



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

Appendix A ... segment IX

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.

1 **SECTION 46.** 701.0503 of the statutes is created to read:

2 **701.0503 Article V, Section 503 – Exceptions to spendthrift provision.**

3 **(1) CLAIMS FOR CHILD SUPPORT.** Notwithstanding any provision in the creating
4 instrument and notwithstanding s. 701.0502, upon application of a person having a
5 valid order directing a beneficiary to make payment for support of the beneficiary's
6 child, a court may do any of the following:

 ***NOTE: What is a "creating instrument"?

7 (a) If the beneficiary is entitled to receive income or principal under the trust,
8 order the trustee to satisfy part or all of the claim out of part or all of the payments
9 of income or principal as they are due, presently or in the future.

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

 ***NOTE: This paragraph refers to a "discretionary trust," but up to this point
"discretionary trust" has not been defined. Would it be appropriate to reference s.
701.0504 (1)? Better yet, can we create a definition for "discretionary trust" in s.
701.0103?

14 **(2) CLAIMS FOR PUBLIC SUPPORT.** Notwithstanding any provision in the creating
15 instrument and notwithstanding s. 701.0502, and except as provided in sub. (3), if
16 the settlor is legally obligated to pay for the public support of a beneficiary under s.
17 46.10, 49.345, or 301.12 or the beneficiary is legally obligated to pay for the
18 beneficiary's public support or for support furnished to the beneficiary's spouse or
19 minor child under s. 46.10, 49.345, or 301.12, upon application by the appropriate
20 state department or county official, a court may do any of the following:

 ***NOTE: What is a "creating instrument"?

 ***NOTE: I am confused by that portion of this subsection that reads ". . . or the
beneficiary is legally obligated to pay for the beneficiary's public support . . ." Should the
first occurrence of beneficiary be settlor? If yes, then this language (but not that portion

of the subsection relating to the beneficiary's spouse or minor child) duplicates the preceding clause. If no, I don't understand how a beneficiary can be legally obligated to pay for his or her own support. Please advise.

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

4 (b) 1. Except as provided in subd. 2., in the case of a beneficiary under a
5 discretionary trust, order the trustee to satisfy part or all of the liability out of part
6 or all of any future payments of income or principal which are made pursuant to the
7 exercise of the trustee's discretion in favor of such beneficiary.

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

12 (3) TRUST FOR A DISABLED INDIVIDUAL. Subsection (2) does not apply to any trust
13 for a disabled individual.

14 (4) SUBSEQUENT MODIFICATION OF COURT'S ORDER. Any order entered by a court
15 under sub. (1) or (2) may be modified upon application of an interested person.

****NOTE: I changed "is subject to modification" to "may be modified". Okay?

16 (5) EXEMPT ASSETS. Assets of a trust, to the extent they are exempt from claims
17 of creditors under other statutes, shall not be subject to sub. (1) or (2).

****NOTE: Can the phrase "Assets of a trust, to the extent they are exempt from
claims..." be changed to the simpler, more concise "Assets of a trust exempt from
claims..."?

18 SECTION 47. 701.0504 of the statutes is created to read:

19 **701.0504 Article V, Section 504 – Discretionary trusts; effect of**
20 **standard. (1)** For purposes of this chapter, and except as provided in sub. (3), a
21 beneficiary's interest in a trust that is subject to the trustee's discretion does not

1 constitute an interest in property or an enforceable right even if the discretion is
2 expressed in the form of a standard of distribution or the beneficiary is then serving
3 as sole trustee or cotrustee.

****NOTE: Please confirm that “this chapter,” as used in this subsection, refers to the entirety of Chapter 701.

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

****NOTE: Please confirm that “this chapter,” as used in this subsection, refers to the entirety of Chapter 701.

****NOTE: Does the phrase “distributions from such an interest or right...” refer back to the “interest in property or an enforceable right” described in sub. (1)? If so, because this is a new and separate subsection, the word “such right” doesn’t really work. I need to either use the phrase “interest in property or an enforceable right” again or refer to “the interest or right described in sub. (1).” Your preference? If not, what interest or right is being addressed in this subsection?

9 (3) Subsections (1) and (2) shall not apply if a beneficiary is acting as sole
10 trustee of a trust for his or her benefit and his or her discretion to make distributions
11 to such beneficiary is not limited by an ascertainable standard or the consent of a
12 party holding an adverse interest to the beneficiary.

****NOTE: I’m not sure why the phrase “distributions to such beneficiary” is used here. Can I substitute “distributions to himself or herself” in its place?

13 (4) (a) Except as provided in par. (b), this section does not limit the right of a
14 beneficiary to maintain a judicial proceeding against a trustee for an abuse of
15 discretion or failure to comply with a standard for distribution.

16 (b) The right of a beneficiary described in par. (a) may not be exercised by a
17 creditor for the beneficiary.

****NOTE: Should this read “creditor of the beneficiary” (rather than “creditor for the beneficiary”)?

1 **SECTION 48.** 701.0505 of the statutes is created to read:

2 **701.0505 Article V, Section 505 – Creditor’s claim against settlor. (1)**

3 (a) Whether or not the terms of a trust include a spendthrift provision and except
4 as provided in par. (b), the following rules apply to claims of a settlor’s creditors:

5 1. During the lifetime of the settlor, the property of a revocable trust is subject
6 to claims of the settlor’s creditors.

7 2. With respect to an irrevocable trust that is not a trust for a disabled
8 individual, upon application of a judgment creditor of the settlor, the court may, if the
9 terms of the trust instrument require or authorize the trustee to make payments of
10 income or principal to or for the settlor, order the trustee to satisfy part or all of the
11 judgment out of part or all of the payments of income or principal as they are due,
12 presently or in the future, or which are payable in the trustee’s discretion. If a trust
13 has more than one settlor, the amount the judgment creditor of a particular settlor
14 may reach may not exceed the settlor’s interest in the portion of the trust attributable
15 to that settlor’s contribution.

 ***NOTE: This subdivision refers only to an application of a “judgment creditor of
the settlor” (not any creditor). Is that your intent?

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

- 1 (b) The rules under par. (a) do not apply to assets of a trust exempt from claims
2 of creditors under other statutes.

 ****NOTE: The language proposed for this section read: “Assets of a trust, to the extent they are exempt from claims of creditors under other statutes, shall not be subject to this [sub. (1)].” Because sub. (1) establishes certain rules, I have revised this paragraph (b) to provide that the rules outlined in par. (a) do not apply to the identified assets; please review this paragraph carefully to ensure that this transposition works.

 ****NOTE: Are there certain identifiable statutes that make assets of a trust exempt from claims of creditors that should be cross-referenced here?

- 3 (2) For purposes of this section, all of the following apply:

 ****NOTE: I’m not sure what “for purposes of this section” means with respect to the listed items that follow. That is, the list of scenarios doesn’t really seem to have any connection to the rights of a creditor and, it would seem, could occur regardless of whether a creditor has a claim against a trust. Am I missing something?

- 4 (a) During the period the power may be exercised, the holder of a power of
5 withdrawal is treated in the same manner as the settlor of a revocable trust to the
6 extent of the property subject to the power.

 ****NOTE: What does “treated in the same manner” mean here? Would it be appropriate to say “the holder of a power of withdrawal has the same power as the settlor of a revocable trust to the extent of the property subject to the power”? For that matter, what does “to the extent of the property” mean? And do I need to specify what it is that limits the time period during which a power of withdrawal may be exercised?

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

- 9 1. A power described under par. (c).
10 2. The beneficiary’s right to withdraw part of the trust property, provided the
11 value of the property affected by the lapse, waiver, or release in any year does not
12 exceed the greater of the following:

 ****NOTE: I replaced “to the extent that” with “provided”. Okay?

- 13 a. The amount referenced in section 2041 (b) (2) or 2514 (e) of the Internal
14 Revenue Code.

 ****NOTE: I eliminated “of 1986,” which had followed “Internal Revenue Code,” from this s. 701.0505 (2) (b) 2. a., and also from subd. 2. b. and s. 701.0816 (27). “Internal Revenue Code” is defined under s. 701.0103 (14) to be the Internal Revenue Code of 1986, as amended. Elsewhere in the bill, Internal Revenue Code is used without reference to

the year. If “Internal Revenue Code of 1986” and not “Internal Revenue Code” is the term used in this section, a reviewing court could determine that the legislature meant to refer specifically to that particular provision of the Internal Revenue Code as it appeared in 1986, and not as it appears after subsequent amendments. Let me know if you have any questions or if I have acted in error.

1 b. The amount referenced in section 2503 (b) of the Internal Revenue Code for
2 each individual other than the beneficiary who makes a transfer to the trust or who
3 is deemed to make a transfer to the trust pursuant to an election to split gifts under
4 section 2513 (a) of the Internal Revenue Code.

5 (c) A beneficiary of a trust is not a settlor, has not made a voluntary or
6 involuntary transfer of the beneficiary’s interest in the trust, or does not have the
7 power to make a voluntary or involuntary transfer of the beneficiary’s interest in the
8 trust solely because the beneficiary holds, exercises, or allows in any capacity, any
9 of the following:

 ***NOTE: Should the occurrence of the word “or” that precedes “does not have the
power. . .” be replaced with “and”?

10 1. A presently exercisable power to consume, invade, appropriate, or distribute
11 property to or for the benefit of the beneficiary if the power is any of the following:

12 a. Exercisable only with the consent of another person holding an interest
13 adverse to the beneficiary’s interest.

14 b. Limited by an ascertainable standard of the beneficiary.

