

A TRUSTEE'S PERSPECTIVE OF THE KEY PROVISIONS OF THE NEW WISCONSIN TRUST CODE

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Victor J. Schultz
Senior Vice President, Head of Personal Trust
Prairie Financial Group, a division of Waukesha State Bank
262-522-7402; vschultz@waukeshabank.com

A Trustee's Perspective of the New Wisconsin Trust Code

I. Introduction.

- A. Governor Scott Walker signed new Wisconsin Trust Code (2013 Wisconsin Act 92) into law on December 13, 2013. The date of publication was December 14, 2013, making the effective date of the law July 1, 2014.
 - 1. WTC applies to trusts created before, on or after 7/1/2014, except for the provisions in §701.0602 (presumption that a trust is revocable), §701.0813 (duty to inform and report), and §701.0903(4) (nonapplication of prudent investor rule to life insurance policies)
 - 2. The changes to the principal and income act apply to the beginning of the trust's first accounting period that begins after July 1, 2014.
 - 3. WTC applies to all judicial proceedings that commence after 7/1/2014 and to proceedings that commenced before 7/1/2014, provided that application of WTC would not be unfair as determined by the court.
- B. Wisconsin is the 27th jurisdiction to enact a version of the UTC. The other jurisdictions that have enacted the UTC are Kansas, Wyoming, New Mexico, District of Columbia, Tennessee, Utah, New Hampshire, Nebraska, Missouri, Oregon, Maine, Arkansas, South Carolina, North Carolina, Virginia, Pennsylvania, Alabama, Florida, North Dakota, Ohio, Arizona, Vermont, Michigan, West Virginia, Massachusetts, and Montana. UTC legislation has also been introduced in New Jersey, Kentucky and Mississippi.
- C. The UTC is primarily a default statute. Most of the provisions of the law can be overridden by the terms of the trust. This means it is crucial for a trustee to read the trust instrument and understand how it might be different from the provisions of the WTC. The mandatory provisions of the UTC are specified in §701.0105. These provisions include the duty of the trustee and a directing party to act in good faith, in accordance with the terms and purposes of the trust and in the interests of the beneficiaries.
- D. The WTC is organized into 12 subchapters.
 - 1. Subchapter 1: General provisions and definitions.
 - 2. Subchapter 2: Judicial proceedings.

3. Subchapter 3: Representation.
4. Subchapter 4: Creation, validity, modification and termination of trusts.
5. Subchapter 5: Creditors' claims; spendthrift and discretionary trusts.
6. Subchapter 6: Revocable trusts.
7. Subchapter 7: Office of trustee.
8. Subchapter 8: Duties and powers of trustees, directing parties and trust protectors.
9. Subchapter 9: Investment management of trusts.
10. Subchapter 10: Liability of trustees and rights of persons dealing with trustees.
11. Subchapter 11: Uniform principal and income act.
12. Subchapter 12: Miscellaneous Provisions.

II. Who are the Key Parties to a Trust?

A. Settlor. (§701.0103(23))

1. "Settlor" means a person, including a testator, who creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor with respect to that person's contribution to the trust except to the extent another person has the right to revoke or withdraw that portion.

B. Beneficiary. (§701.0103(3))

1. "Beneficiary" means a person that has a present or future beneficial interest in a trust, vested or contingent, in a capacity other than that of a trustee, directing party, trust protector or person holding a power of appointment.

C. Qualified Beneficiary. (§701.0103(21))

1. "Qualified beneficiary" means a beneficiary who on the date the beneficiary's qualification is determined:

- a. Is a distributee or permissible distributee of trust income or principal; and
- b. Without considering the existence or exercise of a power of appointment, other than a power that has been irrevocably exercised and notice of the exercise has been given to the trustee, would be:
 - i. A distributee or permissible distributee of trust income or principal if the interests of the distributees describe in a. above terminated on that date without causing the trust to terminate; or
 - ii. Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.
- c. Qualified beneficiaries also include: (§701.0110)
 - i. A charitable organization that is expressly and irrevocably designated to receive distributions under the terms of a charitable trust and is not subject to a right of substitution.
 - ii. A person appointed to enforce a trust created for the care of an animal.
 - iii. A person appointed to enforce a noncharitable trust without an ascertainable beneficiary.
 - iv. For charitable trusts having its principal place of administration, the Wisconsin Attorney General if a charitable organization has not been expressly designated.

D. Examples:

Example 1: Trust provides for distributions of income to “A” for life. At A’s death, the trust property is to be distributed as A shall appoint by her Will, and absent the exercise of the power of appointment, to A’s children.

- i. A is a qualified beneficiary because she is the current distributee of trust income.
- ii. A’s children are also qualified beneficiaries because they are the takers in default of the exercise of a power of appointment.

- iii. Anyone else, including someone who may be appointed under A's Will, is not a qualified beneficiary because the definition does not include an appointee under a general power of appointment or the potential objects of an unexercised power of appointment.

Example 2: Trust provides that the trustee shall distribute all of the trust income to A and B for life. At A's death, 50% of the trust is to be distributed as A shall appoint by her Will, and absent any valid exercise of the power of appointment, the trust property will be distributed to B if living, if not, to B's issue. On B's death, 50% of the trust property is to be distributed to B's issue by right of representation.

- i. Pursuant to §701.0103(21)(a), A and B are qualified beneficiaries.
- ii. Pursuant to §701.0103(21)(b), if the interests of A and B terminated, the trust would terminate. With respect to A's interest, you ignore the testamentary power of appointment, and if A dies first, B is the remaining qualified beneficiary. With respect to B's interest, if B dies first, his issue will take by right of representation so each of B's then living children and the children of any deceased child will be qualified beneficiaries.

Example 3: Credit shelter family trust pays mandatory income to surviving spouse and discretionary principal to spouse and issue. Upon the death of the surviving spouse, the trust distributes outright to children provided the child has reached age 40. In the event spouse dies with no issue, 50% of trust is paid to siblings *per stirpes* of deceased spouse and 50% is paid to siblings *per stirpes* of surviving spouse.

- i. Surviving spouse and issue are qualified beneficiaries pursuant to §701.0103(21)(a).
- ii. Pursuant to §701.0103(21)(b), the trust will terminate after the death of the surviving spouse and attainment of age 40 by the children. Thus if any issue are alive at the time the qualified beneficiaries are determined, there are no additional qualified beneficiaries.
- iii. If there are no issue or all issue predecease the surviving spouse, all siblings of deceased spouse and surviving spouse are also qualified beneficiaries.

Example 4: GST trust pays mandatory income to child and discretionary principal to child and issue. Upon the death of the child, the child has a testamentary special power of appointment in favor of issue or spouse of issue. If the special power is not exercised, the GST trust continues as a pot trust for the benefit of the issue. If there are no issue, the trust distributes to a community foundation.

