

## CHAPTER 701

## TRUSTS

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**701.01 Definitions.** As used in this chapter, unless the context indicates otherwise:

(1) **BENEFICIARY.** “Beneficiary” means a person who has a beneficial interest in a trust.

(2) **CHARITABLE AND PRIVATE TRUST.** To the extent that trust income or principal presently or in the future must be used by the trustee exclusively for a charitable purpose as defined in s. 701.10 (1), the trust is a “charitable trust”; any other trust is a “private trust”, provided it is for the benefit of a person sufficiently identifiable to enforce the trust.

(3) **COURT.** “Court” means the court having jurisdiction.

(4) **PROPERTY.** “Property” means an interest in real or personal property.

(5) **SETTLOR.** “Settlor” means a person who directly or indirectly creates a living or testamentary trust or adds property to an existing trust.

(6) **TESTAMENTARY AND LIVING TRUST.** “Testamentary trust” means a trust subject to the continuing jurisdiction of the court assigned to exercise probate jurisdiction; “living trust” means any other trust, including a testamentary trust removed to this state from another state.

(7) **TRUST.** “Trust” means an express living or testamentary, private or charitable trust in property which arises as a result of a manifestation of intention to create it.

(8) **TRUSTEE.** “Trustee” means a person holding in trust title to or holding in trust a power over property. “Trustee” includes an original, added or successor trustee.

**History:** 1971 c. 66; 1977 c. 187 s. 135; 1977 c. 449; 1983 a. 189.

See note to 801.05, citing Norton v. Bridges, 712 F (2d) 1156 (1983).

**701.02 Purposes for which trusts may be created.** A trust may be created for any lawful purpose.

**History:** 1993 a. 16, 437.

**Cross-reference:** See s. 701.10 (1) which lists the purposes for which a charitable trust may be created.

Advantages of the revocable trust estate plan. Keydel, 1975 WBB No. 3.

**701.03 Passive trusts abolished.** Except as provided in s. 706.08 (4), every trust, to the extent it is private and passive, vests no title or power in the trustee, but the beneficiary takes a title corresponding in extent to the beneficial interest given the beneficiary. A trust is passive if the title or power given the trustee is merely nominal and the creating instrument neither expressly nor by implication from its terms imposes active management duties on the trustee.

**History:** 1989 a. 231.

When a trustee has the duty of paying taxes and insurance, the trust is an active one. Kinzer v. Bidwill, 55 W (2d) 749, 201 NW (2d) 9.

This statute does not apply to living trusts. Section 701.07 which provides that a living trust cannot be deemed passive controls. McMahon v. Standard Bank & Trust Co. 202 W (2d) 565, 550 NW (2d) 727 (Ct. App. 1996).

**701.04 Purchase money resulting trusts abolished.**

(1) If title to property is transferred to one person and all or part of the purchase price is furnished by another, the latter may not enforce a purchase money resulting trust.

(2) Creditors of the person furnishing all or part of the purchase price may enforce a resulting trust, in proportion to the amount of purchase price furnished, to the extent necessary to satisfy their demands, unless an intent to defraud creditors is disproved.

(3) Nothing in this section shall affect the right to enforce a valid express trust or to establish a constructive trust based on fraud, undue influence, breach of confidential relationship or other appropriate grounds.

**701.05 Title of trustee; interest of beneficiaries.**

(1) Unless the creating instrument expressly limits the trustee to a lesser title or to a power, the trustee takes all title of the settlor or other transferor and holds such title subject to the trustee’s fiduciary duties as trustee.

(2) If a trustee of a private trust has title to the trust property, a beneficiary has both a right to have the trustee perform the trustee’s fiduciary duties and an equitable interest, present or future, in the trust property. If a trustee of a private trust holds only a power over property, a beneficiary has a right to have such trustee perform the trustee’s fiduciary duties.

(3) In a private or charitable trust where the trustee takes all title of the settlor or other transferor and holds such title subject to the trustee’s fiduciary duties as trustee, any interest expressly retained by the settlor or not effectively disposed of to others remains in the settlor, or the settlor’s successors in interest, as an equitable reversionary interest and to this extent the settlor, or the settlor’s successors, are beneficiaries of the trust. In a private trust where the trustee takes all title of the settlor or other transferor and holds such title subject to the trustee’s fiduciary duties as trustee, any interest, present or future, created by the settlor in any other person is an equitable interest and such person is a beneficiary of the trust.

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

**701.06 Spendthrift provisions and rights of creditors of beneficiaries.** (1) **INCOME BENEFICIARIES.** A settlor may expressly provide in the creating instrument that the interest in income of a beneficiary other than the settlor is not subject to voluntary or involuntary alienation. The income interest of such a beneficiary cannot be assigned and is exempt from claims against the beneficiary until paid over to the beneficiary pursuant to the terms of the trust.

(2) **PRINCIPAL BENEFICIARIES.** A settlor may expressly provide in the creating instrument that the interest in principal of a beneficiary other than the settlor is not subject to voluntary or involuntary

tary alienation. The interest in principal of such a beneficiary cannot be assigned and is exempt from claims against the beneficiary, but a judgment creditor, after any payments of principal have become due or payable to the beneficiary pursuant to the terms of the trust, may apply to the court for an order directing the trustee to satisfy the judgment out of any such payments and the court in its discretion may issue an order for payment of part or all of the judgment.

**(3) DISCLAIMER OR RENUNCIATION NOT AN ASSIGNMENT.** A disclaimer or renunciation by a beneficiary of part or all of his or her interest under a trust shall not be considered an assignment under sub. (1) or (2).

**(4) CLAIMS FOR CHILD SUPPORT.** Notwithstanding any provision in the creating instrument or subs. (1) and (2), upon application of a person having a valid order directing a beneficiary to make payment for support of the beneficiary's child, the court may:

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

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

**(5) CLAIMS FOR PUBLIC SUPPORT.** Notwithstanding any provision in the creating instrument or subs. (1) and (2), if the settlor is legally obligated to pay for the public support of a beneficiary under s. 46.10 or the beneficiary is legally obligated to pay for the beneficiary's public support or that furnished the beneficiary's spouse or minor child under s. 46.10, upon application by the appropriate state department or county official, the court may:

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

(b) Except as otherwise provided in par. (c), in the case of a beneficiary under a discretionary trust, order the trustee to satisfy part or all of the liability out of part or all of future payments of income or principal which are to be made pursuant to the exercise of the trustee's discretion in favor of such beneficiary;

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

**(5m) TRUST FOR DISABLED INDIVIDUAL.** Subsection (5) does not apply to any trust that is established for the benefit of an individual who has a disability which has continued or can be expected to continue indefinitely, substantially impairs the individual from adequately providing for his or her own care or custody, and constitutes a substantial handicap to the afflicted individual if the trust does not result in ineligibility for public assistance under ch. 49. A trustee of a trust which is exempt from claims for public support under this subsection shall notify the county department under s. 46.215 or 46.22 in the county where the disabled beneficiary resides of the existence of the trust.

**(6) SETTLOR AS BENEFICIARY.** Notwithstanding any provision in the creating instrument and in addition to the remedies available under subs. (4) and (5) where the settlor is a beneficiary, upon application of a judgment creditor of the settlor, the court may, if the terms of the instrument require or authorize the trustee to make payments of income or principal to or for the benefit of the settlor, order the trustee to satisfy part or all of the judgment out of part or all of the payments of income or principal as they are due, presently or in the future, or which are payable in the trustee's discretion, to the extent in either case of the settlor's proportionate contribution to the trust.

**(7) SUBSEQUENT MODIFICATION OF COURT'S ORDER.** Any order entered by a court under sub. (4), (5) or (6) is subject to modification upon application of an interested person.

**(8) EXEMPT ASSETS.** Assets of a trust, to the extent they are exempt from claims of creditors under other statutes, shall not be subject to sub. (4), (5) or (6).

**History:** 1971 c. 66; 1977 c. 309, 418; 1985 a. 176; 1991 a. 316.

**Cross-reference:** See s. 701.07 (3) which deals with creditors' rights where a settlor retains powers over a living trust.

Trust income which is income to the beneficiary under federal tax law is subject to a child support order regardless of whether a distribution is made to the beneficiary. *Grohmann v. Grohmann*, 189 W (2d) 532, 525 NW (2d) 261 (1995).

