - (23) resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;
 - (24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;
 - (25) sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers;
 - (26) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it;
- and

(27) creating or funding a plan under Section 529 of the Internal Revenue Code of 1986, or other college savings vehicle, for the beneficiary's benefit.

SECTION 817. DISTRIBUTION UPON TERMINATION.

(a) Upon termination or partial termination of a trust, the trustee may send to any beneficiary a proposal for distribution. The right of any beneficiary to whom the proposal is sent to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

(b) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed within a reasonable time to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

- (1) it was induced by improper conduct of the trustee; or
- (2) the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.

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Kuczenski, Tracy

From: victor.schultz@micorp.com
Sent: Monday, December 05, 2011 6:26 PM
To: Kuczenski, Tracy
Cc: Wiensch, Adam J.; Elizabeth A. Heiner
Subject: RE: Wisconsin Trust Code Project

Attachments: Directed trust and article 9 proposal submitted to LRB.doc



Directed trust and
article 9 p...

Hi Tracy - thanks for the update - our next Study Group meeting is December 15 so Liz or I will call you next week to get another status update.

Attached is our proposed language for Article 9 and a revision to section 808 and some other subsections. You can incorporate this into your draft. Our Group continues to review the attached language along with a new section 818 on trust protectors.

(See attached file: Directed trust and article 9 proposal submitted to LRB.doc)

By separate email, we will comment on what you should do with current law Chapter 701.

Victor J. Schultz
Vice President and Senior Counsel
Marshall & Ilsley Trust Company N.A.
111 East Kilbourn Avenue, Suite 200, Milwaukee, WI 53202 Phone (414) 287-7019 / Fax (414) 287-7025 / Toll free 800-342-2265 Visit M&I online at www.miwealth.com M&I Wealth Management, a part of BMO Financial Group

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From: "Kuczenski, Tracy" <Tracy.Kuczenski@legis.wisconsin.gov>
To: "Elizabeth A. Heiner" <lheiner@boardmanlawfirm.com>
Cc: "Wiensch, Adam J." <awiensch@foley.com>, <victor.schultz@micorp.com>
Date: 12/03/2011 07:04 PM
Subject: RE: Wisconsin Trust Code Project

Hi Liz, Adam and Victor -

I am sending this email to update you on my progress to date. I have completed the drafting through Article VIII and hope to complete the remaining Article X by the end of this week. At this point in the drafting process, I am not doing anything with current law Chapter 701, and intend to submit the draft containing the new trust code language to editing without that material; I will work on that material (repeals, renumbering, and cross-reference corrections, etc.) as an insert to be included in the next draft. As of today, the current draft is 98 pages long (there are lots of drafter's notes...). I don't

know how long this document will take to go through editing. The editors are busy with not just my drafts, but with the drafts of the other 19 drafting attorneys in the office, and they must, of course, balance shorter or more urgent requests with drafts such as this one.

I also wanted to bring to your attention that I do not yet have any language for proposed Article (subchapter) IX. Is that an oversight, or is there no Article (subchapter) IX?

Finally, I wanted to apologize that I could not deliver on my promise to provide you with a draft by early November. Not only is this material relatively complicated, but I have remained very busy up through the second week of November; I am finally finding more substantial chunks of time to devote to this draft. Thank you for your patience.

Let me know whether I will be receiving an Article IX.

Thanks,
Tracy

Tracy K. Kuczenski
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From: Elizabeth A. Heiner [mailto:lheiner@boardmanlawfirm.com]
Sent: Friday, September 23, 2011 4:38 PM
To: Kuczenski, Tracy
Cc: 'Wiensch, Adam J.'
Subject: Wisconsin Trust Code Project

Hi Tracy -

This is a preliminary decision on how to handle chapter 701. The committee reviewing this will meet soon to finalize our recommendation - then the recommendation will go to the Wisconsin Study Group Committee on 10/13 (and, hopefully, on to you on 10/14.) This is just to give you a flavor for what we are doing. Let me know if you have any suggestions or questions:

Delete	701.01	Definitions
Delete	701.02	Purpose for which trust may be created
Delete	701.03	Passive trusts abolished
Delete	701.04	Purchase money trusts abolished
Delete	701.05	Title of Trustee
Delete	701.06	Spendthrift provisions
Include in Article Six as Section 605	701.065	Debts of Decedents
Delete	701.07	Living Trusts