- i. Child and issue are qualified beneficiaries pursuant to §701.0103(21)(a).
 - ii. Potential appointees under the special power of appointment are ignored.
 - iii. Pursuant to §701.0103(21)(b), the trust will terminate after the death of the child and issue and distribute to a community foundation. Thus the community foundation is also a qualified beneficiary under §701.0103(21)(b)2.
 - iv. If the GST trust did not continue as a pot trust for the benefit of the issue and instead continued as separate share trusts for the benefit of each grandchild and issue, the community foundation would not be a qualified beneficiary because the grandchildren and issue would be the distributees or permissible distributees of trust income and principal after the termination of the original GST trust.
- E. Trustee is the person who receives trust property that has been contributed by the settlor and holds the property for distribution to the beneficiaries. (§701.0103(28))
 1. "Trustee" includes an original, additional and successor trustee and a co-trustee.
- F. Directing party. (§701.0103(7))
 1. "Directing party" means a person who is granted a power:
 - a. To direct a trustee's investment or distribution decisions; or
 - b. To make investment or distribution decisions regarding trust property; and
 - c. In a capacity other than as trustee or trust protector and not including a power of appointment.

G. Trust Protector. (§701.0103(31))

1. "Trust protector" means a person who is granted a power that is not a power of appointment or in a capacity as trustee or directing party.

H. Representative. (§§701.0301 – 701.0305)

1. Basic effect.

- a. Notice to a person who may represent and bind another person has the same effect as if notice were given directly to the other person.
- b. The consent of a person who may represent and bind another person is binding on the person represented unless the person represented objects to the representation before the consent is effective.

2. Representation by Holder of General Power of Appointment. (§701.0302)

- a. To the extent there is no conflict of interest between the holder of a general power and the person represented, the holder of a general power of appointment may represent and bind persons whose interests as permissible appointees, takers in default, or otherwise, are subject to the power.

3. Representation by Fiduciaries, Parents and Persons appointed by the Trustee. (§701.0303)

- a. Absent a conflict of interest between the representative and the person being represented with respect to a particular question or dispute:
 - i. A conservator may represent and bind the estate the conservator controls.
 - ii. A guardian of the estate may represent and bind the ward and the guardian of the person may represent and bind the ward if a guardian of the estate has not been appointed.
 - iii. An agent having authority to act with respect to the particular matter or dispute may represent and bind the principal. (Agent under a Financial Power of Attorney)

- iv. A trustee may represent and bind the beneficiaries of the trust, except as to matters relating to the administration and distribution of the trust.
 - v. A personal representative of a decedent's estate may represent and bind persons interested in the estate, except as to matters relating to the administration or distribution of the estate.
 - vi. A parent may represent and bind the parents' minor or unborn children. If there is a disagreement over which parent can represent a child's interest, the parent who is related to the settlor of the trust may represent the child.
 - b. A trustee may appoint a representative if no one has a substantially identical interest under §701.0304, if no one else identified under §701.0303 can act or the representation might be inadequate.
4. Representation by Person having Substantially Identical Interest. (§701.0304)
- a. The doctrine of virtual representation is a common law rule that allows some members of a class of beneficiaries to represent other beneficiaries who have or may acquire similar or identical interests.
 - b. Virtual representation may be used to give notice to or bind persons who are otherwise not represented and are minors, incapacitated, or unborn or whose identity or location is unknown and not reasonably ascertainable.
 - c. The virtual representative must have a substantially identical interest with respect to a particular matter or dispute and virtual representation is available only to the extent (a) the person being represented is not otherwise represented and (b) there is no conflict of interest between the virtual representative and the person represented.

III. What Law Applies to the Trust?

- A. Common Law of Trusts; Principal of Equity. (§701.0106)
 - 1. Common law is intended to supplement the WTC.
- B. Governing Law. (§701.0107)

1. The law of the jurisdiction designated in the trust instrument determines the meaning and effect of the terms of a trust. The meaning and effect are matters of construction and deal with questions such as: (See §604 of Scott and Fratcher, The Law of Trusts.)
 - a. Who are the beneficiaries of the trust?
 - b. What is the extent of each beneficiary's interest?
 - c. How do you allocate income and principal between each beneficiary?
 - d. How do you allocate receipts and expenditures between income and principal?
 - e. What is the alienability of a beneficiary's interest?
 - f. When can a creditor reach a beneficiary's interest?
2. In the absence of a controlling designation, the law of the jurisdiction having the most significant relationship to the matter at issue.

C. Principal Place of Administration. (§701.0108)

1. The principal place of administration is important to determine which state may tax the trust, which state's courts have primary jurisdiction concerning trust administration and which state's laws govern the administration of the trust.
2. The principal place of administration designated in the trust instrument will control the place of administration if:
 - a. The trustee's usual place of business is located in the designated jurisdiction.
 - b. The trustee is a resident of the designated jurisdiction.
 - c. All or part of the administration occurs in the designated jurisdiction.
 - d. The designated jurisdiction is where the settlor was domiciled at the time the trust instrument was signed.
3. If the principal place of administration is not validly designated in the trust instrument, the place of administration will be the place where the

trustee's usual place of business is located or, if the trustee has no place of business, the jurisdiction where the trustee resides.

- a. If a corporate trustee is designated and has multiple offices in multiple jurisdictions, the corporate trustee may designate the usual place of business by providing notice to the qualified beneficiaries. The notice is valid as long as the corporate trustee has an office in the designated jurisdiction and performs some administrative functions in that jurisdiction.
 - b. If there are cotrustees, the usual place of business will be where the corporate trustee is located. If there is no corporate trustee, the usual place of business will be determined by the cotrustees with notice to the qualified beneficiaries.
4. A trustee may, but has no affirmative duty to, change the principal place of jurisdiction to another state or a jurisdiction outside of the United States. This power is subject to the trustee's mandatory duty to act in good faith, in accordance with the terms and purposes of the trust instrument and the interest of the beneficiaries.
5. Without precluding the right of a court to order, approve or disapprove a transfer, the trustee may transfer the trust's principal place of administration by providing advance notice.
6. In order to transfer the place of administration, the trustee shall notify the qualified beneficiaries and any directing parties or trust protectors of a proposed transfer not less than 30 days before initiating the transfer. The notice shall include:
 - a. The name of the jurisdiction where the place of administration will be transferred.
 - b. The contact information for the trustee at the new place of administration.
 - c. An explanation of the reason for the proposed transfer.
 - d. The date of the proposed transfer.
 - e. The date, which must be at least 30 days after the date of the notice, by which a party may object to the proposed transfer. If anyone objects, the trustee may not proceed with the proposed transfer without court approval.