**701.07 Living trusts. (1) VALIDITY.** A living trust, otherwise valid, shall not be held invalid as an attempted testamentary disposition, a passive trust under s. 701.03, or a trust lacking a sufficient principal because:

(a) It contains any or all of the following powers, whether exercisable by the settlor, another person or both:

1. To revoke, modify or terminate the trust in whole or in part;

2. To exercise a power or option over property in the trust or over interests made payable to the trust under an employe benefit plan, life insurance policy, or otherwise;

3. To direct, during the lifetime of the settlor or another, the person to whom or on whose behalf the income or principal shall be paid or applied;

4. To control the administration of the trust in whole or in part;

5. To add property or cause additional employe benefits, life insurance, or other interests to be made payable to the trust at any time.

(b) The principal consists of a designation of the trustee as a primary or direct, secondary or contingent beneficiary under a will, employe benefit plan, life insurance policy or otherwise; or

(c) The principal consists of assets of nominal value.

**(2) ELIGIBILITY TO RECEIVE ASSETS.** A living trust shall be eligible to receive property from any source.

**(3) CREDITORS' RIGHTS.** If a settlor retains a power to revoke, modify or terminate which is exercisable in the settlor's favor, except when such power is exercisable only in conjunction with a person having a substantial adverse interest, the trust property to the extent it is subject to such power is also subject to the claim of a creditor of the settlor. This subsection shall not apply to trust property to the extent it is exempt from claims of creditors under other statutes.

**History:** 1971 c. 66; 1979 c. 110 s. 60 (4); 1991 a. 316.

**Cross-reference:** See s. 701.06 (6) which deals with creditors' rights where the settlor is a beneficiary of the trust.

Section 701.03 which prohibits passive trusts does not apply to living trusts. This statute which provides that a living trust cannot be deemed passive controls. *McMahon v. Standard Bank & Trust Co.* 202 W (2d) 565, 550 NW (2d) 727 (Ct. App. 1996).

*Understanding Living Trusts.* Moschella. Wis. Law. March 1992.

*Informing the Public About Living Trusts.* Twohig. Wis. Law. March 1992.

**701.08 Transfers to living trusts. (1) VALIDITY AND EFFECT.** The order of execution of a living trust instrument and a will or other instrument purporting to transfer or appoint property to the trust evidenced by the trust instrument shall be disregarded in determining the validity of the transfer or appointment. No reference in any will to a living trust shall cause assets in such trust to be included in property administered as part of the testator's estate; nor shall it cause the trust or any portion thereof to be treated as a testamentary trust.

**(2) GOVERNING TERMS.** Property transferred or appointed by a will or by a beneficiary designation under an employe benefit plan, life insurance policy or other instrument permitting designation of a beneficiary to a living trust, the terms of which the testator or designator was the sole holder of a power to modify, shall be administered in accordance with the terms of the trust as they may have been modified prior to the testator's or designator's death, even though the will or beneficiary designation was not re-executed or republished after exercise of the power to modify, unless the will or beneficiary designation expressly provides otherwise.

Such property transferred or appointed to a living trust, which is subject to a power of modification requiring action or consent of a person other than the testator or designator, shall be administered in accordance with the terms of the trust instrument as they exist at the execution of the will or beneficiary designation, unless expressly otherwise provided. If the will or beneficiary designation expressly provides that the property shall be administered in accordance with the terms of the trust instrument as they may be modified thereafter, the will or beneficiary designation need not be reexecuted or republished after exercise of the power to modify.

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

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

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

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

**701.09 Transfers to testamentary trusts. (1) TESTAMENTARY TRANSFER TO TRUST OF ANOTHER.** A transfer or appointment by will shall not be held invalid because it is made to a trust created, or to be created, under the will of another person if the will of such other person was executed, or was last modified with respect to the terms of such trust, prior to the death of the person making the transfer or appointment and such other person's will is admitted to probate prior to, or within 2 years after, the death of the person making the transfer or appointment. Property included in such a transfer or appointment shall not be considered property subject to administration as part of the other person's estate but shall pass directly to that other person's testamentary trustee, be added to the designated trust and administered as a part thereof.

**(2) INVALID TESTAMENTARY TRANSFER.** If such a transfer or appointment by will is not accepted by the testamentary trustee of such other person or if no will of such other person which meets the conditions specified in sub. (1) is admitted to probate within the period therein limited, and if the will containing such transfer or appointment by will makes no alternative disposition of the assets, the will shall be construed as creating a trust upon the terms contained in the documents constituting the will of such other person as of the date of death of the person making the transfer or appointment by will.

**(3) LIFE INSURANCE PROCEEDS TRANSFERRED TO TRUST OF INSURED.** A trustee named or to be named in the will of an insured person may be designated beneficiary of an insurance policy on the life of the insured if the designation is made in accordance with the terms of the policy. After admission of the insured's will to probate and issuance of letters to such trustee, the insurance proceeds shall be paid to the trustee to be administered in accordance with the terms of the trust as they exist at the death of the insured, and the proceeds may be commingled with other assets passing to the trust. Insurance proceeds paid to a testamentary trustee because of his or her designation as life insurance beneficiary shall not be subject to death tax to any greater extent than if the proceeds were payable to a beneficiary other than the insured's estate. The proceeds shall be inventoried for tax purposes only and shall not be subject to taxes, debts or charges enforceable against the estate or otherwise considered assets of the insured's estate to any greater extent than if the proceeds were payable to a beneficiary other than the insured's estate.

**(4) EMPLOYEE BENEFITS TRANSFERRED TO TRUST OF EMPLOYEE.** A trustee named or to be named in the will of an employee covered by any employee benefit plan or contract described in s. 815.18 (3)

(j) or any annuity or insurance contract purchased by an employer that is a religious, scientific, educational, benevolent or other corporation or association not organized or conducted for pecuniary profit may be designated payee of any benefits payable after the death of the employee if the designation is made in accordance with the terms of the plan or contract. After admission of the employee's will to probate and issuance of letters to the trustee, the death benefits shall be paid to the trustee to be administered in accordance with the terms of the trust as they exist at the death of the employee, and the benefits may be commingled with other assets passing to the trust. Death benefits paid to a testamentary trustee because of his or her designation as payee are not subject to the death tax to any greater extent than if the benefits were payable to a beneficiary other than the employee's estate. The benefits shall be inventoried for tax purposes only and are not subject to taxes, debts or charges enforceable against the estate or otherwise considered assets of the employee's estate to any greater extent than if the benefits were payable to a beneficiary other than the employee's estate.

**(5) TRANSFER OF OTHER PROPERTY.** Property other than that described in subs. (3) and (4) may be made payable to or transferred to a trustee named or to be named in the will of the transferor.

**History:** 1971 c. 66; Sup. Ct. Order, 67 W (2d) 585, 777 (1975); 1975 c. 218; 1987 a. 27; 1989 a. 278; 1991 a. 316.

**701.10 Charitable trusts. (1) VALIDITY.** A charitable trust may be created for any of the following charitable purposes: relief of poverty, advancement of education, advancement of religion, promotion of health, governmental or municipal purposes or any other purpose the accomplishment of which is beneficial to the community. No gift to charity, in trust or otherwise, is invalid because of indefiniteness. If a particular charitable purpose is not indicated and the trustee is not expressly authorized by the creating instrument to select such a purpose, the trustee has an implied power to select one or more charitable purposes. If a particular charitable purpose is not indicated and no trustee is named in the creating instrument, the court may appoint a trustee with such an implied power to select or may direct that the property be transferred outright to one or more established charitable entities.

**(2) MODIFICATION AND TERMINATION.** (a) If a purpose of a charitable trust is or becomes impractical, unlawful or impossible, the court may order the trust continued for one or more other charitable purposes designated by the settlor or, in the absence of such designation, order the property devoted to one or more other charitable purposes either by continuing the trust or by distributing the property to one or more established charitable entities. In determining the alternative plan for disposition of the property, the court shall take into account current and future community needs in the general field of charity within which the original charitable purpose falls, other charitable interest of the settlor, the amount of principal and income available under the trust and other relevant factors. The provisions of this subsection do not apply insofar as the settlor expressly provides in the creating instrument for an alternative disposition if the original trust fails; nor do they apply to gifts by several persons to a charitable entity on a subscription basis if the court finds that the donors intended their gifts to be limited to the original purpose and such purpose fails initially.

(b) If any administrative provision of a charitable trust or part of a plan set forth by the settlor to achieve the settlor's charitable purpose is or becomes impractical, unlawful, inconvenient or undesirable, and a modification of such provision or plan will enable the trustee to achieve more effectively the basic charitable purpose, the court may by appropriate order modify the provision or plan.

(c) If a charitable trust is or becomes uneconomic when principal and probable income, cost of administration and other relevant factors are considered, or in any event if the trust property is valued at less than \$50,000, the court may terminate the trust and order outright distribution to an established charitable entity in the general field of charity within which the charitable purpose falls.