701.08 Transfers to living trusts
 Include in Article Six as Section 606 (clean up outmoded language)

701.09 Transfers to living trusts
 Undecided

701.10 Charitable trusts
 Delete

701.105 Private Foundations
 Include in Article Twelve

701.11 Honorary Trusts
 Delete

701.115 Future Interests in Revocable trusts
 Delete

701.12 Revocation, modification and termination
 of trusts with the consent of the settlor
 Delete

701.13 Modification and Termination of trusts
 by court action
 Delete

701.14 Circuit Court procedure in trust
 proceeding

(1) Generally
 Delete 701.14(1)

(2) Notice
 Include 701.14(2) in Article 2 as
 Section 205

(3) Attorney for Person in Military
 Include 701.14(3) in Article 3 as
 Section 306

(4) Venue.
 Delete

701.15 Representation of Others
 Delete

701.16 Testamentary Trustee
 Delete

701.17 Successor and added trustee
 Delete

701.18 Resignation and removal of trustees
 Delete

701.19 Powers of Trustees
 Delete

701.20 Principal and Income
 We anticipate that all but 701.20(31) will be in Article 11.
 701.20(31) is Section 1005
 in Article 10.)

701.21 Income Payments and Accumulations
 Retain in Article 11

701.22 Distributions in kind by trustee
 Include in Article 12 or roll into
 Gardner's savings language.

701.23 Removal of trusts

Delete

701.24 Applicability
Revise and include in Article 12

701.25 Applicability of general transfers at
Death provisions
Include in Article 12

701.26 Disclaimers of nonprobate transfers
Delete - but ask LRB if they want to
retain the cross
reference to
disclaimers.

Liz

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IRS CIRCULAR 230 NOTICE: To ensure our compliance with certain U.S. Treasury Regulations, please be advised that, unless expressly indicated otherwise, if this communication or any attachment to this communication contains advice relating to any Federal tax issue, the advice is not intended or written to be used, and cannot be used, by any person for the purpose of avoiding Federal tax penalties. If any of the advice was written to support the promotion, marketing, or recommendation of any transaction or matter addressed within the meaning of Internal Revenue Service Circular 230, you should seek advice based upon your particular circumstances from an independent tax advisor.

Directed Trust and Article 9 Statute Proposal

Add to section 103 – Definitions

- ✓ “Directed trust property” means all or any portion of the property of a trust that is invested or managed by a directing party and for which the excluded trustee has no investment management responsibility.
- ✓ “Directing party” means any person (other than the settlor) who pursuant to the trust instrument is given a power to direct specified actions of the trustee.
- ✓ “Excluded trustee” means any trustee who pursuant to the trust instrument is excluded from exercising specified powers that are given to a directing party, and who is directed to act in accordance with the exercise of such powers by the directing party.
- ✓ (There will be a separate trust protector proposal drafted as section 818.) “Trust Protector” means any person, other than a settlor or qualified beneficiary, whose appointment is provided for in the trust instrument and who has any of the powers defined in section 818.

10/24

Trustee appointed by a trust agreement

Amend section 105(b)(2)

- ✓ (2) the duty of a trustee or a directing party to act in good faith and in accordance with the terms and purposes of the trust instrument and the interests of the beneficiaries;

Add to section 111 - Nonjudicial Settlement Agreements

- ✓ §111(d)(10) Appointment of a directing party under section 808; *already there...*

Section 808. Powers to Direct.

- ✓ (a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.
- ✓ (b) The trust instrument may appoint a directing party to direct specified actions of the trustee. If the excluded trustee acts in accordance with the direction the directing party or fails to act due to lack of direction, then except for acts or omissions as a result of willful misconduct the excluded trustee shall not be liable for any loss resulting directly or indirectly from any action taken or omitted with respect to the specified action.
- ✓ (c) An excluded trustee shall have no duty to communicate with or warn or apprise any beneficiary or third party concerning instances in which the excluded trustee would or might have exercised the excluded trustee's own discretion in a manner different than the directing

party. In addition, an excluded trustee shall have no duty to provide advice to, consult with, monitor or evaluate the propriety of the conduct of the directing party.