15 2. A presently exercisable power to appoint any property of the trust to or for
16 the benefit of a person other than the beneficiary, a creditor of the beneficiary, the
17 beneficiary’s estate, or a creditor of the beneficiary’s estate.

18 3. A testamentary power of appointment.

19 4. A presently exercisable right described in sub. (2) (b).

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

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

3 SECTION 49. 701.0506 of the statutes is created to read:

4 **701.0506 Article V, Section 506 – Overdue distribution.** (1) In this
5 section, “mandatory distribution” means a distribution of income or principal which
6 the trustee is required to make to a beneficiary under the terms of the trust, including
7 a distribution upon termination of the trust. “Mandatory distribution” does not
8 include a distribution subject to the exercise of the trustee’s discretion even if any of
9 the following apply:

10 (a) The discretion is expressed in the form of a standard of distribution.

11 (b) The terms of the trust authorizing a distribution couple language of
12 discretion with language of direction.

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

18 SECTION 50. 701.0507 of the statutes is created to read:

19 **701.0507 Article V, Section 507 – Personal obligations of trustee.** Trust
20 property is not subject to personal obligations of the trustee, even if the trustee
21 becomes insolvent or bankrupt.

***NOTE: What if the trustee is also the beneficiary (as under s. 701.0504 (3))?

22 SECTION 51. Subchapter VI (title) of chapter 701 [precedes 701.0601] of the
23 statutes is created to read:

24 **CHAPTER 701**

1 SUBCHAPTER VI

2 REVOCABLE TRUSTS

3 SECTION 52. 701.0601 of the statutes is created to read:

4 **701.0601 Article VI, Section 601 – Capacity of settlor of revocable trust.**5 The capacity required to create, amend, revoke, or add property to a revocable trust,
6 or to direct the actions of the trustee of a revocable trust, is the same as that required
7 to make a will.

8 SECTION 53. 701.0602 of the statutes is created to read:

9 **701.0602 Article VI, Section 602 – Revocation or amendment of**
10 **revocable trust. (1)** Unless the terms of a trust expressly provide that the trust
11 is irrevocable, the settlor may revoke or amend the trust. This subsection does not
12 apply to a trust created under an instrument executed before the effective date of this
13 subsection [LRB inserts date].14 (2) If a revocable trust is created or funded by more than one settlor, all of the
15 following apply:

****NOTE: Is the verb, “fund,” the best way to refer to placing assets in a trust?

16 (a) To the extent the trust consists of marital or community property, the trust
17 may be revoked by either spouse acting alone but may be amended only by joint
18 action of both spouses.19 (b) To the extent the trust consists of property other than marital or community
20 property, each settlor may revoke or amend the trust with regard to the portion of
21 the trust property attributable to that settlor’s contribution.22 (c) Upon the revocation or amendment of the trust by fewer than all of the
23 settlors, the trustee shall promptly notify the other settlors of the revocation or
24 amendment.

1 **(3)** A settlor may revoke or amend a revocable trust by any of the following
2 means:

3 (a) By substantial compliance with a method provided in the terms of the trust.

4 (b) If the terms of the trust do not provide a method, by any of the following
5 means:

6 1. A later will or codicil that expressly refers to the trust or specifically devises
7 property that would otherwise have passed according to the terms of the trust.

8 2. Any other method manifesting clear and convincing evidence of the settlor's
9 intent.

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

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

****NOTE: What are a settlor's powers of distribution?

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

20 **(7)** A trustee who does not know that a trust has been revoked or amended is
21 not liable for distributions made and other actions taken on the assumption that the
22 trust had not been amended or revoked, or for distributions made pursuant to sub.

23 (5).

24 **SECTION 54.** 701.0603 of the statutes is created to read:

1 **701.0603 Article VI, Section 603 – Settlor’s powers; powers of**
2 **withdrawal. (1)** While a trust is revocable, rights of the beneficiaries are subject
3 to the control of, and the duties of the trustee are owed exclusively to, the settlor.

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

6 **(3)** During the period in which a power of withdrawal may be exercised, the
7 holder of the power has the rights of a settlor of a revocable trust under this section
8 to the extent of the property subject to the power.

9 **SECTION 55.** 701.0604 of the statutes is created to read:

10 **701.0604 Article VI, Section 604 – Limitation on action contesting**
11 **validity of revocable trust; distribution of trust property. (1)** A person must
12 commence a judicial proceeding to contest the validity of a trust that was revocable
13 immediately before the settlor’s death within the earlier of the following:

14 (a) One year after the settlor’s death.

15 (b) Four months after the trustee sent the person a copy of the trust instrument
16 and a notice informing the person of the trust’s existence, of the trustee’s name and
17 address, and of the time allowed for commencing a proceeding.

18 **(2)** Upon the death of the settlor of a trust that was revocable immediately
19 before the settlor’s death, the trustee may proceed to distribute the trust property
20 in accordance with the terms of the trust. The trustee is not subject to liability for
21 doing so unless one of the following applies:

22 (a) The trustee knows of a pending judicial proceeding contesting the validity
23 of the trust.

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

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

****NOTE: Does the phrase “determined to have been invalid” refer to the trust or
the beneficiary? If the latter, I’m not sure this makes sense. That is, I can understand
how a particular distribution to a particular beneficiary could be invalid, but I’m not sure
how a beneficiary can be “invalid”. Please advise.

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

****NOTE: If there is no requirement to give notice, how does a beneficiary know that
he or she needs to act within the time period provided under sub. (1)? Perhaps notice is
required elsewhere that I have forgotten?

8 SECTION 56. Subchapter VII (title) of chapter 701 [precedes 701.0701] of the
9 statutes is created to read:

10 CHAPTER 701

11 SUBCHAPTER VII

12 OFFICE OF TRUSTEE

13 SECTION 57. 701.0701 of the statutes is created to read:

14 **701.0701 Article VII, Section 701 – Accepting or declining trusteeship.**

15 (1) Except as provided in sub. (3), a person designated as trustee accepts the
16 trusteeship by doing any of the following:

17 (a) Substantially complying with a method of acceptance provided in the terms
18 of the trust.

19 (b) If the terms of the trust do not provide a method or the method provided in
20 the terms is not expressly made exclusive, by accepting delivery of the trust property,

1 exercising powers or performing duties as trustee, or otherwise indicating
2 acceptance of the trusteeship.

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

****NOTE: What is a reasonable time? Who decides?

7 (3) A person designated as trustee, without accepting the trusteeship, may do
8 any of the following:

9 (a) Act to preserve the trust property if, within a reasonable time after acting,
10 the person sends a declination of the trusteeship in writing to the settlor or, if the
11 settlor is dead or lacks capacity, to the designated cotrustee, or, if none, to the
12 successor trustee, or, if none, to a distributee or a permissible distributee of the trust.

****NOTE: I added "of the trust" following "distributee or a permissible distributee."
Okay?

13 (b) Inspect or investigate trust property to determine potential liability under
14 environmental or other law or for any other purpose.

15 **SECTION 58.** 701.0702 of the statutes is created to read:

16 **701.0702 Article VII, Section 702 – Trustee's bond.** (1) A trustee shall give
17 bond to secure performance of the trustee's duties only if the court finds that a bond
18 is needed to protect the interests of the beneficiaries or is required by the terms of
19 the trust and the court has not dispensed with the requirement.

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

22 (3) No bond shall be required of a trust company bank, state bank, or national
23 banking association which is authorized to exercise trust powers and which has

1 complied with s. 220.09 or 223.02 nor shall a bond be required of a religious,
2 charitable, or educational corporation or society.

****NOTE: Section 220.09 refers to a “national bank”, not a national banking association. Is there a difference between these two entities? If not, I think the draft should use the term “national bank” to be consistent with s. 220.09. If there is a difference between these two entities, perhaps there is another more appropriate section to refer to?

3 SECTION 59. 701.0703 of the statutes is created to read:

4 701.0703 Article VII, Section 703 – Cotrustees. (1) Cotrustees shall act
5 by majority decision.

****NOTE: What if there are only two cotrustees?

6 (2) If a vacancy occurs in a cotrusteeship as provided under s. 701.0704, the
7 remaining cotrustees may act for the trust.

****NOTE: This subsection assumes that there will be multiple cotrustees. Will that always be the case? Also, this subsection refers to all remaining cotrustees, but sub. (4) refers to “a majority of the remaining cotrustees.” Is there a reason for this difference?

****NOTE: I added a cross-reference to s. 701.0704, dealing with vacancy. Okay?

8 (3) A cotrustee must participate in the performance of a trustee’s function
9 unless the cotrustee is unavailable to perform the function because of absence,
10 illness, disqualification under other law, or other temporary incapacity or the
11 cotrustee has properly delegated the performance of the function to another trustee.

12 (4) If a cotrustee is unavailable to perform duties because of absence, illness,
13 disqualification under other law, or other temporary incapacity, and prompt action
14 is necessary to achieve the purposes of the trust or to avoid injury to the trust
15 property, the remaining cotrustee or a majority of the remaining cotrustees may act
16 for the trust.

****NOTE: Why would a majority of the remaining trustees be sufficient to act for the trust under this subsection when sub. (3) requires the participation of a (each) cotrustee?

1 (5) A trustee may delegate to a cotrustee a function unless the delegation is
2 expressly prohibited by the trust terms. Unless a delegation is irrevocable, a trustee
3 may revoke a delegation previously made.