7. The law of the principal place of administration governs the administrative matters related to the trust. Matters of administration include those relating to the duties and powers and liabilities of a trustee. The matters include: (See §604 of Scott and Fratcher, The Law of Trusts.)
 - a. The duties owed by the trustee to the beneficiaries, including the duty to inform and report.
 - b. The powers of the trustee.
 - c. The duties and powers of a directing party or a trust protector.
 - d. The control by the court over the discretionary powers of a trustee.
 - e. The relationship between co-trustees and whether they must act in unanimity or by majority.
 - f. Liabilities for breach of trust.
 - g. Proper trust investments.
 - h. Trustee compensation.
 - i. Trustee right to indemnity and reimbursement of expenses.
 - j. Removal and replacement of a trustee.
 - k. Termination of a trust.
8. Comment: Unless the trust instrument prohibits the trustee from changing the principal place of administration, the trustee controls the place of administration. If a Wisconsin based trustee is administering a trust that does not have a principal place of administration in Wisconsin, the trustee should consider changing the principal place of administration to Wisconsin pursuant to §701.0108.

D. Tax Situs

1. Wisconsin will tax a trust based on the place of administration if the trust was made irrevocable and was administered in Wisconsin before October 29, 1999.
2. Any trust that was made irrevocable on or after October 29, 1999 or was first administered in Wisconsin on or after October 29, 1999 will

be taxed in Wisconsin only if the settlor was a Wisconsin resident at the time that trust became irrevocable. (§71.14)

IV. Can an Irrevocable Trust be Modified or Terminated?

A. Nonjudicial Settlement Agreement. (§701.0111)

1. Interested persons may enter into a binding, nonjudicial settlement agreement with respect to any matter involving a trust. It is valid to the extent it includes terms and conditions that could be approved by the court. For example, a court under subchapter 4 may modify a trust if it is not inconsistent with a material purpose of the trust (§701.0411(2)(b)), because of unanticipated circumstances or inability to administer the trust effectively (§701.0412), if the trust is uneconomic (§701.0414), to correct mistakes (§701.0415), to achieve the settlor's tax objectives (§701.0416), or to combine and divide trusts (§701.0417).
2. Interested persons are defined as a person whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court. An interested person may be represented.
3. A nonjudicial settlement agreement may address the following matters:
 - a. The interpretation or construction of the terms of the trust.
 - b. The approval or waiver of a trustee's report or accounting.
 - c. A direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary power.
 - d. The resignation or appointment of a trustee and the determination of a trustee's compensation.
 - e. The transfer of a trust's principal place of administration.
 - f. The liability or release from liability of a trustee for an action relating to the trust.
 - g. The criteria for distribution to a beneficiary where the trustee has discretion.
 - h. Resolution of disputes arising out of the administration or distribution of a trust.

- i. Investment actions.
 - j. Appointment of and powers granted to a directing party or a trust protector.
 - k. Direction to a directing party or trust protector to perform or refrain from performing a particular act.
 - 4. Any interested person may request that the court approve a nonjudicial settlement agreement.
- B. Modification or termination by consent. (§701.0411)
- 1. A noncharitable irrevocable trust may be terminated or modified, with or without court approval, upon consent of the settlor and all of the beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's consent to modification or termination may be exercised by a representative if the representative is specifically authorized to consent to a trust's modification or termination.

➤ Note: A material purpose is not readily inferred. In order to be material, the purpose remaining to be performed must be of some significance. A finding of such a purpose generally requires some showing of a particular concern on the part of the settlor, such as a concern with regard to a beneficiary. Sometimes the very nature or design of a trust suggests its material purpose (see UTC comments to UTC §411.) A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose. §701.0411(3).
 - 2. The settlor may commence a proceeding to approve or disapprove a proposed modification or termination under §701.0411. A trustee does not have standing to oppose a proposed modification or termination that proceeds by consent of the settlor and all beneficiaries.
 - 3. Upon termination by consent, the trustee shall distribute the trust as agreed by the beneficiaries.
 - 4. A party proposing modification or termination shall give notice at least 30 days in advance of the proposed modification or termination to the settlor, if living, the trustee, a trust protector, a directing party and each beneficiary.
- C. Modification or Termination with Court Approval.

1. A noncharitable irrevocable trust may be terminated upon consent of all the beneficiaries if the court concludes the continuance of the trust is not necessary to achieve a material purpose of the trust. (§701.0411(2))
2. A noncharitable irrevocable trust may be modified upon the consent of all the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust. (§701.0411(3))
3. If not all of the beneficiaries consent to proposed modification or termination, the modification or termination may be approved by the court if the court is satisfied that:
 - a. If all of the beneficiaries had consented, the trust could have been modified or terminated; and
 - b. The interest of a beneficiary who does not consent will be adequately protected. (§701.0411(6))
4. Modification or termination because of unanticipated circumstances or inability to administer trust effectively. (§701.0412)
 - a. The court may modify the administrative or dispositive terms of a trust or terminate the trust if because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust.
 - i. Modification should be consistent with the settlor's probable intent.
 - ii. On termination, the trustee must distribute the property consistent with the purposes of the trust.
 - b. The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impractical or wasteful or would impair the trust administration.
 - c. Notice of a petition to the court under this section must be given to the settlor, if living, the trustee, each trust protector, each directing party and the qualified beneficiaries.
5. *Cy pres*. (§701.0413)
 - a. *Cy pres* is a common law doctrine that applies when the exact intention of the settlor cannot be carried out. It allows the court to carry out the settlor's intention as nearly as possible. The doctrine

is peculiar to charitable trusts and permits a court to direct the application of trust property to a different charitable purpose from that designated by the settlor. This section directs Wisconsin courts to liberally apply the *cy pres* doctrine to make charitable gifts more effective.

b. If a particular charitable purpose becomes unlawful, impractical, impossible to achieve or wasteful:

i. The trust does not fail in whole or in part.

ii. The trust property does not revert to the settlor or the settlor's successors in interest.

iii. The court may apply *cy pres* to modify or terminate the trust by directing that the trust property be applied or distributed in whole or in part in a manner consistent with the settlor's charitable purposes.

c. A provision in the terms of a charitable trust that would result in a distribution of the trust property to a noncharitable beneficiary prevails over the power of the court to apply *cy pres* to modify or terminate the trust only if, when the provision takes effect, the trust property is to revert to the settlor and the settlor is still living.

d. Notice of a petition to the court under this section must be given to the settlor, if living, the trustee, each trust protector, each directing party and the qualified beneficiaries, as well as to any party with standing to enforce the terms of a charitable trust, which may include the Wisconsin attorney general.