(d) It is the purpose of this subsection to broaden the power of the courts to make charitable gifts more effective. In any situation not expressly covered the court shall liberally apply the cy pres doctrine.

(e) The settlor if living, the trustee, the attorney general and an established charitable entity to which income or principal must be paid under the terms of the trust shall be persons interested in any proceeding under this subsection.

**(3) ENFORCEMENT; NOTICE TO ATTORNEY GENERAL.** (a) A proceeding to enforce a charitable trust may be brought by:

1. An established charitable entity named in the governing instrument to which income or principal must or may be paid under the terms of the trust;

2. The attorney general in the name of the state upon the attorney general's own information or, in the attorney general's discretion, upon complaint of any person;

3. Any settlor or group of settlors who contributed half or more of the principal; or

4. A cotrustee.

(b) In a proceeding affecting a charitable trust, notice must be given to the attorney general, but, except as provided in sub. (2), notice need not be given where the income or principal must be paid exclusively to one or more established charitable entities named in the governing instrument.

**(4) ESTABLISHED CHARITABLE ENTITY.** As used in this section, "established charitable entity" means a corporation, unincorporated association or trust operated exclusively for a charitable purpose defined in sub. (1).

**History:** 1971 c. 66; 1991 a. 316; 1993 a. 160.

**Cross-reference:** See s. 879.03 (2) (c) on notice to the attorney general of probate proceedings affecting a charitable trust.

A trust for residents of a city cannot be enlarged as to the area only because the trustees believe the original restriction has become unfair. In re Charitable Trust, Oshkosh Foundation, 61 W (2d) 432, 213 NW (2d) 54.

Construction of the trust terms to allow the majority of the proceeds to be used for a college seminar series for clergymen was impermissible where such a construction would increase the class of beneficiaries and would divert the trust purpose from one providing living facilities for the original beneficiaries into one primarily for the educational benefit of clergymen. In re Petition of Downer Home, 67 W (2d) 55, 226 NW (2d) 444.

**701.105 Private foundations.** (1) (a) In the administration of any trust which is a private foundation, as defined in section 509 of the internal revenue code, a charitable trust, as defined in section 4947 (a) (1) of the internal revenue code, or a split-interest trust as defined in section 4947 (a) (2) of the internal revenue code, all of the following acts shall be prohibited:

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

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

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

4. Making any taxable expenditures as defined in section 4945 (d) of the internal revenue code, which would give rise to any liability for the tax imposed by section 4945 (a) of the internal revenue code.

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

**(2)** In the administration of any trust which is a private foundation as defined in section 509 of the internal revenue code, or which is a charitable trust as defined in section 4947 (a) (1) of the

internal revenue code, there shall be distributed, for the purposes specified in the trust instrument, for each taxable year, amounts at least sufficient to avoid liability for the tax imposed by section 4942 (a) of the internal revenue code.

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

**(4)** Nothing in this section shall impair the rights and powers of the courts or the attorney general of this state with respect to any trust.

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

**701.11 Honorary trusts; cemetery trusts.** (1) Except under sub. (2), where the owner of property makes a testamentary transfer in trust for a specific noncharitable purpose, and there is no definite or definitely ascertainable human beneficiary designated, no enforceable trust is created; but the transferee has power to apply the property to the designated purpose, unless the purpose is capricious. If the transferee refuses or neglects to apply the property to the designated purpose within a reasonable time and the transferor has not manifested an intention to make a beneficial gift to the transferee, a resulting trust arises in favor of the transferor's estate and the court is authorized to order the transferee to retransfer the property.

**(2)** A trust may be created for maintaining, keeping in repair and preserving any grave, tomb, monument, gravestone or any cemetery. Any cemetery company, association or corporation may receive property in trust for any of those purposes and apply the income from the trust to the purpose stated in the creating instrument.

**(3)** (a) A trust described in sub. (2) is invalid to the extent it was created for a capricious purpose or the purpose becomes capricious.

(b) If the assets of any trust described in sub. (2) are valued at less than \$5,000 and the court finds that the cost of operating the trust will probably defeat the intent of the settlor or if the trustee, including a cemetery company, association or corporation, named in the creating instrument is improperly described, the court may order distribution of the assets on terms which will as nearly as possible carry out the settlor's intention.

**History:** 1989 a. 307.

**701.12 Revocation, modification and termination of trusts with consent of settlor.** (1) By written consent of the settlor and all beneficiaries of a trust or any part thereof, such trust or part thereof may be revoked, modified or terminated, except as provided under s. 445.125 (1) (a) 2. to 4.

**NOTE:** Sub. (1) is shown as amended eff. 6–1–97 by 1995 Wis. Act 295. Prior to 6–1–97 it reads:

**(1)** By written consent of the settlor and all beneficiaries of a trust or any part thereof, such trust or part thereof may be revoked, modified or terminated, except as provided under s. 445.125 (1) (b) to (d).

**(2)** For purposes of this section such consent may be given on behalf of a legally incapacitated, unascertained or unborn beneficiary by the court after a hearing in which the interests of such beneficiary are represented by a guardian ad litem. A guardian ad litem for such beneficiary may rely on general family benefit accruing to living members of the beneficiary's family as a basis for approving a revocation, modification or termination of a trust or any part thereof.

**(3)** Nothing in this section shall prevent revocation, modification or termination of a trust pursuant to its terms or otherwise in accordance with law.

**History:** 1971 c. 66; 1977 c. 40; 1979 c. 175 s. 53; 1979 c. 221 s. 2202 (45); 1981 c. 64; 1995 a. 295.

**701.13 Modification and termination of trusts by court action.** (1) **ANTICIPATION OF DIRECTED ACCUMULATION OF INCOME.** When an accumulation of income is directed for the benefit of a beneficiary without other sufficient means to support

or educate himself or herself, the court on the application of the beneficiary or the beneficiary's guardian may direct that a suitable sum from the income accumulated or to be accumulated be applied for the support or education of such person.

(2) APPLICATION OF PRINCIPAL TO INCOME BENEFICIARY. Unless the creating instrument provides to the contrary, if a beneficiary is entitled to income or to have it applied for the beneficiary's benefit, the court may make an allowance from principal to or for the benefit of such beneficiary if the beneficiary's support or education is not sufficiently provided for, taking into account all other resources available to the beneficiary.

(3) TERMINATION. In the case of a living trust where the settlor is deceased and in the case of any testamentary trust, regardless in either case of spendthrift or similar protective provisions, a court with the consent of the trustee may order termination of the trust, in whole or in part, and the distribution of the assets that it considers appropriate if the court is satisfied that because of any substantial reason existing at the inception of a testamentary trust or, in the case of any trust, arising from a subsequent change in circumstances (including but not limited to the amount of principal in the trust, income produced by the trust and the cost of administering the trust) continuation of the trust, in whole or in part, is impractical. In any event, if the trust property is valued at less than \$50,000, the court may order termination of the trust and the distribution of the assets that it considers appropriate.

(4) MARITAL DEDUCTION TRUSTS. In a trust where the income beneficiary also has a general power of appointment as defined in s. 702.01 (3) or where all accumulated income and principal are payable to such beneficiary's estate, any termination, in whole or in part, of the trust under sub. (3) can only be ordered in favor of such beneficiary.

(5) CHARITABLE TRUSTS. Subsections (2) and (3) do not apply to a trust where a future interest is indefeasibly vested in:

(a) The United States or a political subdivision for exclusively public purposes;

(b) A corporation organized exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual and no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation, and which does not participate or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office;

(c) A trustee or a fraternal society, order or association operating under the lodge system, provided the principal or income of such trust is to be used by such trustee or by such fraternal society, order or association exclusively for religious, charitable, scientific, literary or educational purposes or for the prevention of cruelty to children and animals, and no substantial part of the activities of such trustee or of such fraternal society, order or association is carrying on propaganda or otherwise attempting to influence legislation, and such trustee or such fraternal society, order, or association does not participate or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office; or

(d) Any veteran's organization incorporated by act of congress, or of its departments or local chapters or posts, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(6) OTHER APPLICABLE LAW. Nothing in this section shall prohibit modification or termination of any trust pursuant to its terms or limit the general equitable power of a court to modify or terminate a trust in whole or in part.

History: 1971 c. 66; 1983 a. 189 s. 329 (26); 1991 a. 316; 1993 a. 143.

#### 701.14 Circuit court procedure in trust proceedings.

(1) GENERALLY. A proceeding in the circuit court involving a liv-

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

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

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

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

History: 1971 c. 66; Sup. Ct. Order, 67 W (2d) 585, 777 (1975); 1977 c. 449 s. 497; 1991 a. 220, 316.