 ****NOTE: Why does this subsection refer to the power of a “trustee” to delegate,
rather than of a “cotrustee”?

 ****NOTE: Because the last sentence of this subsection refers to “a delegation
previously made,” I changed the tense of the irrevocable delegation from “was
irrevocable” to “is irrevocable.” Okay?

4 (6) Except as provided in sub. (7), a trustee who does not join in an action of
5 another trustee is not liable for the action.

 ****NOTE: Why does this subsection refer to a “trustee” rather than a “cotrustee”?

6 (7) Each trustee shall exercise reasonable care to do all of the following:

 ****NOTE: Why does this subsection refer to a “trustee” rather than a “cotrustee”?

7 (a) Prevent a cotrustee from committing a material breach of trust.

8 (b) Compel a cotrustee to redress a material breach of trust.

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

 ****NOTE: Why does this subsection refer to a “trustee” rather than a “cotrustee”?

12 **SECTION 60.** 701.0704 of the statutes is created to read:

13 **701.0704 Article VII, Section 704 – Vacancy in trusteeship;**
14 **appointment of successor. (1)** A vacancy in a trusteeship exists if any of the
15 following occurs:

16 (a) A person designated as trustee declines the trusteeship.

17 (b) A person designated as trustee cannot be identified or does not exist.

18 (c) A trustee resigns.

19 (d) A trustee is disqualified or removed.

20 (e) A trustee dies.

1 (f) A guardian or conservator is appointed for an individual serving as trustee.

2 (2) If one or more cotrustees remain in office, a vacancy in a trusteeship need
3 not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining
4 trustee.

****NOTE: What if the trust instrument requires a vacancy to be filled?

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

7 (a) By a person designated in the terms of the trust to act as successor trustee.

8 (b) By a person appointed by unanimous agreement of the qualified
9 beneficiaries, other than a person who is a disabled individual and a beneficiary of
10 a trust for a disabled individual or the spouse of the disabled individual.

****NOTE: This paragraph originally read “beneficiaries other than a disabled individual who is a beneficiary of a trust for a disabled individual or his or her spouse.” It was not clear whether “his or her spouse” referred to the spouse of the disabled individual or back to the original “person appointed by unanimous agreement of the qualified beneficiaries.” I modified the structure of this paragraph to make connections between the terms beneficiary, disabled individual, and spouse. Please review the paragraph carefully and confirm both that I interpreted the provision correctly and that it accomplishes your intent.

11 (c) By a person appointed by the court.

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

****NOTE: The term “special fiduciary” is used in several places in the bill, and in each place the powers seem to be a bit different. Is this a term of art? Or should this term or the fiduciary’s powers or limitations be defined?

15 SECTION 61. 701.0705 of the statutes is created to read:

16 701.0705 Article VII, Section 705 – Resignation of trustee. (1) A trustee
17 may resign in any of the following manners:

1 (a) Upon at least 30 days' notice to the qualified beneficiaries, the settlor, if
2 living, and all cotrustees.

3 (b) With the approval of the court.

****NOTE: Are these the only circumstances upon which a trustee may resign? If
so, is it okay to say "a trustee may resign only.."?

4 (2) In approving a resignation, the court may issue orders and impose
5 conditions reasonably necessary for the protection of the trust property.

6 (3) Any liability of a resigning trustee or of any sureties on the trustee's bond
7 for acts or omissions of the trustee is not discharged or affected by the trustee's
8 resignation.

9 SECTION 62. 701.0706 of the statutes is created to read:

10 **701.0706 Article VII, Section 706 – Removal of trustee.** (1) The settlor,
11 a cotrustee, or a qualified beneficiary may request the court to remove a trustee, or
12 a trustee may be removed by the court on its own initiative.

13 (2) The court may remove a trustee if any of the following apply:

14 (a) The trustee has committed a material breach of trust.

15 (b) A lack of cooperation among cotrustees substantially impairs the
16 administration of the trust.

17 (c) The court determines that removal of the trustee best serves the interests
18 of the beneficiaries because of unfitness, unwillingness, or persistent failure of the
19 trustee to administer the trust effectively.

****NOTE: I inverted this paragraph. Okay?

20 (d) There has been a substantial change of circumstances or removal is
21 requested by all of the qualified beneficiaries, the court finds that removal of the
22 trustee best serves the interests of all of the beneficiaries and is not inconsistent with

1 a material purpose of the trust, and a suitable cotrustee or successor trustee is
2 available.

3 (3) Pending a final decision on a request to remove a trustee, or in lieu of or in
4 addition to removing a trustee, the court may order such appropriate relief under s.
5 701.1001 (2) as may be necessary to protect the trust property or the interests of the
6 beneficiaries.

7 SECTION 63. 701.0707 of the statutes is created to read:

8 **701.0707 Article VII, Section 707 – Delivery of property by former**
9 **trustee.** (1) Unless a cotrustee remains in office or the court otherwise orders, and
10 until the trust property is delivered to a successor trustee or other person entitled
11 to it, a trustee who has resigned or been removed has the duties of a trustee and the
12 powers necessary to protect the trust property.

13 (2) A trustee who has resigned or been removed shall proceed expeditiously to
14 deliver the trust property within the trustee's possession to the cotrustee, successor
15 trustee, or other person entitled to it.

16 SECTION 64. 701.0708 of the statutes is created to read:

17 **701.0708 Article VII, Section 708 – Compensation of trustee.** (1) If the
18 terms of a trust do not specify the trustee's compensation, a trustee is entitled to
19 compensation that is reasonable under the circumstances.

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

24 (a) The duties of the trustee are substantially different from those
25 contemplated when the trust was created.

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

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

****NOTE: This subsection provides that the trustee “shall be allowed reasonable compensation for the other services. . .”. It is not clear whether the word shall is used in a mandatory, rather than a discretionary, sense. That is, is it your intent that a trustee who provides additional services is entitled to be paid an additional amount? If so, I think the use of the word “allowed” (rather than a word like entitled) weakens such an argument.

6 SECTION 65. 701.0709 of the statutes is created to read:

7 **701.0709 Article VII, Section 709 – Reimbursement of expenses. (1) A**
8 trustee is entitled to be reimbursed out of the trust property, with interest as
9 appropriate, for all of the following:

****NOTE: Is there a reason that this subsection does not say “a trustee shall be reimbursed out of the trust property. . .”? I think “shall be reimbursed” is clearer than “is entitled to be,” in part because “is entitled to be” implies that there is another alternative for reimbursing a trustee. Is that the case?

10 (a) Expenses that were properly incurred in the administration of the trust.

11 (b) To the extent necessary to prevent unjust enrichment of the trust, expenses
12 that were not properly incurred in the administration of the trust.

****NOTE: If the expenses were not properly incurred, why should they be reimbursed? Or was the reason that they were not properly incurred the prevention of unjust enrichment of the trust? If the latter, I would suggest restructuring the sentence so that that meaning is clear.

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

15 SECTION 66. Subchapter VIII (title)of chapter 701 [precedes 701.0801] of the
16 statutes is created to read:

17 **CHAPTER 701**

1

SUBCHAPTER VIII

****NOTE: No title was provided for this subchapter VIII. If other subchapters have titles, each subchapter must have a title.

2

SECTION 67. 701.0801 of the statutes is created to read:

3

701.0801 Article VIII, Section 801 – Duty to administer trust. Upon

4

acceptance of a trusteeship, the trustee shall administer the trust in good faith, in

5

accordance with its terms and purposes and the interests of the beneficiaries, and

6

in accordance with this chapter.

7

SECTION 68. 701.0802 of the statutes is created to read:

8

701.0802 Article VIII, Section 802 – Duty of loyalty.

9

(1) A trustee shall administer the trust solely in the interests of the beneficiaries.

10

11

(2) Subject to the rights of persons dealing with or assisting the trustee as

12

provided in s. 701.1012, a sale, encumbrance, or other transaction that involves the

13

investment or management of trust property and is entered into by the trustee for

14

the trustee's own personal account or that is otherwise affected by a conflict between

15

the trustee's fiduciary and personal interests is voidable by a beneficiary affected by

16

the transaction unless any of the following apply:

17

(a) The transaction was authorized by the terms of the trust.

18

(b) The transaction was approved by the court.

19

(c) The beneficiary did not commence a judicial proceeding within the time

20

allowed by s. 701.1005.

21

(d) The beneficiary consented to the trustee's conduct, ratified the transaction,

22

or released the trustee in compliance with s. 701.1009.

1 (e) The transaction involves a contract entered into or claim acquired by the
2 trustee before the person became trustee.

3 **(3)** A sale, encumbrance, or other transaction involving the investment or
4 management of trust property is presumed to be affected by a conflict between
5 personal and fiduciary interests if it is entered into by the trustee with any of the
6 following:

7 (a) The trustee's spouse.

8 (b) The trustee's descendants, siblings, parents, or their spouses.

9 (c) An agent or attorney of the trustee.

10 (d) A corporation or other person or enterprise in which the trustee, or a person
11 that owns a significant interest in the trustee, has an interest that might affect the
12 trustee's best judgment.

13 **(4)** A transaction not concerning trust property in which the trustee engages
14 in the trustee's individual capacity involves a conflict between personal and fiduciary
15 interests if the transaction concerns an opportunity properly belonging to the trust.