6. Modification or termination of uneconomic trust. (§701.0414)

a. The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust is insufficient to justify the cost of administration even if the value of the trust exceeds \$100,000.

b. A party petitioning the court under this section must give notice of the petition to the same parties specified under §701.0412.

7. Reformation to correct mistakes. (§701.0415)

a. The court may reform the terms of a trust, even if unambiguous, to conform the terms of the trust to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's

intent and the terms of the trust were affected by a mistake of fact or law.

- b. A party petitioning the court under this section must give notice of the petition to the same parties specified under §701.0412.

8. Modification to achieve settlor's tax objectives. (§701.0416)

- a. To achieve the settlor's tax objectives, the court may modify the terms of a trust in a matter that is not contrary to the settlor's probable intent. The court may make this modification retroactive.
- b. A party petitioning the court under this section must give notice of the petition to the same parties specified under §701.0412.

D. Modification or Termination by Trustee.

- 1. After notice to the settlor, if living, each trust protector, directing party and qualified beneficiary, the trustee of a trust consisting of property having a total value of less than \$100,000 (as indexed for inflation) may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

- a. The \$100,000 limit is indexed for inflation rounded to the nearest \$1,000, to be adjusted every five years from the effective date of this section.
- b. On termination under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

2. Combination and division of trusts. (§701.0417)

- a. After notice to each trust protector, directing party and qualified beneficiary, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust.
- b. Court approval is not required to combine or divide trusts.

E. Trustee's power to appoint assets to a new trust ("Decanting") (§701.0418)

- 1. A trustee who has the power to invade the principal of a trust for the benefit of a beneficiary who is eligible to receive income or an annuity

or unitrust payment from that trust may exercise that power by appointing all of the assets of the trust to a second trust if:

- a. The appointment does not reduce the fixed income, annuity or unitrust interest.
- b. If the power to invade principal is limited by an ascertainable standard, the appointment does not result in the trustee of the second trust having a broader power to invade income or principal.
- c. The beneficiaries of the first trust are the same as the beneficiaries of the second trust, or, if the trustee of the first trust has an absolute power to invade principal, the beneficiaries of the second trust include some or all of the beneficiaries of the first trust.

2. A trustee may not appoint ~~assets~~ to a second trust if:

- a. The trust instrument of the first trust expressly prohibits "decanting."
- b. The first trust qualified for a marital or charitable deduction and the terms of the second trust would not qualify for such a deduction.
- c. The trustee has a beneficial interest in the first trust, unless the second trust is a trust for an individual with a disability.
- d. The appointment would impair currently exercisable withdrawal rights of a beneficiary of the first trust.
- e. The appointment would violate a rule against perpetuities or suspend a trustee's power of alienation.
- f. The appointment would impair the essential purpose of a trust for an individual with a disability.

3. Procedural matters.

- a. A trustee may appoint assets to a second trust with or without court approval.
- b. If the trustee decides to proceed without a court order, the trustee must give notice to all qualified beneficiaries, each trust protector and directing party of the first trust and the settlor, if living.

- c. The notice shall include a written instrument explaining the appointment, copies of the first trust and proposed second trust and notice of the proposed effective date.
- d. The proposed effective date must be at least 30 days after notice is provided unless all persons who are entitled to receive notice waive the 30 day period. Each person who receives the notice has the right to object. In the case of an objection, court approval of the proposed appointment must be obtained. If there is no written objection or each person receiving notice consents, then the trustee can proceed with the appointment.
- e. If the trustee proceeds with court approval, a petition must be filed with the court and all of the persons who would otherwise receive notice of a proposed appointment. The petition shall include the same information as is required to be provided in the notice.
- f. When deciding whether to grant the petition, the court shall consider the purpose of the proposed appointment, the reasons for any objection, changes in circumstances since the first trust was created, and whether the appointment complies with §701.0818.

V. What Rules apply to the Office of Trustee? – §§701.0701 to 701.0710.

A. Accepting or declining trusteeship. (§701.0701)

- 1. A trustee accepts the trusteeship by either:
 - a. Substantially complying with a method of acceptance provided in the terms of the trust.
 - i. For example, by signing the trust instrument as trustee.
 - ii. However, if the trust is not funded until later, the trustee who signed the instrument may not be able to reject the trusteeship without a formal resignation. There is a duty to resign responsibly.
 - b. By accepting delivery of the trust property, exercising powers or performing duties as trustee or otherwise indicating acceptance of the trusteeship.
- 2. A person designated as trustee who has not accepted the trusteeship may decline the trusteeship. This can be accomplished by:
 - a. A formal declination of the trusteeship; or

- b. Failure to accept the trusteeship within a reasonable time after knowing of the designation.
- 3. A person designated as trustee may, without accepting the trusteeship:
 - a. Act to preserve the trustee property if within a reasonable time after acting, the person sends a declination of the trusteeship to the settlor, or if the settlor is deceased to the cotrustee or successor trustee, or if none to a current beneficiary.
 - b. Inspect or investigate trust property to determine potential liability under environmental or other laws or for any other purpose.

B. Trustee's Bond. (§701.0702)

- 1. A trustee shall give bond to secure performance of the trustee's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries, or a bond is required by the terms of the trust and the court has not dispensed with the requirement.
- 2. The court may modify or terminate a bond at any time.
- 3. Certain entities are not required to give a bond, including a trust company bank, state bank, national bank with trust powers, or a religious, charitable or educational organization.

C. Co-Trustees. (§701.0703)

- 1. Majority rule. Co-trustees may act by a majority decision.
- 2. If a vacancy occurs in a co-trusteeship, a majority of the remaining co-trustees may act for the trust.
- 3. A co-trustee must participate in the performance of the trustees' duties unless the co-trustee is unable to perform because of absence, illness, disqualification or other temporary incapacity or because the co-trustee has properly delegated the performance to another trustee.
- 4. If a co-trustee is unable to perform its duties, and prompt action is necessary, the remaining co-trustees or a majority of the remaining co-trustees may act for the trust.
- 5. A trustee may delegate to a co-trustee performance of a function unless delegation is prohibited by the terms of the trust. A trustee may revoke a delegation, unless the delegation was irrevocable.

6. A trustee who does not join in an action of another trustee is not liable for the action. However, each trustee must exercise reasonable care to:
 - a. Prevent a co-trustee from committing a material breach of trust.
 - b. Compel a co-trustee to redress a material breach of trust.
7. A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified all co-trustees of the dissent at or before the time of action is not liable for the action unless the action is a material breach of trust.