Cross-reference: See s. 701.10 (3) which lists the persons who may start proceedings to enforce a charitable trust and requires notice be given to the attorney general of any proceeding affecting such trust.

**701.15 Representation of others.** Except as otherwise provided in ss. 701.12 and 701.13 (1), in a trust proceeding in the circuit court:

(1) POWER TO CREATE OR EXTINGUISH. The sole holder or all coholders of a power of revocation or a general power of appointment as defined in s. 702.01 (3) may represent any or all persons whose interests are subject to such power.

(2) GUARDIAN AD LITEM; VIRTUAL REPRESENTATION. Subject to sub. (1), the court may appoint a guardian ad litem for any person interested who is legally incapacitated, unascertained or unborn if such person is not already represented by a fiduciary having no adverse interest in the proceeding. A guardian ad litem may represent 2 or more such persons where they have a substantially identical interest in the proceeding. The court may dispense with or terminate the appointment of a guardian ad litem for such person if there is a legally competent person who is a party to the proceeding and has a substantially identical interest in it.

History: 1971 c. 66; 1977 c. 449; 1983 a. 189 s. 329 (26).

**701.16 Testamentary trustees.** (1) APPOINTMENT OF ORIGINAL TRUSTEE. (a) *Trustee named in will.* A trustee who is named or whose appointment is provided for in a will derives the authority to carry out the trust from the will and assumes the office of trustee upon the issuance of letters of trust by the court as provided in s. 856.29. A trustee named in a will may renounce the position by an instrument filed with the court having jurisdiction to admit the will to probate.

(b) *Other original trustee.* If a testamentary trust is created which fails to name a trustee, or the named trustee refuses to accept the position or predeceases the settlor and no alternate trustee is named in the will nor effective provision made for appointment of an alternate trustee, the court shall appoint a suit-

able person as trustee. Letters of trust shall be issued to such trustee as provided in s. 856.29.

(c) *Special trustee.* If it appears necessary, the court can appoint a special trustee until a regular trustee can be appointed. A special trustee may be appointed without notice and may be removed whenever the court so orders. Such special trustee shall give such bond as the court requires and shall have such powers as are conferred by the order of appointment and set forth in any letters of trust issued the special trustee.

(d) *Foreign trustee.* If a trustee is authorized to carry out a trust created by will admitted to probate outside this state, but not also admitted to probate in this state, the foreign trustee may have recorded in the office of the register of deeds of a county in which part of the subject matter of the trust is located a certified copy of the letters of trust and filed with the register of probate of the same county a statement appointing the register of probate in his or her official capacity the trustee's resident agent for service of process. Thereafter the trustee may exercise all powers and have all the rights, remedies and defenses that the trustee would have if he or she received letters of trust from a circuit court of this state. Service of process shall be complete upon delivery of duplicate copies to the register of probate, one of which copies the register of probate shall promptly forward by registered mail to the foreign trustee.

(2) **BOND.** Prior to the issuance of letters of trust to an original testamentary trustee under sub. (1) or to a successor or added testamentary trustee under s. 701.17 (1), the court may require such trustee to give a bond in accordance with ch. 878 and conditioned on the faithful performance of such trustee's duties. If a settlor directs that a trustee serve without bond, the court shall give effect to this direction unless it determines that a bond is required by a change in the trustee's personal circumstances since the execution of the settlor's will. If the court requires a bond, and the trustee named in the will fails to furnish the required bond within a reasonable period of time after receiving notice of the bond requirement, the court may remove the trustee named in the will and appoint a successor trustee under s. 701.17. No bond shall be required of a trust company bank, state bank or national banking association which is authorized to exercise trust powers and which has complied with s. 220.09 or 223.02, nor shall a bond be required of a religious, charitable or educational corporation or society.

(3) **INVENTORY.** A testamentary trustee shall make and file a verified inventory of all property received from the settlor's personal representative or from any other source.

(4) **ANNUAL ACCOUNTING.** (a) A testamentary trustee is required to make and file a verified account annually with the court, except as provided in pars. (am) and (b). If the trustee is accounting on a calendar-year basis, the court may not require the trustee to file the annual account prior to April 15. Production of securities and other assets for examination is not necessary upon the filing of an annual account unless the court determines such production is necessary to ascertain the correctness of an account filed for a particular trust. In the case of a testamentary charitable trust a copy of the annual account filed with the court shall be filed with the attorney general.

(am) The annual accounting requirements under par. (a) do not apply to corporate trustees or to corporate cotrustees if those trustees or cotrustees agree, in their initial consent to act as trustees or cotrustees or in a subsequent filing with the register in probate for the county that has jurisdiction over the trust, to provide annual accounts to all persons interested, as defined in s. 851.21, who request those accounts by writing to the trustee or cotrustee. Each request is effective until the requester withdraws it or is no longer a person interested. A corporate trustee or cotrustee may withdraw its agreement by notifying the appropriate register in probate of its intent to do so.

(b) Except in the case of a testamentary charitable trust, the court may dispense with the requirement of an annual accounting where, due to the size or nature of the trust property, the duration of the trust, the relationship of the trustee to the beneficiaries or other relevant factors, compliance with such requirement is unnecessary or unduly burdensome on the trustee. Whether or not an annual accounting is required a beneficiary may petition the court to require an accounting and the trustee may petition for approval of the trustee's accounts on a periodic basis.

(c) Notwithstanding pars. (a), (am) and (b) the court may require an accounting at any time.

(d) Notwithstanding s. 879.47, trustees and cotrustees may submit to courts accounts in the format that they normally use for accounts submitted to beneficiaries under this subsection, if all of the information required by the court is included.

(5) **FINAL ACCOUNTING.** A verified final account is required upon the termination of a testamentary trust. Upon the petition of a surviving or successor trustee, a beneficiary, a personal representative of a deceased trustee or on its own motion, the court may order a verified account filed upon the death, resignation or removal of a testamentary trustee. The court may require such proof of the correctness of a final account as it considers necessary.

(6) **DISCHARGE.** No testamentary trustee or personal representative of a deceased trustee shall be discharged from further responsibility with respect to a testamentary trust until the court is satisfied upon notice and hearing that the requirements of this section have been met and it has received satisfactory proof that the trust property has been turned over to a successor or special trustee or, where the trust is terminated, distributed to the beneficiaries entitled to such property or turned over to a special trustee for distribution.

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

**Cross-references:** See s. 223.12 which contains requirements which must be met before a foreign corporate trustee is qualified to act in this state.

See s. 701.23 (1) which provides for the discharge of a trustee where a testamentary trust is removed to another state.

Even during hearing on discharge, trustee's duty affirmatively to represent beneficiaries' interests by disclosing relevant information remains, and breach of this duty leaves discharge open to attack. *Hammes v. First National Bank & Trust Co.* 79 W (2d) 355, 255 NW (2d) 555.

See note to 701.18 citing *Matter of Sherman B. Smith Family Trust*, 167 W (2d) 196, 482 NW (2d) 118 (Ct. App. 1992).

A trustee has a duty to the trust beneficiaries to ensure the personal representative transfers all property to which the trust is entitled. Even where the same person acts as trustee and personal representative the trustee has a duty to enforce claims the trust has against the personal representative. *Old Republic Surety Co. v. Erlien*, 190 W (2d) 400, 527 NW (2d) 389 (Ct. App. 1994).

**701.17 Successor and added trustees.** (1) **APPOINTMENT OF SUCCESSOR OR ADDED TRUSTEE.** If there is a vacancy in the office of trustee because of the death, resignation or removal of a trustee, the court may appoint a successor trustee unless the creating instrument names or provides an effective method for appointing a successor. Upon the death of a sole trustee, title to the trust property does not pass to the trustee's personal representative but to the successor named in or appointed pursuant to the terms of the creating instrument or, in the case of a successor or special trustee appointed by the court, as provided in sub. (5). The court may in the exercise of a sound discretion appoint an additional trustee if necessary for the better administration of the trust, unless the creating instrument expressly prohibits such addition or provides an effective method for appointing an additional trustee. Subject to s. 701.16 (2), a successor or added testamentary trustee shall be issued letters of trust, at that trustee's request.

(2) **APPOINTMENT OF SPECIAL TRUSTEE.** If it appears necessary, the court may appoint a special trustee until a successor trustee can be appointed or, where a trust has terminated, to distribute the assets. A special trustee may be appointed without notice and may be removed whenever the court so orders. Such special trustee shall give such bond as the court requires and shall have the pow-

ers conferred by the order of appointment and set forth in any letters of trust issued the special trustee.

**(3) POWERS OF SUCCESSOR OR ADDED TRUSTEE.** Unless expressly prohibited in the creating instrument, all powers conferred upon the trustee by such instrument attach to the office and are exercisable by the trustee holding the office.