(d) Administrative actions of an excluded trustee pertaining to matters within the scope of a directing party's authority (such as confirming the directing party's directions have been carried out and recording and reporting actions taken at the directing party's direction) shall be deemed to be actions taken by the excluded trustee solely to allow the excluded trustee to perform those duties assigned to the excluded trustee under the trust instrument and shall not be deemed to constitute an undertaking by the excluded trustee to monitor the directing party or otherwise participate in actions within the scope of the directing party's authority.

(e) A directing party is a fiduciary with respect to its powers to direct specified actions. As a fiduciary, the directing party is subject to the same duties and standards that are applicable to a trustee of a trust, except to the extent the governing instrument provides otherwise. A directing party may not exonerate itself from its fiduciaries duties and will be subject to the provisions of article 10 in the event of a breach of its duties.

(f) Any directing party who accepts an appointment under a trust subject to the laws of this State submits to the jurisdiction of the courts of this State with respect to matters involving the trust, regardless of any term to the contrary in any other agreement or the trust instrument.

(g) A directing party with respect to directed trust property is subject to the provisions of section 902. A trust protector is not considered a directing party and is subject to the provisions of section 818.

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 the property of a trust 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 and provide the value of property for which there is no readily available daily 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 daily market value; or
- (4) Monitor the conduct or investment performance of the directing party.

Section 903. Life insurance contracts owned by trusts.

(a) Nonapplication of prudent investor rule.

(1) Notwithstanding the provisions of section 881.01, with respect to any contract for life insurance acquired or retained on the life of a qualified person, a trustee has no duty to:

- (i) Determine whether any contract of life insurance is, or remains a proper investment;
- (ii) Investigate the financial strength of the life insurance company;
- (iii) Determine whether to exercise any policy option available under the contract for life insurance;
- (iv) Diversify any such contract for life insurance or the assets of the trust with respect to the contract for life insurance; or
- (v) Inquire about or investigate the health or financial condition of any insureds.

(2) For purposes of this section, a “qualified person” is a person who is insured or a proposed insured, or the spouse of that person, who has provided the trustee with the funds used to acquire or pay premiums with respect to a policy of insurance on the life of that person or the spouse of that person, or on the lives of that person and the spouse of that person.

(3) The trustee is not liable to the beneficiaries of the trust or any other person for any loss sustained with respect to a contract for life insurance to which this section applies.

(4) Unless otherwise provided in the trust instrument, paragraph (1) applies if:

(i) The trust instrument, by reference to this section, makes this section applicable to contracts for life insurance held by the trust; or

(ii) The trustee gives notice that this section applies to a contract for life insurance held by the trust.

1. The notice must be given to the qualified beneficiaries and must contain a copy or restatement of this statute section.
2. Notice given pursuant to any of the provisions of article 3 of the Wisconsin Trust Code to a person who represents the interests of any of the qualified beneficiaries shall be treated as notice to the person so represented.
3. Notice must be given in the manner provided in Wisconsin Trust Code section 109.
4. If any person notified pursuant to the paragraph delivers a written objection to the application of this section to the trustee within 30 days after the date on which the objector received such notice, paragraph (1) shall not apply until the objection is withdrawn.
5. Any notice sent by United States mail is presumed to have been received 3 days after depositing the notice in the United States mail system with proper postage prepaid, unless any party can prove otherwise.

(5) This section does not apply to any contract for life insurance purchased from any affiliate of the trustee, or with respect to which the trustee or any affiliate of the trustee receives any commission, unless the duty to purchase the life insurance contract has been directed by a directing party or the duty has been delegated to another person in accordance with subsection (b). For purposes of this subsection, an "affiliate" is any person who controls, is controlled by, or is under common control with the trustee.

(6) If paragraph (1) applies, a trustee may not be compensated for performing any of the applicable services described in paragraph (1) applies.

(b) Delegation of investment management responsibility.