D. Vacancy in Trusteeship; Appointment of Successor. (§701.0704)

1. A vacancy may occur if the designated trustee declines to act as trustee, the designated trustee cannot be located, a trustee resigns, is disqualified or removed, a trustee dies or a guardian or conservator is appointed for the trustee.
2. A vacancy in a trusteeship need not be filled if one or more co-trustees remain in office.
3. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.
4. A vacancy in a trusteeship must be filled in the following order of priority:
 - a. By a person designated in the terms of the trust.
 - b. By a person appointed by unanimous agreement of the qualified beneficiaries, unless the trust is for an individual with a disability in which case the persons who may be appointed as trustee is limited.
 - c. By a person appointed by the court.
5. The court may appoint an additional trustee, a directing party or a trust protector whenever the court considers the appointment necessary for the administration of the trust.

E. Resignation of Trustee. (§701.0705)

1. A trustee may resign either:

- a. On at least 30 days' notice to the qualified beneficiaries, to the settlor if living, and each co-trustee, directing party and trust protector.
 - b. With the approval of the court. The court may issue orders upon notice of resignation necessary for protection of trust property.
2. Any liability of a resigning trustee for acts or omissions by the trustee is not discharged or affected by the trustee's resignation. The trustee has a duty to resign responsibly.

F. Removal of Trustee. (§701.0706)

1. The settlor, a co-trustee or a qualified beneficiary may request the court to remove a trustee or a trustee may be removed by the court on its own initiative.
2. The court may act to remove a trustee if any of the following applies:
 - a. The trustee has committed a material breach of trust.
 - b. Lack of cooperation among co-trustees substantially impairs the administration of the trust.
 - c. The trustee is unfit, unwilling or persistently fails to administer the trust effectively and the court determines that the removal of the trustee best serves the interests of the beneficiaries.
 - d. There has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, and the court finds that removal best serves the interests of the beneficiaries, removal is not inconsistent with a material purpose of the trust and a suitable successor trustee is available.

G. Delivery of Property by Former Trustee. (§701.0707)

1. Unless a cotrustee remains in office or the court orders otherwise, until the trust property is delivered to a successor trustee, a trustee who has resigned or been removed has the continuing duties of a trustee and the power necessary to protect the trust property.
2. A trustee who has resigned or has been removed shall proceed expeditiously to deliver the trust property to the successor trustee.

H. Compensation of Trustee. (§701.0708)

1. A trustee is entitled to compensation that is reasonable under the circumstances if the trust does not specify the trustee's compensation. This includes compensation for services other than as trustee.
2. The trustee is entitled to compensation as specified under the terms of trust or by reference to another ascertainable source for determining that compensation. The court may allow more or less compensation to the trustee if either:
 - a. The duties of the trustee are substantially different from that contemplated when the trust was created; or
 - b. The compensation specified by the terms would be unreasonably low or high.

I. Reimbursement of Expenses. (§701.0709)

1. A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate:
 - a. For expenses that were properly incurred in the administration of the trust.
 - b. For expenses not properly incurred in the administration of the trust to the extent necessary to prevent unjust enrichment of the trust.
2. An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

J. Title to Trust Property. (§701.0710) (relates to current Wis. Stat. §701.05)

1. A settlor or transferor of property to a trust may effectively transfer property to a trust by placing legal title in the name of the trustee, which shall include any successor trustee regardless of whether a successor trustee is referenced in the transfer document.
2. A transfer that places legal title in the name of the trust is deemed to place legal title in the name of the trustee.

VI. What are the Duties of a Trustee? - §§701.0801 to 701.0814.

A. Duty to administer the trust. (§701.0801)

1. The trustee shall administer the trust in good faith, in accordance with its terms and purposes, in the interests of the beneficiaries and in accordance with the WTC.
- B. Duty of loyalty. (§701.0802)
1. The trustee shall administer the trust solely in the interests of the beneficiaries.
- C. Duty to be impartial. (§701.0803)
1. If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property.
- D. Duty to act prudently. (§701.0804)
1. A trustee shall administer the trust as a prudent person would by considering the purposes, terms, distribution requirements and other circumstances of the trust.
- E. Duty to incur reasonable costs. (§701.0805)
1. The trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, the skills of the trustee and the complexity of the trust administration.
- F. Duty to use special skills. (§701.0806)
1. A trustee who has special skills or expertise, or who is hired in reliance on those special skills or expertise, must use those special skills or expertise.
- G. Duty to properly delegate. (§701.0807)
1. A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill and caution in:
 - a. Selecting an agent.
 - b. Establishing the scope and terms of the delegation consistent with the purposes and terms of the trust (i.e., contracting with the agent).

- c. Periodically reviewing the agent's action in order to monitor the agent's performance and compliance with the terms of the delegation.
- H. Duty to control and protect trust property. (§701.0809)
 - 1. The trustee shall take reasonable steps to take control of and protect the trust property.
- I. Duty to keep records and identify trust property. (§701.0810)
 - 1. A trustee shall keep adequate records of the administration of the trust.
 - 2. A trustee shall keep trust property separate from the trustee's own property.
- J. Duty to enforce and defend claims. (§701.0811)
 - 1. A trustee must take reasonable steps to enforce claims of the trust and to defend claims against the trust.
- K. Duty to collect trust property; duties of successor trustees. (§701.0812)
 - 1. A trustee must take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee and to redress a breach of trust known to the trustee to have been committed by a former trustee or by a trust protector or former trust protector. (Note: a trustee has no duty to redress a breach by a directing party per §701.0808(3)(d).)
 - 2. A successor trustee does not have a duty to examine the accounts of a former trustee.
- L. Duty to inform and report to beneficiaries. (§701.0813)
 - 1. A trustee shall keep the current beneficiaries and other qualified beneficiaries who so request reasonably informed about the administration of the trust. Unless unreasonable under the circumstances, a trustee shall promptly respond to the qualified beneficiary's request for information related to the administration of the trust.
 - 2. A trustee shall:

- a. Upon request of a qualified beneficiary, promptly furnish a copy of the portions of the trust instrument that are related to the interest of the qualified beneficiary or a copy of the trust instrument.
 - b. Within a reasonable period of time (UTC provides within 60 days) after accepting a trusteeship, notify the qualified beneficiaries of the acceptance and of the trustee's name, address and telephone number.
 - c. Within a reasonable period of time (UTC provides within 60 days) after the trustee acquires knowledge of the creation of an irrevocable trust or that a revocable trust has become irrevocable, whether by the death of the settlor or otherwise, notify the qualified beneficiaries of the trust's existence, the identity of the settlor, the name, address and phone number of each directing party and trust protector, the right to request a copy of the relevant portions of the trust instrument and the right to receive a trustee's report (under §701.0813(3)).
 - d. Notify the current beneficiaries and any qualified beneficiaries who so request of any change in the method or rate of the trustee's compensation. (UTC requires advance notice.)
 - e. Upon receiving any court petition that does not identify each directing party and trust protector, notify the petitioner of the identity of each directing party and trust protector who is serving at the time of the filing of the petition.
3. A trustee shall send to the current beneficiaries and each qualified beneficiary who requests it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets, and if feasible, their respective market values. On a vacancy in trusteeship, unless there is a co-trustee, the former trustee must continue to send the report to the qualified beneficiaries. A personal representative or guardian may send qualified beneficiaries the report on behalf of a deceased or incapacitated trustee.
 4. A qualified beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished. With respect to future reports and other information, a qualified beneficiary may withdraw a waiver previously given.
 5. The requirements to notify qualified beneficiaries of the existence of a trust and that a trust has become irrevocable and to supply trust reports

to current beneficiaries and other qualified beneficiaries who so request, do not apply to a trustee who accepts a trust before July 1, 2014, to an irrevocable trust created before July 1, 2014 or to a revocable trust that becomes irrevocable before July 1, 2014.

M. Discretionary Powers. (§701.0814)

1. This section deals with how a trustee shall exercise its discretionary power to distribute income and/or principal.
2. The trustee has the general duty to exercise a discretionary power in good faith, in accordance with the terms and purposes of the trust, in the interests of the beneficiaries. A court may not determine that a trustee abused its discretion merely because the court would have exercised the discretion in a different manner.

VII. Directed Trusts - §701.0808 and §701.0902.

- A. Revocable Trusts. While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.
- B. A Directed Trust occurs when the investment or distribution duties of a trust are split between the trustee and a directing party. A directed trust has two fiduciary parties – a “directing party” who has the power to direct specified investment or distribution decisions and the “trustee” who is obligated to follow the direction of the directing party.
- C. Why would you want a Directed Trust?
 1. Special Assets. The settlor/beneficiaries want the trustee to retain “special assets” in the trust, such as a family business, real estate, unique tangible personal property, concentrated investments, family limited partnerships or an alternative investment not followed by the trustee, like a private equity fund.
 2. Investment management. The settlor/family has a relationship with an investment adviser and desires to use the investment adviser rather than the corporate trustee to make investment decisions for the trust assets.
 3. Distributions. The settlor or family wants to appoint a family member or trusted adviser to make distribution decisions. For example, you may want to appoint a family member or attorney with special expertise to make distribution decisions for a special needs trust. A distribution committee may be used to make tax-motivated

distributions or to make distributions decisions for beneficiaries with substance or gambling abuse issues.

D. How does a Directed Trust work?

1. The directing party may be appointed in the trust instrument by the settlor, by the court in a court order, or by the interested parties in a nonjudicial settlement agreement. §701.0808(2).
2. The directing party is a fiduciary and is required to act in good faith, in accordance with the terms and purposes of the trust, and in the interests of the beneficiaries. This is a mandatory duty that cannot be overridden by the terms of the trust. A directing party is liable for any loss that results from a breach of the directing party's duties. §701.0808(5) and §701.0105(2)(b).
3. Comment: This suggests a directing party needs to work with the trustee to understand the terms of the trust and the circumstances of all the beneficiaries. The directing party should understand how the investments will affect income distributions to current beneficiaries and taxation of the trust and the beneficiaries.
4. Most of the provisions that apply to a trustee under subchapter 7 and subchapter 10 of the WTC also apply to a directing party. §701.0808(8).
5. A directing party who accepts an appointment is subject to the jurisdiction of the courts of Wisconsin if the principal place of administration is in Wisconsin. §701.0808(9).
6. A trustee is not liable for any loss resulting from following the directed action or lack of direction, unless the act or omission was the result of the trustee's willful misconduct. §701.0808(2). The trustee has no duty to:
 - a. Provide advice to, consult with, monitor or evaluate a directing party's conduct;
 - b. Inform or warn a beneficiary, third party or the directing party that the trustee disagrees with the actions or directions of the directing party;
 - c. Prevent a directing party from giving a direction or taking any action;

- d. Compel a directing party to redress the directing party's actions or directions. §701.0808(3).
- 7. Administrative actions of a trustee related to matters within the scope of a directing party's power, including confirming that a direction has been carried out and recording and reporting actions directed by a directing party, do not constitute either the monitoring of a directing party or participating in the actions of a directing party.
- 8. A directing party may request information that is related to the power granted to the directing party and the trustee shall provide the requested information. If the trustee is bound by a confidentiality restriction, the trustee may require the directing party to be so bound. A trustee is not liable for providing information to a directing party that is related to the power granted to the directing party. A trustee is not required to provide any information to the directing party that is not requested. §701.0808(6).
- 9. Division of the investment duties and powers between a directing party and a trustee with respect to directed trust property.
 - a. A directing party who has power over directed trust property shall (§701.0902(1)):
 - i. Direct the trustee on any investment transaction of the directed trust property and the investment and reinvestment of principal and income.
 - ii. Direct the trustee on the management, control and voting of the directed trust property.
 - iii. Select and determine the compensation of any outside investment manager and delegate authority to them pursuant to §881.01(10).
 - iv. Determine the frequency and methodology for valuing directed trust property and for providing the value of property for which there is no readily available daily market value.
 - b. A trustee who has no power over directed trust property has no duty to do any of the following with respect to the directed trust property (§701.0902(2)):
 - i. Prepare or review investment policy statements.
 - ii. Perform investment or suitability reviews.

iii. Determine or verify the value of directed trust property.

iv. Monitor the conduct or investment performance of the directing party.

E. Custody of the directed trust property is an issue that needs to be addressed by the trustee and the directing party.

1. A directing party may direct investment of the directed trust property. Custody of the directed trust property is a core duty of the trustee. (A trustee shall take reasonable steps to take control of and protect trust property. (§701.0809))
2. Investment managers will prefer that custody be placed with the custodian of their choice so the investment manager can use a trading platform that the investment manager is accustomed to. Frequently this will be a different custodian than that used by the trustee, especially a corporate trustee.
3. A solution will be a delegation of the custody responsibilities by the trustee pursuant to §701.0807. This requires the trustee to use reasonable care, skill and caution to select the agent, to establish the scope and terms of the delegation (a contract), and to periodically monitor the agent's performance and compliance with the contract.
4. If custody is delegated, the trustee may have to employ shadow accounting to prepare the principal and income account statements and to coordinate information for fiduciary income tax preparation.

F. A Directed Trust is different than a Delegated Trust.

1. Under §881.01(10), a trustee may delegate investment and management functions of a trust to an agent. Delegation is done similar to the rules under §701.0807.
2. A delegated trustee has some investment duties and responsibilities over delegated trust property. The delegating trustee must be able to document and prove the exercise of reasonable care to select the agent, to establish the scope and terms of the delegation and to monitor performance.
3. In a directed trust, the trustee has no discretionary investment duties regarding the directed trust property.