**(4) POWERS OF COTRUSTEES.** If one of several trustees dies, resigns or is removed, the remaining trustees shall have all rights, title and powers of all the original trustees. If the creating instrument manifests an intent that a successor trustee be appointed to fill a vacancy, the remaining trustees may exercise the powers of all the original trustees until such time as a successor is appointed.

**(5) VESTING OF TITLE.** A special or successor trustee is vested with the title of the original trustee and an added trustee becomes a joint tenant with the existing trustee in all trust property. The court may order a trustee who resigns, is removed or is joined by an added trustee to execute such documents transferring title to trust property as may be appropriate to facilitate administration of the trust or may itself transfer title.

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

**Cross-reference:** See s. 223.11 which deals with the effect of consolidation of trust company banks.

**701.18 Resignation and removal of trustees. (1) RESIGNATION.** A trustee may resign in accordance with the terms of the creating instrument or petition the court to accept the trustee's resignation and the court may, upon notice and hearing, discharge the trustee from further responsibility for the trust upon such terms and conditions as are necessary to protect the rights of the beneficiaries and any cotrustee. In no event shall a testamentary trustee be discharged from further responsibility except as provided in s. 701.16 (6).

**(2) REMOVAL.** A trustee may be removed in accordance with the terms of the creating instrument or the court may, upon its own motion or upon a petition by a beneficiary or cotrustee, and upon notice and hearing, remove a trustee who fails to comply with the requirements of this chapter or a court order, or who is otherwise unsuitable to continue in office. In no event shall a testamentary trustee be discharged from further responsibility except as provided in s. 701.16 (6).

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

Trustees of an employees' profit-sharing plan who are also beneficiaries may not be removed simply because other beneficiaries have lost confidence in them or because they personally benefit in a minor way from a denial of benefits to a participant. *Zimmermann v. Brennan*, 56 W (2d) 623, 202 NW (2d) 923.

Although will creating trust provided trustee could resign without court approval, filing a petition for the appointment of a successor and approval of accounts invoked court jurisdiction and required the exercise of discretion regarding the trustee's resignation. *Matter of Sherman B. Smith Family Trust*, 167 W (2d) 196, 482 NW (2d) 118 (Ct. App. 1992).

**701.19 Powers of trustees. (1) POWER TO SELL, MORTGAGE OR LEASE.** In the absence of contrary or limiting provisions in the creating instrument, in the court order appointing a trustee or in a subsequent order, a trustee has complete power to sell, mortgage or lease trust property without notice, hearing or order. A trustee has no power to give warranties in a sale, mortgage or lease which are binding on the trustee personally. In this section "sale" includes an option or agreement to transfer for cash or on credit, exchange, partition or settlement of a title dispute; this definition is intended to broaden rather than limit the meaning of "sale". "Mortgage" means any agreement or arrangement in which trust property is used as security.

**(2) COURT AUTHORIZATION OF ADMINISTRATIVE ACTION.** (a) In the absence of contrary or limiting provisions in the creating instrument, in any case where it is for the best interests of the trust, on application of the trustee or other interested person, the court may upon notice and hearing authorize or require a trustee to sell, mortgage, lease or otherwise dispose of trust property upon such terms and conditions as the court deems just and proper.

(b) Despite contrary or limiting provisions in the creating instrument, upon application of a trustee or other interested person, a court may upon notice and hearing order the retention,

investment, reinvestment, sale, mortgage, lease or other disposition of trust property if the court is satisfied that the original purpose of the settlor cannot be carried out, substantially performed or practically achieved for any reason existing at the inception of the trust or arising from any subsequent change in circumstances and the retention, investment, reinvestment, sale, mortgage, lease or other disposition of the property more nearly approximates the settlor's intention.

(c) Unless authorized in the creating instrument, a trustee may not be interested as a purchaser, mortgagee or lessee of trust property unless such purchase, mortgage or lease is made with the written consent of all beneficiaries or with the approval of the court upon notice and hearing. A representative of a beneficiary, under s. 701.15, may give written consent for such beneficiary.

(d) A trustee may not sell individually owned assets to the trust unless the sale is authorized in the creating instrument, made with the written consent of all beneficiaries or made with the approval of the court upon notice and hearing.

**(3) WHEN MANDATORY POWER DEEMED DISCRETIONARY.** If a creating instrument expressly or by implication directs a trustee to sell trust property and such property has not been sold for a period of 25 years after the creation of the trust, such direction to the trustee shall be deemed a discretionary power of sale.

**(4) CONTINUATION OF BUSINESS BY COURT ORDER.** In the absence of contrary or limiting provisions in the creating instrument, the circuit court may, where it is in the best interests of the trust, order the trustee to continue any business of a deceased settlor. The order may be issued without notice and hearing, in the court's discretion and, in any case, may provide:

(a) For conduct of the business solely by the trustee, jointly with one or more of the settlor's surviving partners or as a corporation or limited liability company to be formed by the trustee;

(b) As between the trust and the trustee, the extent of liability of the trust and the extent of the personal liability of the trustee for obligations incurred in the continuation of the business;

(c) As between beneficiaries, the extent to which liabilities incurred in the continuation of the business are to be chargeable solely to a part of the trust property set aside for use in the business or to the trust as a whole; and

(d) As to the period of time for which the business may be conducted and such other conditions, restrictions, regulations, requirements and authorizations as the court orders.

(e) Nothing in this subsection shall be construed as requiring a trustee to liquidate a business, including a business operated as a closely held corporation, when such action is not required by the creating instrument or other applicable law.

**(4m) CONTINUATION OF BUSINESS BY DIRECTION OF SETTLOR.** If the settlor directs retention of a business that is among the trust's assets in the trust document or by other written means, a trustee may retain that business during the settlor's lifetime without liability.

**(5) FORMATION OF BUSINESS ENTITY.** In the absence of contrary or limiting provisions in the creating instrument:

(a) The court may by order authorize a trustee to become a partner under ch. 178 or 179 and transfer trust property to the partnership in return for a partnership interest.

(aL) The court may by order authorize a trustee to become a member of a limited liability company under ch. 183 and transfer trust property to the limited liability company in return for an ownership interest.

(b) The court may by order authorize a trustee to organize a corporation for any purpose permitted by ch. 180, subscribe for shares of such corporation and transfer trust property to such corporation in payment for the shares subscribed.

(c) The court may by order authorize a trustee to form a corporation for any purpose permitted by ch. 181.

(d) An order under this subsection may in the court's discretion be issued without notice and hearing.

**(6) REGISTRATION OF SECURITIES IN NOMINEE.** Unless prohibited in the creating instrument, a trustee may register securities in the name of a nominee.

**(7) PROXY VOTING OF STOCK.** Unless the creating instrument contains an express prohibition or specifies the manner in which the trustee is to vote stock in a corporation or certificates of beneficial interest in an investment trust, the trustee may vote such stock or certificates by general or limited proxy, with or without power of substitution.

**(8) PLATTING LAND.** In the absence of contrary or limiting provisions in the creating instrument, the court may by order authorize a trustee to plat land which is part of the trust, either alone or together with other owners of such real estate. In such platting the trustee must comply with the same statutes, ordinances, rules and regulations which apply to a person who is platting the person's own land. The order under this subsection may in the court's discretion be issued without notice and hearing.

**(9) JOINT TRUSTEES.** (a) In the absence of contrary or limiting provisions in the creating instrument, any power vested in 3 or more trustees may be exercised by a majority. This paragraph shall not apply to living trusts created prior to July 1, 1971, or to testamentary trusts contained in wills executed or last republished prior to that date.

(b) A trustee who has not joined in exercising a power is not liable to an affected person for the consequences of the exercise unless the trustee has failed to discharge the trustee's duty to participate in the administration of the trust. A dissenting trustee is not liable for the consequences of an act in which the dissenting trustee joins at the direction of the majority of the trustees if the dissenting trustee's dissent is expressed in writing to the other trustees at or before the time of the joinder.

**(10) RESTRICTION ON EXERCISE OF POWERS.** Unless the creating instrument negates application of this subsection, a power conferred upon a person in the person's capacity as trustee to make discretionary distributions of principal or income to himself or herself or to make discretionary allocations in the trustee's favor of receipts or expenses as between principal and income, cannot be exercised by the trustee. If the power is conferred on 2 or more trustees, it may be exercised by the trustees who are not so disqualified. If there is no trustee qualified to exercise the power, it may be exercised by a special trustee appointed by the court. This subsection shall not apply to living trusts created prior to July 1, 1971, or to testamentary trusts contained in wills executed or last republished prior to that date.