16 **(5)** An investment by a trustee in securities of an investment company or
17 investment trust to which the trustee, or its affiliate, provides services in a capacity
18 other than as trustee is not presumed to be affected by a conflict between personal
19 and fiduciary interests if the investment otherwise complies with the prudent
20 investor rule of s. 881.01. In addition to receiving compensation for acting as trustee,
21 the trustee may be compensated by the investment company or investment trust for
22 providing those services out of fees charged to the trust. If the trustee receives
23 compensation from the investment company or investment trust for providing
24 investment advisory or investment management services, the trustee must at least
25 annually notify the persons entitled under s. 701.0813 to receive a copy of the

1 trustee's annual report of the rate and method by which that compensation was
2 determined.

****NOTE: Just to be clear, does the second sentence in this subsection (that begins with "In addition. . .") permit the trustee to be paid twice from the trust: first for acting as trustee and second for acting in some capacity for the investment company or investment trust? Must the services provided for the investment company also be services provided for the trust? If so, I don't think that is clear.

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

****NOTE: Is the word, "enterprise" a term of art or does it have a recognized meaning? Would it, for example, encompass a partnership or association that may not be a corporation?

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

10 (a) An agreement between a trustee and a beneficiary relating to the
11 appointment or compensation of the trustee.

12 (b) Payment of reasonable compensation to the trustee.

13 (c) A transaction between a trust and another trust, a decedent's estate, or a
14 conservatorship of which the trustee is a fiduciary or in which a beneficiary has an
15 interest.

****NOTE: The drafting instructions had the word "conservatorship" in brackets (which I eliminated in this draft). Was the use of brackets intentional?

16 (d) A deposit of trust money in a regulated financial-service institution
17 operated by the trustee.

****NOTE: What is a "regulated financial-service institution"? Should it be defined?

18 (e) An advance by the trustee of money for the protection of the trust.

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

 ****NOTE: The term "special fiduciary" is used in several places in the bill, and in
each place the powers seem to be a bit different. Is this a term of art? Or should this term
or the fiduciary's powers or limitations be defined?

4 **SECTION 69.** 701.0803 of the statutes is created to read:

5 **701.0803 Article VIII, Section 803 – Impartiality.** If a trust has 2 or more
6 beneficiaries, the trustee shall act impartially in investing, managing, and
7 distributing the trust property, giving due regard to the beneficiaries' respective
8 interests and the purposes and terms of the trust.

9 **SECTION 70.** 701.0804 of the statutes is created to read:

10 **701.0804 Article VIII, Section 804 – Prudent administration.** A trustee
11 shall administer the trust as a prudent person would, by considering the purposes,
12 terms, distributional requirements, and other circumstances of the trust. In
13 satisfying this standard, the trustee shall exercise reasonable care, skill, and
14 caution.

15 **SECTION 71.** 701.0805 of the statutes is created to read:

16 **701.0805 Article VIII, Section 805 – Costs of administration.** In
17 administering a trust, the trustee may incur only costs that are reasonable in
18 relation to the trust property, the purposes of the trust, the skills of the trustee, and
19 the complexity of the trust administration.

20 **SECTION 72.** 701.0806 of the statutes is created to read:

21 **701.0806 Article VIII, Section 806 – Trustee's skills.** A trustee who has
22 special skills or expertise, or is named trustee in reliance upon the trustee's

1 representation that the trustee has special skills or expertise, shall use those special
2 skills or expertise.

3 SECTION 73. 701.0807 of the statutes is created to read:

4 **701.0807 Article VIII, Section 807 – Delegation by trustee. (1)** A trustee
5 may delegate duties and powers that a prudent trustee of comparable skills could
6 properly delegate under the circumstances. The trustee shall exercise reasonable
7 care, skill, and caution in each of the following:

****NOTE: Is a “prudent trustee” different than a “prudent person”? That is, are
separate standards applied? If not, would it be okay to say “prudent person”?

8 (a) Selecting an agent.

9 (b) Establishing the scope and terms of the delegation, consistent with the
10 purposes and terms of the trust.

11 (c) Periodically reviewing the agent’s actions in order to monitor the agent’s
12 performance and compliance with the terms of the delegation.

13 (2) In performing a delegated function, an agent owes a duty to the trust to
14 exercise reasonable care to comply with the terms of the delegation.

15 (3) A trustee who complies with sub. (1) is not liable to the beneficiaries or to
16 the trust for an action of the agent to whom the function was delegated.

17 (4) By accepting a delegation of powers or duties from the trustee of a trust that
18 is subject to the law of this state, an agent submits to the jurisdiction of the courts
19 of this state even if the terms of the delegation provide for a different jurisdiction or
20 venue.

21 (5) This section shall not apply to the delegation of investment and
22 management functions which are governed by s. 881.01 (10).

****NOTE: This subsection could be read two different ways: 1) s. 701.0807 does not
apply to any delegation of investment and management functions; that delegation is
governed by s. 881.01 (10); 2) s. 701.0807 applies to the delegation of investment and

management functions, but not those that are that are governed by s. 881.01 (10). I recommend this sentence be modified to clarify the proper meaning.

1 **SECTION 74.** 701.0808 of the statutes is created to read:

2 **701.0808 Article VIII, Section 808 – Powers to direct.** (1) While a trust
3 is revocable, the trustee may follow a direction of the settlor that is contrary to the
4 terms of the trust.

5 (2) The trust instrument may appoint a directing party to direct specified
6 actions of the trustee. If the excluded trustee acts in accordance with the direction
7 of the directing party or fails to act due to lack of direction, then, except for acts or
8 omissions as a result of willful misconduct, the excluded trustee shall not be liable
9 for any loss resulting directly or indirectly from any action taken or omitted with
10 respect to the specified action.

11 (3) An excluded trustee shall have no duty to communicate with or warn or
12 apprise any beneficiary or 3rd party concerning instances in which the excluded
13 trustee would or might have exercised the excluded trustee's own discretion in a
14 manner different than the directing party. In addition, an excluded trustee shall
15 have no duty to provide advice to, consult with, monitor, or evaluate the propriety of
16 the conduct of the directing party.

****NOTE: Can the words "shall have no" be replaced with "has no"?

17 (4) Administrative actions of an excluded trustee pertaining to matters within
18 the scope of a directing party's authority, such as confirming the directing party's
19 directions have been carried out and recording and reporting actions taken at the
20 directing party's direction, shall be deemed to be actions taken by the excluded
21 trustee solely to allow the excluded trustee to perform those duties assigned to the
22 excluded trustee under the trust instrument and shall not be deemed to constitute

1 an undertaking by the excluded trustee to monitor the directing party or otherwise
2 participate in actions within the scope of the directing party's authority.

****NOTE: Can "shall not be deemed to constitute" be replaced with "shall not constitute"?

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

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

13 (7) A directing party with respect to directed trust property is subject to the
14 provisions of s. 701.0902. A trust protector is not considered a directing party and
15 is subject to the provisions of s. 701.0818.

****NOTE: What does "with respect to directed trust property" mean in the first sentence of this subsection? Would it be acceptable to replace this phrase with "having responsibility over" or "having power over" or "having control of" or something similar?

****NOTE: The most recent e-mail from Victor Schultz, dated 12/5/2012, eliminated subsections (5) and (9). Sub. (5) read: "The trust instrument may confer upon a trustee or other person a power to direct the modification or termination of the trust." Sub. (9) read: "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." Okay?

****NOTE: This section cross-references s. 701.0818. However, the drafting materials did not include any material for a section 818. Is this a numbering error? Or is the material for section 818 not yet completed?

16 SECTION 75. 701.0809 of the statutes is created to read:

1 **701.0809 Article VIII, Section 809 – Control and protection of trust**
2 **property.** A trustee shall take reasonable steps to take control of and protect the
3 trust property.

4 **SECTION 76.** 701.0810 of the statutes is created to read:

5 **701.0810 Article VIII, Section 810 – Record-keeping and identification**
6 **of trust property. (1)** A trustee shall keep adequate records of the administration
7 of the trust.

8 **(2)** A trustee shall keep trust property separate from the trustee's own
9 property.

10 **(3)** Except as otherwise provided in sub. (4), a trustee shall cause the trust
11 property to be designated so that the interest of the trust, to the extent feasible,
12 appears in records maintained by a party other than a trustee or beneficiary.

13 **(4)** If the trustee maintains records clearly indicating the respective interests,
14 a trustee may invest as a whole the property of 2 or more separate trusts.

15 **SECTION 77.** 701.0811 of the statutes is created to read:

16 **701.0811 Article VIII, Section 811 – Enforcement and defense of claims.**
17 A trustee shall take reasonable steps to enforce claims of the trust known to the
18 trustee and to defend claims against the trust known to the trustee.

19 **SECTION 78.** 701.0812 of the statutes is created to read:

20 **701.0812 Article VIII, Section 812 – Collecting trust property; duties**
21 **and liabilities of successor trustees. (1)** Subject to sub. (2), a trustee shall take
22 reasonable steps to compel a former trustee or other person to deliver trust property
23 to the trustee, and to redress a breach of trust known to the trustee to have been
24 committed by a former trustee or other fiduciary of the trust.

****NOTE: I added “Subject to sub. (2)” to this subsection, as sub. (2) appears to limit the responsibilities under this subsection. Okay?

1 (2) A successor trustee shall not have a duty to examine the accounts of a
2 former trustee and shall not be liable for the acts and omissions of a former trustee
3 or other fiduciary of the trust.

4 SECTION 79. 701.0813 of the statutes is created to read:

5 **701.0813 Article VIII, Section 813 – Duty to inform and report.**

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

****NOTE: What is the difference between a distributee and a permissible distributee? Is one a subset of the other? That is, is it necessary to refer to both?