4. An agent performing a delegated function owes a duty to use reasonable care under both §701.0807(2) and §881.01(10)(b). A directing party is a fiduciary and is required to act in good faith with regard to the terms of the trust and the interests of the beneficiaries.
5. This suggests a trustee can charge a lower fee when acting under a directed trust rather than a delegated trust. It also suggests the directing party has a higher degree of liability and responsibility under a directed trust. Will investment managers charge a higher investment fee when acting as a directing party? Will investment managers prefer a delegated relationship rather than a directed trust? Will investment managers insist that an individual be the directing party and that the individual delegate investment authority under §881.01(10)?

G. A Directed Trust is different than a Direction to Hold.

1. A trust may direct the trustee to retain a specific asset and attempt to relieve the trustee from any liability that would otherwise attach for failure to dispose of the assets. Estate of Allis, 191 Wis. 23 (1926); Will Mueller, 28 Wis 2d 26 (1964).
2. Under common law, if the terms of a trust provide a mandatory direction to the trust to retain specific investments (rather than a permissive direction), the direction provides a higher degree of protection to the trustee. However, the trustee is not relieved of all liability. For example, the trustee may be liable if the trustee knows or should have known that such retention would cause substantial harm to the trust or its beneficiaries or is unlawful. Restatement (Third) of Trusts, §92, comment d.
3. Case law suggests that beneficiaries will sue fiduciaries for failure to diversify even when the trust instrument authorizes retention of specific assets and contains exculpation language that appears to relieve fiduciaries from liability for retaining the assets. Wood v. US Bank, 160 Ohio App.3d 831, 828 N.W.2d 1072 (2005); In re Chase Manhattan Bank, 26 App. Div. 3d 824, 809 N.Y.S2d, 360 (2006).
4. If you are a trustee holding “special assets” or a trustee that is subject to a direction to retain specific assets, you may want to consider modifying the trust to create a directed trust relationship. It may offer greater liability protection.

VIII. Trust Protector - §701.0818

- A. Appointment. A trust protector may be appointed by the settlor in a trust instrument, by a court in a court order, or by the interested persons in a

nonjudicial settlement agreement. The trust protector has those powers granted in the trust instrument, court order or nonjudicial settlement agreement.

B. Legal capacity of trust protector powers. The legal capacity in which a particular power is exercisable may be specified in the trust instrument, a court order or a nonjudicial settlement agreement. This includes specifying whether a power exercisable in a non-fiduciary capacity must be exercised in good faith. In absence of the specification of the legal capacity, powers shall be exercised by the trust protector as follows:

1. The following powers shall be exercisable in a fiduciary capacity:
 - a. Interpret or enforce the terms of the trust.
 - b. Review and approve trustee reports or accountings.
 - c. Resolve disputes between a trustee or directing party and a beneficiary.
 - d. Consent to or veto distributions to a beneficiary.
 - e. Consent to or veto investment actions.
2. Other powers shall be exercisable in a nonfiduciary capacity, including the following powers:
 - a. Modify the trust instrument to respond to changes in the law affecting trusts.
 - b. Modify the trust instrument to achieve a different tax status or respond to changes in tax law.
 - c. Change principal place of administration, tax situs or governing law.
 - d. Modify the interests of a beneficiary, add a new beneficiary or select a beneficiary from an indefinite class.
 - e. Modify the terms of a power of appointment.
 - f. Remove, replace or appoint a trustee, directing party or protector.
 - g. Terminate the trust.
 - h. Appoint (decant) assets to a new trust.

- i. Advise the trustee on matters concerning a beneficiary, including whether to provide information to a beneficiary.
 - j. Correct errors or ambiguities in the terms of the trust.
- 3. If a trust protector is also the settlor, any power granted may be exercised the trust protector's personal interests.
- 4. If a trust protector is also a qualified beneficiary, a power exercisable in a nonfiduciary capacity may be exercised in the trust protector's personal interests.
- 5. A trust protector who is also serving as the trustee or directing party shall exercise any power in a fiduciary capacity.
- 6. Example. A person is given the power to appoint a successor trustee. This person is a trust protector. The trust instrument is silent on the legal capacity of this power. If the person with this power is the settlor or a qualified beneficiary, the power is personal and neither a fiduciary or nonfiduciary capacity applies. If the person is the family attorney or CPA, then a nonfiduciary capacity applies. If the person is the trustee, a fiduciary capacity applies.

C. Trust protector duties.

- 1. A power exercisable in a fiduciary capacity must be exercised in good faith, consistent with the terms and purposes of the trust and in the interests of the beneficiaries.
- 2. A power exercisable in a nonfiduciary capacity must be exercised in good faith, unless the trust provides otherwise.
- 3. A trust protector has no duty to exercise its powers, to monitor the conduct of the trustee or a directing party, or to monitor changes in the law or circumstances of the beneficiaries.

D. Trust protector liability. A trust protector is liable for a breach of its duties, unless the trust protector is the settlor or the trust protector is a qualified beneficiary and the power is exercisable in a nonfiduciary capacity.

E. Resignation and release of powers. A trust protector may resign or release any power by giving written notice to the trustee and any successor trust protector.

- F. Prohibited actions. A trust protector may not do any of the following:
1. Create or expand a beneficial interest in favor of the trust protector, his or her estate, his or her creditors, or the creditors of his or her estate. This prohibition does not apply to a trust protector who is the settlor or who is a qualified beneficiary with a power exercisable in a nonfiduciary capacity.
 2. Remove a requirement to pay back government benefits.
 3. Reduce or eliminate an income interest in a trust for which a marital deduction was taken, a charitable remainder trust, a QSST, or a in which the settlor has a qualified interest under IRC §2702(b).
 4. Modify the trust in a manner that would cause the trust to no longer qualify for the marital or charitable deduction.
- G. Settlor rights. A trust protector is not subject to the direction of the settlor and a settlor has no cause of action against the trust protector. Whether or not the settlor is alive, the trust protector may consider a settlor's goals, objectives and philosophies when exercising its powers.
- H. Duties of a trustee and directing party with respect to a trust protector. A trustee or a directing party shall follow the directions of a trust protector unless the directions are manifestly contrary to the power granted to the trust protector or the exercise of the directions would constitute a serious breach of duty owed to the beneficiaries of the trust. A trustee and a directing party have no duty to monitor the conduct of the trust protector, provide advice to on consult with the trust protector, or communicate with, warn or apprise any beneficiary concerning instances in which the trustee or directing party might have acted in a different manner than the trust protector.
- I. Right to information. A trust protector may request information that is related to the power granted to the trust protector and the trustee shall provide the requested information. A trustee is not required to provide any information to the trust protector that is not requested.
- J. Payment or reimbursement of attorney fees and costs. In accordance with §701.1004, a trustee shall pay or reimburse a trust protector for attorney fees and costs to defend a claim against the trust protector.
- K. Application of other sections to trust protectors. Provisions that apply to a trustee regarding accepting or declining an appointment, compensation, reimbursement of expenses, remedies for breach of trust, damages, limitations of action, reliance on trust instrument, events affecting

administration, exculpation, beneficiary consent, release or ratification, and limitation on personal liability also apply to a trust protector.