(1) A trustee that administers an insurance contract on the life or lives of one or more persons may delegate, without any continuing obligation to review the agent's actions, certain investment functions with respect to any such contract to any one or more of the following persons as investment agents:

- (i) The trust's settlor;
 - (ii) Beneficiaries of the trust, regardless of the beneficiary's interest, whether qualified or not;
 - (iii) The spouse, ancestor or descendant of any person described in subsections (i) or (ii);
 - (iv) Any person or entity nominated by a majority of the qualified beneficiaries; or
 - (v) An investment agent if the trustee exercises reasonable care, judgment, and caution in selecting the investment agent and in establishing the scope and terms of any delegation.
- (2) The delegable investment functions under this subsection include:
- (i) A determination of whether any insurance contract is or remains a proper investment;
 - (ii) The investigation of the financial strength of the life insurance company;
 - (iii) A determination of whether or not to exercise any policy option available under any insurance contracts;
 - (iv) A determination of whether to diversify such contracts relative to one another or to other assets, if any, administered by the fiduciary; or
 - (v) An inquiry about changes in the health or financial condition of the insured or insureds relative to any such contract.
- (3) Until the life insurance contract matures and the policy proceeds are received, a trustee that administers an insurance contract under this subsection is not obligated to diversify the other trust assets, if any, relative to such insurance contract.

COMMENT: Since the Uniform Trust Code was adopted, administration of trusts has continued to evolve, especially with regard to directed trusts. Settlers are increasingly designing "directed trusts" and existing irrevocable trusts are being transferred to new jurisdictions to become modified as directed trusts. Beneficiaries, settlors and trustees desire directed trusts because they want someone other than the trustee to have some or all of the responsibilities and liabilities traditionally associated with the trust function. Directed trusts include provisions that allow for an advisor, co-trustee, special trustee or other fiduciary to direct the trustee on how to exercise a variety of ministerial and discretionary responsibilities, such as investment decisions pertaining to all or a portion of the trust assets, tax reporting, distributions, transfer of tax situs, amendments to the trust instrument and how and when beneficiaries receive notices and information. The trustee continues to possess the trust power and authority that the direction covers, but the trustee executes those powers at the direction of the advisor (referred to as the "directing party" under the Wisconsin Trust Code.)

If the settlor or beneficiaries want to bifurcate specified duties between the trustee and a separate directing party and require the trustee to follow directions without monitoring, second-guessing or interfering with the directing party's decisions, then the direction provisions must be structured so that (1) trustee liability is limited to willful misconduct; (2) the trustee is required to follow the directions; and (3) the trustee must have no duty to monitor the actions of the directing party. Without these provisions, the direction would be tantamount to a delegation and the trustee functions would not be truly bifurcated. A delegation requires the trustee to monitor the conduct of the delegate, and may impose liability on the trustee for the negligent conduct of the delegate or negligent hiring of the delegate. This will prevent the trustee from acting without risk and limit the trustee's ability to charge a reduced fee.

If the settlor wishes for the trustee to provide suggestions or advice or to monitor or oversee the actions of the directing party, then the directing party may be appointed pursuant to a delegation under section 807 or as a trust protector pursuant to section 818.

Except for section 808(a), the Wisconsin Trust Code completely rewrites UTC section 808 and creates section 818 to deal with trust protectors. Article 9 is modified to incorporate special provisions dealing exclusively with trusts where investments are directed. The new provisions include the following.

New definitions are added for "directed trust property", "directing party", "excluded trustee" and "trust protector". Directed trust property describes property that is exclusively managed by an outside investment adviser (who serves as a directing party.) A directing party may be referred to in the trust instrument as an advisor, special trustee, co-trustee or other fiduciary who has the exclusive power to direct specified actions. This does not include the power to consent to or veto the proposed acts of the trustee. The power to consent or veto specified acts is subject to the trust protector provisions. Specified actions may include investment acts, discretionary distribution decisions, decisions on which beneficiaries receive trust accountings and other information about the trust or any other act that the trustee has the power to take. An excluded trustee is generally the designated trustee, but may be referred to as the administrative trustee, directed trustee or trustee without investment or other authority. The excluded trustee is required to follow the directions of the directing party. A trust protector may be identified as such or may be identified as a person with the power to consent to or veto actions of the trustee or to exercise any of the trust protector powers described in the trust instrument or in section 818.