11 (2) A trustee shall do all of the following:

12 (a) Upon request of a qualified beneficiary, promptly furnish to the qualified
13 beneficiary either a copy of the portions of the trust instrument relating to the
14 interest of the qualified beneficiary or a copy of the trust instrument, in the discretion
15 of the trustee.

16 (b) Within a reasonable period of time after accepting a trusteeship, notify the
17 qualified beneficiaries of the acceptance and of the trustee’s name, address, and
18 telephone number.

19 (c) Within a reasonable period of time after the date the trustee acquires
20 knowledge of the creation of an irrevocable trust, or the date the trustee acquires
21 knowledge that a formerly revocable trust has become irrevocable, whether by the

1 death of the settlor or otherwise, notify the qualified beneficiaries of all of the
2 following:

- 3 1. The trust's existence.
- 4 2. The identity of the settlor or settlors.
- 5 3. The right to request a copy of the documentation referred to in par. (a).
- 6 4. The right to request information under sub. (1).
- 7 5. The right to a trustee's report as provided in sub. (3).

8 (d) Notify the distributees or permissible distributees of trust income or
9 principal, and other qualified beneficiaries who so request, of any change in the
10 method or rate of the trustee's compensation.

11 (3) (a) At least annually and upon the termination of a trust, a trustee shall
12 send to the distributees or permissible distributees of trust income or principal, and
13 to other qualified beneficiaries who request it, all of the following:

- 14 1. A report of the trust property, liabilities, receipts, and disbursements,
15 including the source and amount of the trustee's compensation.
- 16 2. A listing of the trust assets and, if feasible, their respective market values.

17 (b) Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a
18 report containing the information described under par. (a) 1. must be sent to the
19 qualified beneficiaries by the former trustee. A personal representative or guardian
20 may send the qualified beneficiaries a report containing the information described
21 in par. (a) 1. on behalf of a deceased or incapacitated trustee.

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

1 (5) Subsection (2) (b) and (c) and sub. (3) do not apply to a trustee who accepts
2 a trusteeship before the effective date of this subsection [LRB inserts date], to an
3 irrevocable trust created before the effective date of this subsection [LRB inserts
4 date], or to a revocable trust that becomes irrevocable before the effective date of this
5 subsection [LRB inserts date].

6 **SECTION 80.** 701.0814 of the statutes is created to read:

7 **701.0814 Article VIII, Section 814 – Discretionary powers; tax savings.**

8 (1) Notwithstanding the breadth of discretion granted to a trustee in the terms of
9 the trust, including the use of such terms as “absolute,” “sole,” or “uncontrolled,” the
10 trustee shall exercise a discretionary power in good faith and in accordance with the
11 terms and purposes of the trust and the interests of the beneficiaries. A court shall
12 not determine that a trustee abused its discretion merely because the court would
13 have exercised the discretion in a different manner or would not have exercised the
14 discretion.

15 (2) Subject to sub. (4), and unless the terms of the trust expressly indicate that
16 a provision of this subsection does not apply, all of the following apply:

17 (a) A person other than a settlor who is a beneficiary and trustee of a trust that
18 confers on the trustee a power to make discretionary distributions to or for the
19 trustee’s personal benefit may exercise the power only in accordance with an
20 ascertainable standard.

21 (b) A trustee may not exercise a power to make discretionary distributions to
22 satisfy a legal obligation of support that the trustee personally owes another person.

23 (3) A power whose exercise is limited or prohibited by sub. (2) may be exercised
24 by a majority of the remaining trustees whose exercise of the power is not so limited

1 or prohibited. If the power of all trustees is so limited or prohibited, the court may
2 appoint a special fiduciary with authority to exercise the power.

***NOTE: The term “special fiduciary” is used in several places in the bill, and in each place the powers seem to be a bit different. Is this a term of art? Or should this term or the fiduciary’s powers or limitations be defined?

3 (4) Subsection (2) does not apply to any of the following:

4 (a) A power held by the settlor’s spouse who is the trustee of a trust for which
5 a marital deduction, as defined in section 2056 (b) (5) or 2523 (e) of the Internal
6 Revenue Code of 1986, as in effect on the effective date of this paragraph [LRB
7 inserts date], or as later amended, was previously allowed.

***NOTE: I’m not sure I understand why this paragraph references sections of the Internal Revenue Code (IRC) “as in effect on the date of this paragraph or as later amended.” It is possible that the provisions of the IRC at those two separate time periods could be inconsistent with one another. If subsequent changes to the provisions of the IRC will not affect the operability of this subsection, is it necessary to make any reference at all to the time at which the provision of the IRC is in effect? Also, doesn’t the definition of Internal Revenue Code at s. 701.0103 (14) cover the concept being addressed here?

8 (b) Any trust during any period that the trust may be revoked or amended by
9 its settlor.

10 (c) A trust if contributions to the trust qualify for the annual exclusion under
11 section 2503 (c) of the Internal Revenue Code of 1986, as in effect on the effective date
12 of this paragraph [LRB inserts date], or as later amended.

***NOTE: Please refer to the ***NOTE under par. (a).

13 SECTION 81. 701.0815 of the statutes is created to read:

14 701.0815 Article VIII, Section 815 – General powers of trustee. (1)

15 Subject to sub. (2), a trustee, without authorization by the court, may exercise the
16 following powers:

***NOTE: I added “Subject to sub. (2)” to the introduction to sub. (1), as sub. (2) seems to impose a limitation on the extent of the powers described in sub. (1). Okay?

17 (a) Powers conferred by the terms of the trust.

18 (b) Except as limited by the terms of the trust, all of the following powers:

1 1. All powers over the trust property which an unmarried, competent owner has
2 over individually owned property.

3 2. Any other powers appropriate to achieve the proper investment,
4 management, and distribution of the trust property.

5 3. Any other powers conferred by this chapter.

6 (2) A trustee's exercise of the trustee's power is subject to the fiduciary duties
7 prescribed by this chapter.

 ****NOTE: Because this s. 701.0815 relates to the powers of a trustee, I changed "The
exercise of a power" to "A trustee's exercise of the trustee's power." Okay?

8 **SECTION 82.** 701.0816 of the statutes is created to read:

9 **701.0816 Article VIII, Section 816 – Specific powers of trustee.** Without
10 limiting the authority conferred by s. 701.0815, a trustee may do all of the following:

11 (1) Collect trust property and accept or reject additions to the trust property
12 from a settlor or any other person.

13 (2) Acquire or sell property, for cash or on credit, at public or private sale.

14 (3) Exchange, partition, or otherwise change the character of trust property.

15 (4) Deposit trust money in an account in a regulated financial-service
16 institution.

 ****NOTE: What is a "regulated financial-service institution"? Should it be defined?

17 (5) Borrow money, with or without security, and mortgage or pledge trust
18 property for a period within or extending beyond the duration of the trust.

19 (6) With respect to an interest in a business or enterprise, including a
20 proprietorship, partnership, limited liability company, business trust, corporation,
21 or other form of business, continue the business or enterprise and take any action
22 that may be taken by shareholders, partners, members, or property owners,

1 including merging, dissolving, or otherwise changing the form of business
2 organization or contributing additional capital.

***NOTE: I modified this sentence a bit by making the different forms of business illustrative of a “business or enterprise.” Okay?

3 (7) With respect to a stock or other security, exercise the rights of an absolute
4 owner, including the right to do any of the following:

***NOTE: I made stocks or other securities singular, rather than plural, and repeated the phrase throughout this subsection.

5 (a) Vote, or give proxies to vote, with or without power of substitution, or enter
6 into or continue a voting trust agreement.

7 (b) Hold a stock or other security in the name of a nominee or in other form
8 without disclosure of the trust so that title may pass by delivery.

9 (c) Pay calls, assessments, and other sums chargeable or accruing against the
10 stock or security, and sell or exercise stock subscription or conversion rights.

11 (d) Deposit the stock or other security with a depository or other regulated
12 financial-service institution.

***NOTE: Again, what is a “regulated financial-services institution.”

13 (8) With respect to an interest in real property, construct, or make ordinary or
14 extraordinary repairs to, alterations to, or improvements in, buildings or other
15 structures, demolish improvements, raze existing or erect new party walls or
16 buildings, subdivide or develop land, dedicate land to public use or grant public or
17 private easements, and make or vacate plats and adjust boundaries.

***NOTE: What is a “party wall”?

18 (9) Enter into a lease for any purpose as lessor or lessee, including a lease or
19 other arrangement for exploration and removal of natural resources, with or without
20 the option to purchase or renew, for a period within or extending beyond the duration
21 of the trust.

1 (10) Grant an option involving a sale, lease, or other disposition of trust
2 property or acquire an option for the acquisition of property, including an option
3 exercisable beyond the duration of the trust, and exercise an option so acquired.

4 (11) Insure the property of the trust against damage or loss and insure the
5 trustee, the trustee’s agents, and beneficiaries against liability arising from the
6 administration of the trust.

7 (12) Abandon or decline to administer property of no value or of insufficient
8 value to justify its collection or continued administration.

 ****NOTE: I wonder why the word “collection” is used here; it doesn’t seem to follow
“abandon or decline,” but perhaps I am simply not familiar with what “collection” means
in this context?

9 (13) With respect to possible liability for violation of environmental law, do any
10 of the following:

11 (a) Inspect or investigate property the trustee holds or has been asked to hold,
12 or property owned or operated by an organization in which the trustee holds or has
13 been asked to hold an interest, for the purpose of determining the application of
14 environmental law with respect to the property.