**(11) PROTECTION OF THIRD PARTIES.** With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust power and its proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers the trustee purports to exercise. A third person is not bound to assure the proper application of trust property paid or delivered to the trustee.

**History:** 1971 c. 66; 1979 c. 175 s. 50; 1991 a. 316; 1993 a. 112, 160, 486; 1995 a. 336.

**Cross-references:** See s. 112.01, the Uniform Fiduciaries Act, and s. 112.06, the Uniform Act for Simplification of Fiduciary Security Transfers, on protection of third parties.

See 112.02 which provides for suspending powers of a testamentary trustee in military service.

Chapter 881 and 223.055 contain limitations on investments by trustees.

Loss of future profit to estate through disposal of parcel is damage chargeable to trustee or executor only if parcel was not needed for liquidity. In re Estate of Meister, 71 W (2d) 581, 239 NW (2d) 52.

Fiduciary and estate liability in contract and in tort. Dubis, 55 MLR 297.

**701.20 Principal and income.** **(1) SCOPE OF SECTION.** Unless otherwise stated, this section governs the ascertainment of income and principal and the apportionment of receipts and

expenses in trusts and decedents' estates, to the extent not inconsistent with the provisions of a creating instrument. A person making an outright gift or establishing a trust may make provision in the creating instrument for the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the personal representative or trustee to do so and the provision where not otherwise contrary to law controls notwithstanding this section.

**(2) DUTY OF TRUSTEE AS TO RECEIPTS AND EXPENDITURE.** (a) A trust shall be administered with due regard to the respective interests of beneficiaries of income and principal. A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expenditure is charged to income or principal or partly to each:

1. In accordance with the terms of the creating instrument, notwithstanding contrary provisions of this section;

2. In the absence of any contrary terms of the creating instrument, in accordance with the provisions of this section; or

3. If neither of the rules of administration under subd. 1. or 2. is applicable, in accordance with what is reasonable and equitable in view of the respective interests of the beneficiaries.

(b) If the creating instrument gives the trustee discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference that the trustee has or has not improperly exercised such discretion arises from the fact that the trustee has made an allocation contrary to this section.

(c) After determining income and principal, the trustee shall charge to income or principal expenses and other charges as provided in sub. (12).

**(3) INCOME; PRINCIPAL; CHARGES.** As used in this section:

(a) "Income" is the return in money or other property derived from the use of principal, including, but not limited to, return received as:

1. Rent of real or personal property, including sums received for cancellation or renewal of a lease.

2. Interest, including sums received as consideration for the privilege of prepayment of principal, except as provided in sub. (7).

3. Income earned during administration of a decedent's estate as provided in sub. (5).

4. Corporation distributions as provided in sub. (6).

5. Accrued increment on bonds or other obligations issued at discount as provided in sub. (7).

6. Receipts from business and farming operations as provided in sub. (8).

7. Receipts from disposition of natural resources as provided in subs. (9) and (10).

8. Receipts from other principal subject to depletion as provided in sub. (11).

9. Proceeds of insurance relating to loss of income.

(b) "Principal" is property other than income, including, but not limited to:

1. Consideration received by the trustee on the sale or other transfer of principal or on repayment of a loan or as a refund or replacement or change in the form of principal.

2. Proceeds of property taken on eminent domain proceedings.

3. Proceeds of insurance upon property forming part of the principal.

4. Stock dividends, receipts on liquidation of a corporation, and other corporate distributions as provided in sub. (6).

5. Receipts from the disposition of bonds or other obligations as provided in sub. (7).

6. Receipts from disposition of natural resources as provided in subs. (9) and (10).

7. Receipts from other principal subject to depletion as provided in sub. (11).



8. Allowances for depreciation established under subs. (8) and (12) (a) 2.

9. Income added to and held as principal as provided in s. 701.21 (4).

**(4) WHEN RIGHT TO INCOME ARISES; APPORTIONMENT OF INCOME.** (a) Except as provided in par. (b), income earned or accrued in whole or in part before the date when an asset becomes subject to the trust shall be income when received.

(b) In the administration of a decedent's estate or of an asset becoming subject to a trust by reason of a will or by reason of the death of a decedent, income which is earned or accrued to the date of death of the decedent but not yet payable, including, but not limited to, income in respect of a decedent, or which is due but not yet paid, shall be added to principal when received.

(c) On termination of an income interest, the following amounts shall be classified as income and treated as if received prior to the termination.

1. Income collected but undistributed on the date of termination and not subject to s. 701.21 (4).

2. Income due but not paid to the trustee on the date of termination.

3. Income accrued.

(d) In determining accrued income, the following rules apply:

1. Corporate distributions to stockholders including distributions from a regulated investment company or by a trust qualified and electing to be taxed under federal law as a real estate investment trust shall be treated as accrued on the day fixed by the corporation for determination of stockholders of record entitled to distribution or, if no date is fixed, on the date of declaration of the distribution by the corporation.

2. Income in the form of periodic payments (other than corporate distributions to stockholders), including interest, rent and annuities, shall be treated as accruing from day to day.

3. Obligations for the payment of money which are sold by the issuer at a discount from their maturity value in lieu of interest payments shall be treated as accruing from day to day.

**(5) INCOME EARNED DURING ADMINISTRATION OF A DECEDENT'S ESTATE.** (a) Unless the will otherwise provides and subject to par. (b), debts, funeral expenses, estate taxes, property taxes prorated to the date of death, family allowances unless charged against income by the court, and administration expenses shall be charged against the principal of the estate.

(b) Unless the will otherwise provides, income from the assets of a decedent's estate after the death of the decedent and before distribution, including income from property used to discharge liabilities, legacies and devises, shall be determined in accordance with the rules applicable to a trustee under this section and distributed as follows:

1. To legatees and devisees of specific property other than money, the income from the property bequeathed or devised to them less the following recurrent and other ordinary expenses attributable to the specific property: property taxes (excluding taxes prorated to the date of death), interest (excluding interest accrued to the date of death), income taxes (excluding taxes on income in respect of a decedent, capital gains and any other income taxes chargeable against principal) which accrue during the period of administration, ordinary repairs, and other expenses of management and operation of the property. For the purpose of this subdivision, property elected by a surviving spouse under s. 861.02 (1) is a bequest or devise to the surviving spouse.

2. To all other legatees and devisees, except as provided in par. (d), the balance of the income, less the balance of the recurrent and other ordinary expenses attributable to all other property from which the estate is entitled to income, the distribution to be in proportion to their respective interests in the property at the time of distribution and based upon the value of the property at the date of death.

(c) Income received by a trustee under par. (b) shall be treated as income of the trust.

(d) A legatee, including a trustee, of a specific amount of money not determined by a pecuniary formula shall not be paid any part of the income of the estate but shall receive interest on any unpaid portion of the legacy for the period commencing one year after decedent's death at the legal rate set forth in s. 138.04.

(e) Unless the creating instrument otherwise provides, if a trust may be included in a decedent's gross estate for federal estate tax purposes, and if the trust is divided or distributed in whole or in part as a result of the decedent's death, this subsection shall apply during the period after the death of the decedent and before the division or distribution is complete. For this purpose, the assets of the trust shall be valued as of the decedent's death.

**(6) CORPORATE DISTRIBUTIONS.** (a) Except as provided in pars. (b), (c) and (d), all corporate distributions are income, including cash dividends, distributions of or rights to subscribe to shares or securities or obligations of corporations other than the distributing corporation, and the proceeds of the rights or property distributions. Except as provided in pars. (c) and (d), if the distributing corporation gives a stockholder an option to receive a distribution either in cash or in its own shares, the distribution chosen is income.

(b) Corporate distributions of shares of the distributing corporation, including distributions in the form of a stock split or stock dividend, are principal. A right to subscribe to shares or other securities issued by the distributing corporation accruing to stockholders on account of their stock ownership and the proceeds of any sale of the right are principal.

(c) Except to the extent that the corporation indicates that some part of a corporate distribution is a settlement of preferred or guaranteed dividends accrued since the trustee became a stockholder or is in lieu of an ordinary cash dividend, a corporate distribution is principal if the distribution is pursuant to:

1. A call of shares;

2. A merger, consolidation, reorganization, or other plan by which assets of a corporation are acquired by another corporation;

3. A total or partial liquidation of the corporation, including any distribution which the corporation indicates is a distribution in total or partial liquidation;

4. Any distribution of assets pursuant to a court decree or final administrative order by a government agency ordering distribution of the particular assets; or

5. Any distribution of securities other than shares of the distributing corporation on which no gain or loss is recognized for federal income tax purposes.