- L. Jurisdiction. A trust protector who accepts an appointment is subject to the jurisdiction of the courts of Wisconsin if the principal place of administration is in Wisconsin.

IX. Are there any Investment Management Changes under the New Wisconsin Trust Code?

- A. Wisconsin chapter 881 governs the investment management of a trust. §701.0901.
- B. The WTC amends chapter 881 in two respects:
 - 1. The definition of fiduciary is expanded to include a directing party who has the power to direct the trustee's investment decisions, a trust protector who has a power exercisable in a fiduciary capacity over trust investments, and any other person to whom a court appoints a power over the investment of the assets of an estate, trust, conservatorship or guardianship. §881.01(1)(b).
 - 2. The diversification rule of §881.01(4) is reconciled with current §881.05, which permits retention of securities in certain situations. Under the revision, §881.05 is repealed and replaced with a special rule for assets collected by a fiduciary under §881.01(4)(b). An asset is "collected" by a fiduciary if the fiduciary did not exercise discretion to acquire or purchase the asset. This special rule is an exception to the diversification requirement and allows a fiduciary to retain an asset that is collected by the fiduciary until such time that the fiduciary determines it is advisable to dispose of the asset. While the asset is being retained, the fiduciary has a duty to exercise discretion at reasonable intervals to determine if the asset should be retained or disposed. The provision also allows a beneficiary to file an application with the court to compel the fiduciary to sell the asset. If such an application is filed, the court shall conduct a hearing to determine what action is consistent with the terms and purposes of the estate, trust, conservatorship or guardianship and the interests of the beneficiaries.
- C. The prudent investor rule does not apply to life insurance contracts owned by trusts in certain situations. (§701.0903)
 - 1. If a principal purpose of a trust is to hold a life insurance contract, the trustee does not have a duty to determine whether the life insurance contract is or remains a proper investment of the trust. For purposes of this subsection, the trustee has no duty to do any of the following:

- a. Investigate the financial strength of the life insurance company.
 - b. Determine whether to exercise any policy option, right, or privilege available under the life insurance contract.
 - c. Diversify the life insurance contract relative to other contracts or assets of the trust.
 - d. Inquire about or investigate the health or financial condition of the insured.
 - e. Prevent the lapse of the life insurance contract if the trust does not have sufficient marketable assets to pay the life insurance premiums.
2. A trustee is not liable for a loss that arises because the trustee did not take any action to determine whether a life insurance contract is or remains a proper investment.
 3. This section applies to a life insurance contract that is acquired, retained or owned before, on or after July 1, 2014. However, with respect to a trust that was executed before July 1, 2014, the trustee may opt into the provisions of this section by notifying the qualified beneficiaries that the trustee elects to be governed by this section and by providing the qualified beneficiaries with a copy of this section.

X. Limitations on Liabilities of a Trustee.

A. Limitation of Action Against Trustee. (§701.1005)

1. A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary is sent a report that adequately discloses the existence of a potential claim for breach of trust.
2. To trigger the running of the one-year statute of limitations, the beneficiary must be sent a report adequately disclosing the existence of the potential claim so that the beneficiary knows of the potential claim or should have inquired into its existence.
3. Comment: This suggests a trustee should try to send accountings to as many beneficiaries as possible to trigger the one-year statute of limitations.

4. If the beneficiary does not receive a report adequately disclosing the potential claim, a proceeding must be commenced within five years after the first to occur of the following:
 - a. Removal, resignation or death of the trustee;
 - b. Termination of the beneficiary's interest in the trust; or
 - c. Termination of the trust.
5. This does not apply to a claim for fraud, which is governed by applicable law.

B. Limitation on Action Contesting Validity of Revocable Trust; Distribution of Trust Property. (§701.0604)

1. A person must commence a judicial proceeding to contest the validity of trust that was revocable at the settlor's death within the earlier of:
 - a. One year after the settlor's death.
 - b. Four months after the trustee sends the person a copy of the trust instrument and a notice informing the person of the trust's existence, the trustee's name and address and the time allowed for commencing a proceeding. A trustee does not have a duty to provide this notice.
2. Upon the death of the settlor, the trustee may proceed to distribute the revocable trust property in accordance with the terms of the trust without liability for doing so unless either:
 - a. The trustee knows of a pending judicial proceeding contesting the validity of the trust.
 - b. A potential contestant has notified the trustee in writing of a possible judicial proceeding and a judicial proceeding is commenced within 60 days after the contestant sent the notification.
3. A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

C. Distribution on Termination. (§701.0817)

1. On termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any

beneficiary to whom a proposal is sent to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent, but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

2. Comment: This provision suggests that the best trustee practice will be to put any proposed trust distribution plan in writing and to provide at least 30 days' notice prior to making any distributions pursuant to such a plan.
3. Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall within a reasonable time distribute the trust property to the persons entitled to it. The trustee has the right to retain a reasonable reserve for the payment of debts, expenses and taxes.

D. Exculpation of Trustee. (§701.1008) (This provision applies to directing parties and trust protectors as well.)

1. A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent it either:
 - a. Relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference; or
 - b. Was inserted as a result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.
2. An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves the exculpatory term is fair under the circumstances existing at the time the trust instrument was signed and that its existence and contents were adequately communicated to the settlor.

E. Beneficiary's Consent, Release or Ratification. (§701.1009)

1. A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach or ratified the transaction constituting the breach, unless:
 - a. The beneficiary was induced by improper conduct of the trustee; or
 - b. The beneficiary did know of the beneficiary's rights or of the material facts relating to the breach at the time of the consent, release or ratification.

F. Limitation on Personal Liability of Trustee. (§701.1010)

1. A trustee is not personally liable on a contract if the trustee in the contract discloses the fiduciary capacity.
2. This section protects a trustee who reveals the fiduciary relationship by either signing as trustee or by referring to the trust in the contract.
3. A trustee is personally liable for a tort committed in the course of administering a trust or for obligations arising from ownership or control of trust property, only if the trustee was personally at fault.