A directing party is a fiduciary and is subject to the mandatory duty under section 105 to act in good faith and in accordance with the terms and purposes of the trust instrument and the interests of the beneficiaries.

A nonjudicial settlement agreement may be used to appoint a directing party pursuant to section 111.

Subsection 808(b) acknowledges that a directing party may be appointed in a trust instrument. An excluded trustee who follows the directions of a directing party or fails to act because of the lack of directions from a directing party is not liable for such actions except in the case of willful misconduct. Wisconsin law defines "willful misconduct" as "_____." The

Study Group does not wish to subject the trustee with the responsibility to independently monitor and second-guess the decisions of the directing party because of the threat of liability for negligent or gross negligent acts.

Subsection 808(c) clarifies that the excluded trustee has no responsibility to monitor the directing party as is required by a co-trustee under subsection 703(g). A duty to monitor or warn may result in potential responsibility, liability and interference with the directed acts. This subsection is similar to Delaware and New Hampshire law and is intended to clearly bifurcate the directed actions and remove them from the excluded trustee's responsibilities.

Subsection 808(d) is also based on Delaware law (and subsequently adopted by New Hampshire) and is intended to exclude administrative or ministerial acts by the excluded trustee as an assumption of duties that are assigned exclusively to the directing party. Administrative or ministerial acts include confirmation that a directed investment trade or discretionary distribution was made and reported on a trust accounting.

Section 808(e) confirms that a directing party is a fiduciary and specifies that the directing party has the same duties and standards that apply to a trustee. The responsibility to act in good and in accordance with the terms and purposes of the trust and the interests of the beneficiaries is a mandatory responsibility under the section 105 of the Wisconsin Trust Code and cannot be exonerated by contract or other means. A directing party that breaches its fiduciary duties is liable in accordance with article 10 of the Wisconsin Trust Code.

Section 808(f) submits a directing party to the jurisdiction of the Wisconsin courts similar to a delegated party under the Wisconsin Prudent Investor Act or a delegated agent under section 807.

Subsection 808(g) clarifies that a directing party and excluded trustee with respect to investments are also subject to the provisions of section 902. A party that is a trust protector is not subject to the provisions of section 808, but rather is subject to the provisions of section 818.

Section 902 deals exclusively with directed investment acts and is based on South Dakota law. Subsection 902(a) specifies the investment powers and duties of a directing party. These powers and duties include not only the power to purchase, retain, manage and sell trust property, but also include the power to vote proxies, determine reasonable compensation of other investment advisors, determine when and how to value directed investment property and to provide the value of property for which there is no readily available daily market value. Subsection 902(b) specifies that the excluded trustee has no duty or responsibility for investment policy statements, investment reviews, valuation of directed investment property or monitoring investment performance or conduct.

Section 903 deals with life insurance contracts and is based on the Florida statutes on life insurance owned by trusts. The intention is to avoid the application of the prudent investor rule to life insurance contracts owned by a trust and to permit the delegation of the management of the life insurance contract to the insured or other family or other qualified party.

Kuczenski, Tracy

From: Elizabeth A. Heiner [lheiner@boardmanlawfirm.com]
Sent: Tuesday, December 06, 2011 4:12 PM
To: Kuczenski, Tracy
Cc: 'Wiensch, Adam J.'; 'victor.schultz@micorp.com'
Subject: Chapter 701
Attachments: Chapter 701 (A1281014).DOCX

Hi Tracy-

I have attached the decisions that the Chapter 701 Committee made regarding chapter 701. There are a few additions that must be resolved:

- a. We have not finalized the decision on the effective dates. Generally, the bill will be effective as of January 1, 2013 (assuming that it is passed in spring of 2012), but there are some provisions that may only apply to trusts written on or after 1/1/2013.
- b. Someone is supposed to propose savings language.
- c. Someone is supposed to propose trust priority of claims language comparable to Wis. Stat. sec. 859.25. I believe it is going to be added to current Wis. Stat. sec. 701.065.

*Not done.
2x
12/11/11*

Will you draft Article 11 by renumbering current 701.20 (the Principal and Income Act)? Please note that 701.20(31) should be deleted as it is in UTC Section 1005.

Thanks!

Liz

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12/6/2011