(d) Distributions made from ordinary income by a regulated investment company or by a trust qualifying and electing to be taxed under federal law as a real estate investment trust are income. All other distributions made by the company or trust, including distributions from capital gains, depreciation, or depletion, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, are principal.

(e) Corporate distributions other than cash which are deemed income under this subsection may be distributed in kind, or the trustee may instead distribute its cash equivalent on the date of distribution by the corporation.

**(7) PREMIUM AND DISCOUNT.** (a) Except as provided in par. (b), no provision may be made for amortization of premiums or for accumulation for discounts on bonds or other obligations for the payment of money. The proceeds of sale, redemption or other disposition of the bonds or obligations are principal.

(b) In the case of a bond or other stated obligation for the payment of money bearing no stated interest but payable or redeemable at maturity or at a future time at an amount in excess of the amount in consideration of which it was issued, the increment in

value while held by the personal representative or trustee is income when realized.

**(8) BUSINESS AND FARMING OPERATIONS.** If a trustee uses any part of the principal in the operation of a business, including an agricultural or farming operation, as a sole proprietor, partner or member of a limited liability company, the net profits and losses of the business shall be computed in accordance with generally accepted accounting principles for a comparable business.

(a) Net profits from a business are income.

(b) Net losses from a business do not reduce other trust income for the fiscal or calendar year during which they occur but shall be carried into subsequent fiscal or calendar years and reduce the net profits of the business for those years.

**(9) DISPOSITION OF NATURAL RESOURCES.** (a) If any part of the principal consists of a right to receive royalties, overriding or limited royalties, working interests, production payments, net profit interests, or other interests in minerals, oil, gas, stone, gravel, sand or other natural resources in, on or under land, the receipts from taking the natural resources from the land shall be allocated as follows:

1. If received as rent on a lease or extension payments on a lease, the receipts are income.

2. If received from a production payment, the receipts are income to the extent of any factor for interest or its equivalent provided in the governing instrument. There shall be allocated to principal the fraction of the balance of the receipts which the unrecovered cost of the production payment bears to the balance owed on the production payment, exclusive of any factor for interest or its equivalent. The receipts not allocated to principal are income.

3. If received as a royalty, overriding or limited royalty, or bonus, or from a working, net profit, or any other interest in minerals or other natural resources, receipts not provided for in subs. 1. and 2. shall be apportioned on a yearly basis in accordance with this subdivision whether or not any natural resource was being taken from the land at the time the trust was established. There shall be added to principal as an allowance for depletion such portion of the gross receipts as shall be allowed as a deduction in computing taxable income for federal income tax purposes. The balance of the gross receipts, after payment therefrom of all expenses, direct and indirect, is income.

(b) If a trustee, on January 1, 1979, held an item of depletable property of a type specified in this subsection the trustee may continue to allocate receipts from the property in the manner used before January 1, 1979.

(c) This subsection does not apply to timber, water, soil, sod, dirt, peat, turf, mosses or interests in a partnership or limited liability company owning natural resources.

**(10) TIMBER, WATER, SOIL, SOD, DIRT, PEAT, TURF, MOSSES OR AN INTEREST IN A PARTNERSHIP OR LIMITED LIABILITY COMPANY OWNING NATURAL RESOURCES.** If any part of the principal consists of an interest in timber, water, soil, sod, dirt, peat, turf, mosses or a partnership or limited liability company owning natural resources, the receipts shall be allocated in accordance with sub. (2) (a) 3.

**(11) OTHER PROPERTY SUBJECT TO DEPLETION.** Except as provided in subs. (9) and (10), if the principal consists of property subject to depletion, including leaseholds, patents, copyrights, royalty rights and any rights to receive periodic payments under a contract or plan for deferred compensation or for the benefit of one or more of the employees of an employer, receipts shall be allocated in accordance with sub. (2) (a) 3.

**(12) CHARGES AGAINST INCOME AND PRINCIPAL.** (a) The following charges shall be made against income:

2. Ordinary expenses incurred in connection with the administration, management, or preservation of the trust property, including fees and expenses of attorneys, accountants, appraisers, investment counselors, custodians and agents, regularly recurring taxes assessed against any portion of the principal, all premiums on insurance other than life insurance, interest, maintenance, and ordinary repairs.

3. Any tax levied upon receipts defined as income under this section or the trust instrument and payable by the trustee.

(b) No allowance may be made for depreciation of any property held by the trustee unless the court directs otherwise.

(c) If charges against income are of unusual amount, the trustee may by means of reserves or other reasonable means charge them over a reasonable period of time and withhold from distribution sufficient sums to regularize distributions.

(d) The following charges shall be made against principal:

2. Charges not provided for in par. (a), including fees and expenses of attorneys, accountants, appraisers, investment counselors, custodians and agents, the cost of investing and reinvesting principal, the payments on principal of an indebtedness including a mortgage amortized by periodic payments of principal, expenses for preparation of property for rental or sale, and attorney fees and other expenses in judicial proceedings unless the court directs otherwise.

3. Extraordinary repairs or expenses incurred in making a capital improvement to principal, including special assessments.

4. Any tax levied upon profit, gain, or other receipts allocated to principal notwithstanding denomination of the tax as an income or franchise tax by the taxing authority.

5. If a death tax or generation skipping transfer tax is levied in respect to a trust, any amount apportioned to the trust, or any beneficial interest in the trust.

(dm) The following charges shall be made in equal portions against income and principal:

1. The trustee's regular compensation, whether based on a percentage of principal or income.

2. Special compensation of trustees, and trustee's compensation computed on principal as an acceptance, distribution, or termination fee.

(e) Regularly recurring charges payable from income shall be apportioned to the same extent and in the same manner that income is apportioned under sub. (4).

**History:** 1971 c. 40; 1977 c. 408; 1983 a. 189; 1985 a. 37; 1987 a. 27; 1987 a. 393 s. 53; 1991 a. 39; 1993 a. 112, 160.

**701.21 Income payments and accumulations. (1) DISTRIBUTION OF INCOME.** Where a beneficiary is entitled to receive income from a trust, but the creating instrument fails to specify how frequently it is to be paid, the trustee shall distribute at least annually the income to which such beneficiary is entitled.

**(2) PERMITTED ACCUMULATIONS.** No provision directing or authorizing accumulation of trust income shall be invalid.

**(3) CHARITABLE TRUST ACCUMULATIONS.** A trust containing a direction or authorization to accumulate income from property devoted to a charitable purpose shall be subject to the general equitable supervision of the court with respect to any such accumulation of income, including its reasonableness, amount and duration.

**(4) DISPOSITION OF ACCUMULATED INCOME.** Income not required to be distributed by the creating instrument, in the absence of a governing provision in the instrument, may in the trustee's discretion be held in reserve for future distribution as income or be added to principal subject to retransfer to income of the dollar amount originally transferred to principal; but at the termination of the income interest, any undistributed income shall be distributed as principal.

**701.22 Distributions in kind by trustees; marital bequests.** In case of a division of trust assets into 2 or more trusts or shares, any distribution or allocation of assets as an equivalent of a dollar amount fixed by formula or otherwise shall be made at current fair market values unless the governing instrument expressly provided that another value may be used. If the governing instrument requires or permits a different value to be used, all assets available for distribution, including cash, shall, unless otherwise expressly provided, be so distributed that the assets, including cash, distributed as such an equivalent will be

fairly representative of the net appreciation or depreciation in the value of the available property on the date or dates of distribution. A provision in the governing instrument that the trustee may fix values for purposes of distribution or allocation does not of itself constitute authorization to fix a value other than current fair market value.

The valuation of assets for distribution is the current market value at the time of distribution. Estate of Naulin, 56 W (2d) 100, 201 NW (2d) 599.

**701.23 Removal of trusts. (1) REMOVAL TO FOREIGN JURISDICTION.** Unless the creating instrument contains an express prohibition or provides a method of removal, a circuit court having jurisdiction of a trust created by a will admitted to probate in such court may, upon petition of a trustee or a beneficiary with the consent of the trustee and after a hearing as to which notice has been given to the trustee and other interested persons, order removal of such trust to another state where the court finds that such removal is in accord with the express or implied intention of the settlor, would aid the efficient administration of the trust or is otherwise in the best interests of the beneficiaries. Such order may be conditioned on the appointment of a trustee in the state to which the trust is to be removed and shall be subject to such other terms and conditions as the court deems appropriate for protection of the trust property and the interests of the beneficiaries. Upon receipt of satisfactory proof of compliance with all terms and conditions of the order, the court may discharge the local trustee from further responsibility in the administration of the trust.