15 (b) Take action to prevent, abate, or remedy any actual or potential violation
16 of any environmental law affecting property held directly or indirectly by the trustee,
17 whether taken before or after the assertion of a claim or the initiation of
18 governmental enforcement.

 ****NOTE: I removed the word “otherwise” that preceded “remedy”. Okay?

19 (c) Decline to accept property into trust or disclaim any power with respect to
20 property that is or may be burdened with liability for violation of environmental law.

21 (d) Compromise claims against the trust which may be asserted for an alleged
22 violation of environmental law.

****NOTE: Does the phrase “compromise claims” have a meaning that is common or clear enough that it doesn’t need additional explanation?

1 (e) Pay the expense of any inspection, review, abatement, or remedial action to
2 comply with environmental law.

3 (14) Pay or contest any claim, settle a claim by or against the trust, and release,
4 in whole or in part, a claim belonging to the trust.

5 (15) Pay taxes, assessments, compensation of the trustee and of employees and
6 agents of the trust, and other expenses incurred in the administration of the trust.

7 (16) Exercise elections with respect to federal, state, and local taxes.

8 (17) Select a mode of payment under any employee benefit or retirement plan,
9 annuity, or life insurance payable to the trustee, exercise rights thereunder,
10 including exercise of the right to indemnification for expenses and against liabilities,
11 and take appropriate action to collect the proceeds.

12 (18) Make loans out of trust property, including loans to a beneficiary on terms
13 and conditions the trustee considers to be fair and reasonable under the
14 circumstances. The trustee has a lien on future distributions for repayment of any
15 loans made to a beneficiary under this subsection.

****NOTE: As proposed in the drafting instructions, this subsection ended with the phrase “and the trustee has a lien on future distributions for repayment of those loans.” This phrase didn’t really follow the introduction to the subsection and seemed to extend to loans made to persons other than a beneficiary, which didn’t make sense. I modified the ending of this subsection by creating a new sentence that ties the lien to a loan made to a beneficiary. Okay?

16 (19) Pledge trust property to guarantee loans made by others to the beneficiary.

17 (20) Appoint a trustee to act in another jurisdiction with respect to trust
18 property located in the other jurisdiction, confer upon the appointed trustee all of the
19 powers and duties of the appointing trustee, require that the appointed trustee
20 furnish security, and remove any trustee so appointed.

1 (21) Pay an amount distributable to a beneficiary who is under a legal
2 disability or who the trustee reasonably believes is incapacitated, by paying it
3 directly to the beneficiary, applying it for the beneficiary’s benefit, or by doing any
4 of the following:

 ***NOTE: What is a “legal disability?” Is it different than a disability held by a
“disabled individual” (a defined term)?

5 (a) Paying the amount to the beneficiary’s conservator or the guardian of the
6 beneficiary’s estate.

7 (b) Paying the amount to the beneficiary’s custodian under the uniform
8 transfers to minors act under ss. 54.854 to 54.898 or the uniform custodial trust act
9 under ss. 54.950 to 54.988, and, for that purpose, creating a custodianship or
10 custodial trust.

11 (c) If the trustee does not know of a conservator, guardian of the estate,
12 custodian, or custodial trustee, paying the amount to an adult relative or other
13 person having legal or physical care or custody of the beneficiary or to the guardian
14 of the person of the beneficiary, to be expended on the beneficiary’s behalf.

15 (d) Managing the amount as a separate fund on the beneficiary’s behalf, subject
16 to the beneficiary’s continuing right to withdraw the distribution.

 ***NOTE: Is a “right to withdraw” distinguishable from the defined term, “power
to withdraw?” If not, I suggest using the defined term. If so, should the distinction be
made more clear?

17 (22) On distribution of trust property or the division or termination of a trust,
18 make distributions in divided or undivided interests, allocate particular assets in
19 proportionate or disproportionate shares, value the trust property for those
20 purposes, and adjust for resulting differences in valuation.

1 (23) Resolve a dispute concerning the interpretation of the trust or its
2 administration by mediation, arbitration, or other procedure for alternative dispute
3 resolution.

4 (24) Prosecute or defend an action, claim, or judicial proceeding in any
5 jurisdiction to protect trust property and the trustee in the performance of the
6 trustee's duties.

7 (25) Sign and deliver contracts and other instruments that are useful to
8 achieve or facilitate the exercise of the trustee's powers.

9 (26) On termination of the trust, exercise the powers appropriate to wind up
10 the administration of the trust and distribute the trust property to the persons
11 entitled to it.

12 (27) Create or fund a plan under section 529 of the Internal Revenue Code, or
13 other college savings vehicle, for the beneficiary's benefit.

14 **SECTION 83.** 701.0817 of the statutes is created to read:

15 **701.0817 Article VIII, Section 817 – Distribution upon termination. (1)**

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

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

1 **(3)** A release by a beneficiary of a trustee from liability for breach of trust is
2 invalid to the extent any of the following applies:

3 (a) The release was induced by improper conduct of the trustee.

4 (b) The beneficiary, at the time of the release, did not know of the beneficiary’s
5 rights or of the material facts relating to the breach.

6 **SECTION 84.** Subchapter IX (title) of chapter 701 [precedes 701.0901] of the
7 statutes is created to read:

8 **CHAPTER 701**

9 **SUBCHAPTER IX**

10 **INVESTMENT MANAGEMENT OF TRUSTS**

11 **SECTION 85.** 701.0901 of the statutes is created to read:

12 **701.0901 Article IX, Section 901 – Application of the Wisconsin Prudent**
13 **Investor Act.** Except as provided in this subchapter, the investment management
14 of the property of a trust shall be governed by ch. 881.

15 **SECTION 86.** 701.0902 of the statutes is created to read:

16 **701.0902 Article IX, Section 902 – Directed trust property.** (1) Unless
17 the trust instrument provides otherwise, a directing party with respect to directed
18 trust property has the power and duty to do all of the following:

 ****NOTE: What does “with respect to directed trust property” mean in this
 subsection? Would it be acceptable to replace this phrase with “having responsibility
 over” or “having power over” or “having control of” or something similar?

19 (a) Direct the excluded trustee on the retention, purchase, sale, exchange,
20 tender, encumbrance, or any other investment transaction of the directed trust
21 property and the investment and reinvestment of principal and income.

22 (b) Direct the excluded trustee with respect to the management, control, and
23 voting powers, including voting proxies.

****NOTE: The subject seems to be missing from this paragraph: the management, control, and voting powers of what. I assume the directed trust property?

1 (c) Select and determine reasonable compensation of one or more outside
2 investment advisors, managers, consultants, or counselors, which may include the
3 excluded trustee, and delegate investment authority to them pursuant to the
4 investment delegation provisions under s. 881.01 (10).

5 (d) Determine the frequency of and methodology for valuing directed trust
6 property and provide the value of property for which there is no readily available
7 daily market value.

8 (2) Unless the trust instrument provides otherwise, an excluded trustee with
9 respect to directed trust property has no duty to do any of the following:

10 (a) Prepare or review investment policy statements.

11 (b) Perform investment or suitability reviews, inquiries, or investigations.

12 (c) Determine or verify the value of directed trust property for which there is
13 no readily available daily market value.

14 (d) Monitor the conduct or investment performance of the directing party.

15 SECTION 87. 701.0903 of the statutes is created to read:

16 **701.0903 Article IX, Section 903 – Life insurance contracts owned by**
17 **trusts. (1) NONAPPLICATION OF PRUDENT INVESTOR RULE.** (a) In this subsection, a
18 “qualified person” is a person who is insured or a proposed insured, or the spouse of
19 that person, who has provided the trustee with the funds used to acquire or pay
20 premiums with respect to a policy of insurance on the life of that person or the spouse
21 of that person, or on the lives of that person and the spouse of that person.

****NOTE: Under LRB drafting conventions, generally, a definition precedes the material in which the term is used. For that reason, I moved the definition for “qualified person” to the beginning of the statutory component (subsection (1)), and applied it only to the component within which the term appears. Please confirm that qualified person is only defined for purposes of this subsection (1).

****NOTE: I have a number of questions about the cross-references used in this s. 701.0903, and in the components within this section. Please review the components and my notes to ensure that I accurately applied the appropriate cross-references.

****NOTE: In some instances in this subsection, the phrase “contract of life insurance” is used and in other instances the phrase “contract for life insurance” is used. Are both acceptable? Should only one be used for consistency?

1 (b) Notwithstanding the provisions of s. 881.01, with respect to any contract for
2 life insurance acquired or retained on the life of a qualified person, a trustee has no
3 duty to do any of the following:

****NOTE: It is implied but not explicit that the life insurance contract described here is owned by a trust. I believe it should be explicit. Please advise.

- 4 1. Determine whether the contract of life insurance is, or remains, a proper
5 investment.
6 2. Investigate the financial strength of the life insurance company.
7 3. Determine whether to exercise any policy option available under the contract
8 for life insurance.
9 4. Diversify the contract for life insurance or the assets of the trust with respect
10 to the contract for life insurance.
11 5. Inquire about or investigate the health or financial condition of any insureds.

12 (c) A trustee is not liable to a beneficiary of the trust or any other person for any
13 loss sustained with respect to a contract for life insurance to which this section
14 applies.

****NOTE: Can “with respect to” be replaced by “as a result of”?

****NOTE: This subdivision uses the phrase “this section”; under LRB drafting conventions, “section” refers to the statutory section, not the component. So, as used in this par. (c), section refers to s. 701.0903. Is that your intent?