**(2) REMOVAL TO THIS STATE.** Unless the creating instrument contains an express prohibition against removal or provides a method for removal, a court may, upon the petition of a foreign trustee or beneficiary with the consent of the trustee, appoint a local trustee to receive and administer trust property presently being administered in another state. The local trustee may be required to give bond conditioned on the faithful performance of his or her duties or to meet any other conditions required by a court in the other state before permitting removal of the trust to this state.

**History:** 1977 c. 449 s. 497; 1993 a. 486.

**701.24 Applicability of ss. 701.01 to 701.23.** Except as otherwise provided in s. 701.19 (9) (a) and (10), ss. 701.01 to 701.23 are applicable to a trust existing on July 1, 1971, as well as a trust created after such date and shall govern trustees acting under such trusts. If application of any provision of ss. 701.01 to 701.23 to a trust in existence on August 1, 1971, is unconstitutional, it shall not affect application of the provision to a trust created after that date.

**History:** 1971 c. 66; 1977 c. 309.

**701.27 Disclaimer of transfers under nontestamentary instruments. (1) DEFINITIONS.** In this section:

(a) “Beneficiary under a nontestamentary instrument” includes any person who receives or might receive property or an interest in property under the terms or legal effect of a nontestamentary instrument.

(b) “Nontestamentary instrument” means any instrument other than a will which effectively controls the disposition of property or an interest in property. This term includes, without limitation, an inter vivos instrument exercising a power of appointment whether created by will or by nontestamentary instrument, life insurance policies and annuity contracts, inter vivos trusts, conveyances, contracts and choses in action.

(c) “Power” has the meaning designated in s. 702.01 (4).

(d) “Property” has the meaning as designated in s. 851.27.

**(2) RIGHT TO DISCLAIM.** (a) *In general.* A person who is a beneficiary under a nontestamentary instrument, person succeeding to a disclaimed interest created by a nontestamentary instrument, donee of a power created by nontestamentary instrument, appointee under a power exercised by nontestamentary instrument or taker in default under a power created by nontestamentary instrument, may disclaim any property or interest in property,

including contingent or future interests or the right to receive discretionary distributions, by delivering a written instrument of disclaimer under this section.

(b) *Joint tenants.* 1. Upon the death of a joint tenant that occurs on or after June 7, 1996, a surviving joint tenant may disclaim any property or interest in property that would otherwise accrue to him or her by right of survivorship and that is the subject of the joint tenancy. A surviving joint tenant may disclaim the entire interest if he or she fulfills the requirements under section 2518 of the internal revenue code.

2. Any property or interest in property or portion of property or interest in property that is disclaimed under subd. 1. shall become an asset in the decedent’s probate estate.

(bm) *Survivorship marital property.* Upon the death of a spouse, the surviving spouse may disclaim the decedent spouse’s interest in survivorship marital property.

(c) *Partial disclaimer.* Property may be disclaimed in whole or in part, except that a partial disclaimer of property passing by nontestamentary instrument or by the exercise of a power may not be made if partial disclaimer is expressly prohibited by the instrument or by the instrument exercising the power.

(d) *Spendthrift provision.* The right to disclaim exists notwithstanding any limitation on the interest of the disclaimant in the nature of a spendthrift provision or similar restriction.

(e) *After death.* A person’s right to disclaim survives the person’s death and may be exercised by the person’s personal representative or special administrator upon receiving approval from the court having jurisdiction of the person’s estate after hearing upon notice to all interested persons if the personal representative or special administrator has not taken any action which would bar the right to disclaim under sub. (7).

**(3) INSTRUMENT OF DISCLAIMER.** (a) The instrument of disclaimer shall:

1. Describe the property or interest disclaimed;
2. Declare the disclaimer and the extent of the disclaimer;
3. Be signed by the disclaimant; and
4. Be delivered within the time and in the manner provided under subs. (4) and (5).

(b) Notwithstanding par. (a), any disclaimer which meets the requirements of section 2518 of the internal revenue code, or any other provisions of federal law, constitutes an effective disclaimer under this section.

**(4) TIME FOR EFFECTIVE DISCLAIMER.** (a) *Disclaiming a present interest.* An instrument disclaiming a present interest shall be executed and delivered not later than 9 months after the effective date of the nontestamentary instrument, except that, for cause shown, the period may be extended by a court of competent jurisdiction, either within or after the 9–month period, for such additional time as the court deems just. The effective date of a revocable instrument or contract is the date on which the person having the power to revoke no longer has the power to revoke it or to transfer to himself, herself or another person the equitable ownership of the property or interest which is the subject of the disclaimer.

(b) *Disclaiming a future interest.* An instrument disclaiming a future interest shall be executed and delivered not later than 9 months after the event that determines that the taker of the property or interest is finally ascertained and his or her interest indefeasibly fixed, except that, for cause shown, the period may be extended by a court of competent jurisdiction, either within or after the 9–month period, for such additional time as the court deems just.

(c) *Future right to income or profits.* Notwithstanding pars. (a) and (b), an instrument disclaiming the future right to receive mandatory distributions of income or profits from any source may be executed and delivered at any time.

(d) *Persons under 21.* Notwithstanding pars. (a) and (b), a person under 21 years of age may disclaim at any time not later than 9 months after the date on which the person attains 21 years of age.

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

**(5) DELIVERY AND FILING OF DISCLAIMER.** (a) *Delivery.* In addition to any requirements imposed by the creating instrument, the instrument of disclaimer is effective only if, within the time specified under sub. (4), it is delivered to and received by:

1. The transferor of the property or interest disclaimed, if living;
2. The personal representative or special administrator of the deceased transferor of the property; or
3. The holder of legal title to the property.

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

(c) *Filing.* When delivery is made to the personal representative or special administrator of a deceased transferor, a copy of the instrument of disclaimer shall be filed in the probate court having jurisdiction.

(d) *Failure to deliver or file.* Failure to deliver a copy of the instrument of disclaimer to the trustee under par. (b) or to file a copy in the probate court under par. (c), within the time specified under sub. (4), does not affect the validity of any disclaimer.

(e) *Recording.* If real property or an interest in real property is disclaimed, a copy of the instrument of disclaimer may be recorded in the office of the register of deeds of the county in which the real estate is situated.

**(6) EFFECT OF DISCLAIMER.** (a) *Property not vested.* The property or interest disclaimed under this section shall be deemed not to have been vested in, created in or transferred to the disclaimant.

(b) *Devolution.* Unless the transferor of the property or donee of the power has otherwise provided, the property or interest disclaimed devolves as if the disclaimant had died before the effective date of the nontestamentary instrument; or if the disclaimant is an appointee under a power exercised by nontestamentary instrument, as if the disclaimant had died before the effective date

of the exercise of the power; or if the disclaimant is a taker in default under a power created by nontestamentary instrument, as if the disclaimant had predeceased the donee of the power. A disclaimer relates back for all purposes to the effective date of the nontestamentary instrument; or if the disclaimant is an appointee under a power exercised by nontestamentary instrument, to the effective date of the exercise of the power; or if the disclaimant is a taker in default under a power created by nontestamentary instrument, to the last possible date for exercise of the power. A disclaimer of the future right to receive mandatory distributions of income or profits relates to the period stated in the disclaimer.

(c) *Future interest.* Unless the instrument creating the future interest manifests a contrary intent, a future interest limited to take effect in possession or enjoyment after the termination of the interest which is disclaimed takes effect as if the disclaimant had died before the effective date of the nontestamentary instrument or, if the disclaimant is an appointee under a power exercised by nontestamentary instrument, as if the disclaimant had died before the effective date of the exercise of the power.

(d) *Nonapplicability.* This subsection does not apply to a disclaimer under sub. (2) (b), the effect of which is provided in sub. (2) (b) 2.

**(7) BAR.** (a) *Method.* A person's right to disclaim property or an interest in property is barred by the person's:

1. Assignment, conveyance, encumbrance, pledge or transfer of the property or interest or a contract therefor;
2. Written waiver of the right to disclaim; or
3. Acceptance of the property or interest or benefit of the property.

(b) *Effect upon successors in interest.* The disclaimer or the written waiver of the right to disclaim is binding upon the disclaimant or person waiving and all persons claiming through or under him or her.

**(8) NONEXCLUSIVENESS OF REMEDY.** This section does not abridge the right of a person to waive, release, disclaim or renounce property or an interest in property under any other statute, the common law, or as provided in the creating instrument.

**(9) APPLICABILITY.** This section applies to property or an interest in property existing or created on or after May 13, 1978 if the time for delivery of a disclaimer under this section has not expired.

**History:** 1977 c. 309; 1983 a. 189 s. 329 (26); 1991 a. 39, 301; 1995 a. 360.

**NOTE:** 1991 Wis. Act 301, which affected this section, contains extensive legislative council notes.