15 (d) Subject to par. (e) 4., unless otherwise provided in the trust instrument, par.
16 (b) applies to a contract for life insurance if any of the following applies:

****NOTE: Please confirm that par. (b) is the appropriate cross-reference here.

****NOTE: Can par. (b) apply to a contract for life insurance if any of the requirements under subd. 1. and 2. do not apply? If not, par. (d) should read “par. (b) does not apply unless one of the following applies.” Also, does par. (b) need to say “Subject to

par. (d) and notwithstanding s. 881.01...”? If par. (b) doesn’t say that, it will apply to all life insurance contracts regardless of what par. (d) says.

- 1 1. The trust instrument, by reference to this section, makes this section
2 applicable to contracts for life insurance held by the trust.

****NOTE: This subdivision uses the phrase “this section;” under LRB drafting conventions, “section” refers to the statutory section, not the component. So, as used here, each occurrence of section refers to s. 701.0903. Is that your intent?

- 3 2. The trustee gives notice as provided under par. (e) that this section applies
4 to a contract for life insurance held by the trust.

****NOTE: I created a new paragraph (e) to incorporate the notice requirements and limitations. Please review and confirm that I accurately captured your intent.

****NOTE: This subdivision uses the phrase “this section;” under LRB drafting conventions, “section” refers to the statutory section, not the component. So, as used here, section refers to s. 701.0903. Is that your intent?

- 5 (e) 1. Notice shall be given to each qualified beneficiary and must include a copy
6 or restatement of this section.

****NOTE: Notice of what?

****NOTE: What does “this section” refer to in this subdivision?

- 7 2. Notice shall be given in the manner provided in s. 701.0109.

- 8 3. Notice given under subch. III to a person who represents the interests of any
9 qualified beneficiary shall be treated as notice to the person so represented.

- 10 4. If any person notified pursuant to the paragraph objects to the application
11 of this section by delivering a written objection to the trustee within 30 days after the
12 date on which the objector received such notice, par. (b) shall not apply until the
13 objection is withdrawn.

****NOTE: This subdivision uses the phrase “this section;” under LRB drafting conventions, “section” refers to the statutory section, not the component. So, as used here, “application of this section” means “application of [s. 701.0903].” Is that your intent?

****NOTE: What does the phrase “notified pursuant to the paragraph” refer to?

****NOTE: I assumed that the objection must be delivered to the trustee, and restructured this paragraph to clarify that point. Okay?

****NOTE: Please confirm that “par. (b),” as it appears at the end of this subdivision, is the appropriate cross-reference.

1 5. Any notice sent by United States mail is presumed to have been received 3
2 days after depositing the notice in the United States mail system with proper postage
3 prepaid, unless any party can prove otherwise.

****NOTE: I wonder whether this is an adequate time period, given the proposed closure of regional postal offices in this state and the possibility that Saturday service may be discontinued. I raise this after reading an article published on Tuesday, December 6, 2011, by the Wisconsin State Journal entitled “Big Changes Coming for Postal Service”: http://host.madison.com/wsj/news/local/big-changes-coming-for-postal-service/article_c6bd35d2-a40f-5782-8592-153a84438223.html

****NOTE: Should the sender be required to provide evidence that the sender deposited the notice in the mail by some documentation or receipt?

****NOTE: Does this need to specify the standard of review of evidence submitted to “prove otherwise”?

4 (f) 1. In this paragraph, an “affiliate” is any person who controls, is controlled
5 by, or is under common control with the trustee.

****NOTE: Under LRB drafting conventions, generally, a definition precedes the material in which the term is used. For that reason, I moved the definition for “affiliate” to the beginning of the statutory component (paragraph (f)), and applied it only to the component within which the term appears. Okay?

6 2. This section does not apply to any contract for life insurance purchased from
7 any affiliate of the trustee, or with respect to which the trustee or any affiliate of the
8 trustee receives any commission, unless the duty to purchase the life insurance
9 contract has been directed by a directing party or the duty has been delegated to
10 another person in accordance with sub. (2).

****NOTE: Where does the duty to purchase life insurance come from? This is not clear.

****NOTE: This paragraph uses the phrase “this section”; under LRB drafting conventions, “section” refers to the statutory section, not the component. So, as used here, “This section does not apply” means “Section 701.0903 does not apply. . . .” Is that your intent?

11 (g) If par. (b) applies, a trustee may not be compensated for performing any of
12 the applicable services described in par. (b).

****NOTE: What are “applicable services”? Is the purpose of this paragraph to provide that a person who performs these services, even though that person is not required to perform the services, can’t be paid for providing them? If so, I’m not sure the word “applicable” is necessary.

1 (2) DELEGATION OF INVESTMENT MANAGEMENT RESPONSIBILITY. (a) A trustee that
2 administers an insurance contract on the life of one or more individuals may
3 delegate, without any continuing obligation to review the agent's actions, investment
4 functions as provided in this subsection to any of the following investment agents:

****NOTE: It is implied but not explicit that the life insurance contract described here is owned by a trust. I believe it should be explicit. Please advise. Also, do the individuals affected by the life insurance contract need to be beneficiaries or otherwise related to the trust?

****NOTE: The drafting instructions directed me to draft the introduction to this paragraph as follows: "A trustee that administers an insurance contract on the life or lives of one or more persons..." I eliminated "or lives" and substituted individuals for persons. Okay?

****NOTE: I eliminated the word, certain, which preceded investment functions and added the clause "as provided in this subsection" following investment functions. I also eliminated the clause "with respect to any such contract" (which followed investment functions) as I believe it is clear from the list of delegated functions that the functions relate to the insurance contract. Okay?

****NOTE: The drafting instructions used the phrase "the following persons as investment agents." I simplified the phrase by eliminating "persons as". Okay?

5 1. The trust's settlor.

6 2. A beneficiary of the trust, regardless of the beneficiary's interest, whether
7 qualified or not.

8 3. The spouse, ancestor, or descendant of any person described in subd. 1. or

9 2.

10 4. Any person nominated by a majority of the qualified beneficiaries.

****NOTE: As proposed, this subdivision read "Any person or entity nominated. . ." Person is defined under s. 990.01 (26) to ". . . include[] all partnerships, associations and bodies politic or corporate." For that reason, I eliminated "or entity" from this subdivision. Okay?

11 5. An investment agent if the trustee exercises reasonable care, judgment, and
12 caution in selecting the investment agent and in establishing the scope and terms
13 of any delegation.

14 (b) Delegable investment functions under this subsection include all of the
15 following:

1 1. A determination of whether any insurance contract is or remains a proper
2 investment.

 ***NOTE: The language of this subdivision is not clear: does “any insurance contract” as used in this subdivision include insurance contracts other than the life insurance contracts described in par. (a)?

3 2. The investigation of the financial strength of the life insurance company.

 ***NOTE: I believe this subdivision needs to make a more explicit connection between the life insurance company identified in the subdivision and the insurance policy; I assume it is the insurance policy described in par. (a)?

4 3. A determination of whether or not to exercise a policy option available under
5 any insurance contract.

 ***NOTE: The language of this subdivision is not clear: does “any insurance contract” as used in this subdivision include insurance contracts other than the life insurance contracts described in par. (a)?

6 4. A determination of whether to diversify such contracts relative to one
7 another or to other assets, if any, administered by the fiduciary.

 ***NOTE: Which contracts are being referred to here? The contracts under subd. 1. or 3. or both or others? Please let me know whether any subdivision in this paragraph should be cross-referenced in any other subdivision.

 ***NOTE: Who is “the fiduciary”?

8 5. An inquiry about changes in the health or financial condition of the insured
9 or insureds relative to any such contract.

 ***NOTE: Which contracts are being referred to here? The contracts under subd. 1. or 3. or both or others? Please let me know whether any subdivision in this paragraph should be cross-referenced in any other subdivision.

10 (c) Until a life insurance contract matures and the policy proceeds are received,
11 a trustee that administers an insurance contract under this subsection is not
12 obligated to diversify the other trust assets, if any, relative to such insurance
13 contract.

 ***NOTE: It is implied but not explicit in this paragraph and elsewhere in sub. (2) that a life insurance contract is an asset of a trust. I believe we need to include language in at least one place in this paragraph to make that more explicit. The first place could be sub. (2) (a) (intro.); another would be in the portion of the sentence that describes “an insurance contract administered under this subsection” A third could be in describing “the other trust assets.” Could I incorporate a phrase such as “held by the trust” or “owned by the trust” or something else? Please advise.

****NOTE: I'm not sure the phrase "relative to such insurance contract" works as it is used in connection to the "other trust assets."

1 **SECTION 88.** Subchapter X (title) of chapter 701 [precedes 701.1001] of the
2 statutes is created to read:

3 **CHAPTER 701**

4 **SUBCHAPTER X**

 ****NOTE: No title was provided for this subchapter X. If other subchapters have titles, each subchapter must have a title.

5 **SECTION 89.** 701.1001 of the statutes is created to read:

6 **701.1001 Article X, Section 1001 – Remedies for breach of trust. (1)** A
7 violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.
8 **(2)** To remedy a breach of trust that has occurred or may occur, a court may do
9 any of the following:

10 (a) Compel the trustee to perform the trustee's duties.

11 (b) Enjoin the trustee from committing a breach of trust.

12 (c) Compel the trustee to redress a breach of trust by paying money, restoring
13 property, or other means.

14 (d) Order a trustee to account.

 ****NOTE: Order a trustee to account for something? Or to give an accounting of
something?

15 (e) Appoint a special fiduciary to take possession of the trust property and
16 administer the trust.

 ****NOTE: The term "special fiduciary" is used in several places in the bill, and in each place the powers seem to be a bit different. Is this a term of art? Or should this term or the fiduciary's powers or limitations be defined?

17 (f) Suspend the trustee.

18 (g) Remove the trustee as provided in s. 701.0706.

19 (h) Reduce the compensation of or deny compensation to the trustee.

1 (i) Subject to s. 701.1012, void an act of the trustee, impose a lien or a
2 constructive trust on trust property, or trace trust property wrongfully disposed of
3 and recover the property or its proceeds.

****NOTE: How does s. 701.1012 limit this provision?

4 (j) Order any other appropriate relief, whether provided elsewhere in this
5 chapter, available at common law, or under equity principles.

6 SECTION 90. 701.1002 of the statutes is created to read:

7 **701.1002 Article X, Section 1002 – Damages for breach of trust. (1) A**
8 trustee who commits a breach of trust is liable to an affected beneficiary for the
9 greater of the following:

10 (a) The amount required to restore the value of the trust property and trust
11 distributions to what they would have been had the breach not occurred.

12 (b) The profit the trustee made by reason of the breach.

13 **(2)** Except as otherwise provided in this subsection, if more than one trustee
14 is liable to a beneficiary for a breach of trust, a trustee is entitled to contribution from
15 the other trustee or trustees. A trustee is not entitled to contribution if the trustee
16 was substantially more at fault than another trustee or if the trustee committed the
17 breach of trust in bad faith or with reckless indifference to the purposes of the trust
18 or the interests of the beneficiary. A trustee who received a benefit from the breach
19 of trust is not entitled to contribution from another trustee to the extent of the benefit
20 received.

21 SECTION 91. 701.1003 of the statutes is created to read:

22 **701.1003 Article X, Section 1003 – Damages in absence of breach.**
23 Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or
24 depreciation in the value of trust property or for not having made a profit.

1 **SECTION 92.** 701.1004 of the statutes is created to read:

2 **701.1004 Article X, Section 1004 – Attorneys fees and costs.** (1) In a
3 judicial proceeding involving the administration of a trust, the court, as justice and
4 equity may require, may award costs and expenses, including reasonable attorneys
5 fees, to any party, to be paid by another party or from the trust that is the subject of
6 the controversy.

7 (2) Subject to sub. (3), if a trustee defends or prosecutes any proceeding in good
8 faith, whether successful or not, the trustee is entitled to receive from the trust the
9 necessary expenses and disbursements, including reasonable attorneys fees,
10 incurred. This subsection may not preclude a court from ordering reimbursement
11 of the trust for such expenses and disbursements from another party as provided in
12 sub. (1).

13 (3) (a) Payment of costs or attorneys fees incurred in any proceeding from the
14 assets of the trust may be made by the trustee without the approval of any person
15 and without court authorization, unless the court orders otherwise as provided in
16 par. (c).

17 (b) If a claim or defense based upon a breach of trust is made against a trustee
18 in a proceeding, the trustee shall provide notice to each qualified beneficiary of the
19 trust whose share of the trust may be affected by the payment of attorneys fees and
20 costs of the intention to pay costs or attorneys fees incurred in the proceeding from
21 the trust prior to making payment. The notice shall inform each such qualified
22 beneficiary of the right to apply to the court for an order prohibiting the trustee from
23 paying attorneys fees or costs from trust assets. If a trustee is served with a motion
24 for an order prohibiting the trustee from paying from the trust attorneys fees or costs
25 in the proceeding and the trustee pays attorneys fees or costs from the trust before

1 an order is entered on the motion, the trustee and the trustee's attorneys who have
2 been paid attorneys fees or costs from trust assets are subject to the remedies in pars.
3 (c) and (d).

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

****NOTE: I'm not sure the phrase "unless the court finds good cause" works without additional explanation, but perhaps I am being hyper-critical. If I am reading it correctly, I believe the phrase means good cause to allow attorneys fees and costs to be paid from the trust. Yes? Would it be a problem to state that explicitly?

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

****NOTE: I'm not familiar with the phrase "to refund timely." Could the last sentence close with "failure to refund the trust in a timely manner?"

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

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

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

19 **SECTION 93.** 701.1005 of the statutes is created to read:

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

21 (1) A beneficiary may not commence a proceeding against a trustee for breach of

1 trust more than one year after the date the beneficiary or a representative of the
2 beneficiary was sent a report that adequately disclosed the existence of a potential
3 claim for breach of trust.

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

***NOTE: What must the report include in order to “adequately disclose the
existence of a potential claim”? How much detail or evidence? How smart must the
beneficiary be?

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

10 (a) The removal, resignation, or death of the trustee.

11 (b) The termination of the beneficiary’s interest in the trust.

12 (c) The termination of the trust.

13 (4) Subsections (1) and (3) shall not apply to a claim for fraud as to which the
14 period shall be governed by applicable law.

***NOTE: I’m not sure the word “period” is, by itself, sufficient.

15 SECTION 94. 701.1006 of the statutes is created to read:

16 701.1006 Article X, Section 1006 – Reliance on trust instrument. A
17 trustee who acts in reasonable reliance on the express provisions of the trust is not
18 liable to a beneficiary for a breach of trust to the extent the breach resulted from the
19 reliance.

***NOTE: How likely is this to happen? How does it happen?

20 SECTION 95. 701.1007 of the statutes is created to read:

1 **701.1007 Article X, Section 1007 – Event affecting administration or**
2 **distribution.** If the happening of an event, including marriage, divorce,
3 performance of educational requirements, or death, affects the administration or
4 distribution of a trust, a trustee who has exercised reasonable care to ascertain the
5 happening of the event is not liable for a loss resulting from the trustee's lack of
6 knowledge.

7 **SECTION 96.** 701.1008 of the statutes is created to read:

8 **701.1008 Article X, Section 1008 – Exculpation of trustee. (1)** A term of
9 a trust relieving a trustee of liability for breach of trust is unenforceable to the extent
10 that it does any of the following:

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

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

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

21 **SECTION 97.** 701.1009 of the statutes is created to read:

22 **701.1009 Article X, Section 1009 – Beneficiary's consent, release, or**
23 **ratification.** A trustee is not liable to a beneficiary for breach of trust if the
24 beneficiary consented to the conduct constituting the breach, released the trustee

1 from liability for the breach, or ratified the transaction constituting the breach,
2 unless one of the following applies:

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

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

8 SECTION 98. 701.1010 of the statutes is created to read:

9 **701.1010 Article X, Section 1010 – Limitation on personal liability of**
10 **trustee. (1)** Except as otherwise provided in the contract, a trustee is not personally
11 liable on a contract properly entered into in the trustee's fiduciary capacity in the
12 course of administering the trust if the trustee in the contract disclosed the fiduciary
13 capacity.

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

18 SECTION 99. 701.1011 of the statutes is created to read:

19 **701.1011 Article X, Section 1011 – Interest as general partner. (1)** Unless
20 personal liability is imposed in the contract, a trustee who holds an interest as a
21 general partner in a general or limited partnership is not personally liable on a
22 contract entered into by the partnership after the trust's acquisition of the interest
23 if the fiduciary capacity was disclosed in the contract or in a statement previously
24 filed pursuant to ch. 178 or ch. 179.

****NOTE: Is “holding an interest as a general partner” the same as being a general partner? If so, can we just say “is a general partner”?

****NOTE: I substituted ch. 178 for the Uniform Partnership Act and ch. 179 for the Uniform Limited Partnership Act. That said, is there a particular section in those chapters, governing notice or disclosure, that should be cross-referenced here?

****NOTE: This subsection refers to “the fiduciary capacity.” Whose fiduciary capacity and with respect to what or whom?

****NOTE: As drafted, the trust is acquiring an interest as a general partner. Is that your intent? How or why would a trust do that?

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

****NOTE: Does the partnership at issue here have to have any relationship to the trust for which the person who holds an interest as a general partner serves as a trustee?

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

****NOTE: Does the partnership at issue here have to have any relationship to the trust for which the person who holds an interest as a general partner serves as a trustee? If so, that should be spelled out. If not, why would the settlor be liable for liabilities of the partnership?

7 **SECTION 100.** 701.1012 of the statutes is created to read:

8 **701.1012 Article X, Section 1012 – Protection of person dealing with**
9 **trustee.** (1) A person other than a beneficiary who in good faith assists a trustee,
10 or who in good faith and for value deals with a trustee, without knowledge that the
11 trustee is exceeding or improperly exercising the trustee’s powers is protected from
12 liability as if the trustee properly exercised the power.

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

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

 ****NOTE: This subsection apparently includes beneficiaries, whereas subs. (1), (2),
and (4) do not. Is that intentional?

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

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

10 **SECTION 101.** 701.1013 of the statutes is created to read:

11 **701.1013 Article X, Section 1013 – Certification of trust.** **(1)** Instead of
12 furnishing a copy of the trust instrument to a person other than a beneficiary, the
13 trustee may furnish to the person a certification of trust containing the following
14 information:

15 (a) That the trust exists and the date the trust instrument was executed.

16 (b) The identity of the settlor.

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

18 (d) The powers of the trustee.

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

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

***NOTE: What is being signed or otherwise authenticated in this paragraph?

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

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

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

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

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

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

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

21 (8) A person making a demand for copies of the trust instrument or excerpts
22 from the trust instrument in addition to a certification of trust is liable for costs,
23 expenses, reasonable attorneys fees and damages if the court determines that the
24 person did not act in good faith in demanding the copies.

