

**WISCONSIN TRUST CODE IN ACTION - KEY ISSUES
AFFECTING TRUSTEES**

**Presented to: Dodge County Bar Association
November 18, 2015**

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Wisconsin Trust Code In Action – Key Issues Affecting Trustees

- I. So What Happened on July 1, 2014?
 - A. Quick Recap.
 1. The Uniform Trust Code (UTC) was initially promulgated by the Uniform Law Commissioners in 2000. Kansas was the first state to adopt a version of the UTC in 2002.
 2. In 2007, a study group was formed to consider the adoption of the UTC in Wisconsin, with the intention of substantially revising or restating Wisconsin statute chapter 701.
 3. The Wisconsin Trust Code bill was finally introduced in November 2013. It quickly passed the Senate and Assembly and was signed into law by Governor Walker on December 13, 2013 (2013 Wisconsin Act 92.)
 4. The new Wisconsin Trust Code (WTC) became effective on the first day of the seventh month following the date of publication (12/14/2013.) This resulted in an effective date of July 1, 2014.
 - a. 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.)
 - b. 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.
 - c. 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.
 5. 31 jurisdictions have enacted a version of the UTC. In addition to Wisconsin, 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, Montana, Kentucky, Maryland, Mississippi

and Minnesota (effective 1/1/2016.) UTC legislation has also been introduced in New Jersey.

6. WTC is a complete restatement of Wisconsin statute chapter 701. It is primarily a default statute meaning most of the WTC provisions can be overridden by the trust instrument.

B. Initial impact on trust administration in Wisconsin.

1. TRUSTEE'S CHECKLIST UNDER THE NEW WISCONSIN TRUST CODE

A. Identify key parties to a trust

1. Settlor
2. Trustee or cotrustees
3. Qualified beneficiaries
 - Current beneficiaries
 - First-level remainder beneficiaries
4. Representatives
5. Directing party
6. Trust protector

B. Identify applicable law

1. Governing law: governs meaning and effect of terms of trust
2. Principal place of administration: controls which state's courts have primary jurisdiction and which state's law governs the administration of the trust
3. Tax situs: where you need to file state fiduciary income tax returns

C. Duty to inform and report

1. Follow the trust instrument and keep the CB and QB who request information reasonably informed
2. Trustee acceptance notice (when accepting trusts after 6/30/2014)
 - Notify QB of acceptance by the trustee
 - Inform QB of trustee name, address, and phone number
3. Irrevocable trust notice (for trusts that become irrevocable after 6/30/2014)
 - Notify QB of existence of trust
 - Identify settlor
 - Provide name, address, and phone number for trustee, directing party, and trust protector
 - Inform of right to request relevant portions of trust instrument and trust accounting
4. Trustee compensation change notice (for all trusts)

- Notify CB and any other QB who requests of any change in the method or rate of trustee compensation
5. Notice of directing party and trust protector (for all trusts)
 - Upon receipt of a court petition, notify petitioner of any unidentified directing party or trust protector
 6. Trust accountings
 - For trusts that become irrevocable after 6/30/2014, send accountings to all CB and any QB who request

D. Administration issues

1. Consider expanding recipients of trust accountings to trigger SOL under 701.1005
2. Upon death of settlor, consider sending a notice of death of settlor of revocable trust under 701.0604
3. To limit creditor claims upon death of the settlor, consider sending a creditor claims notice under 701.0508
4. Upon a partial or final distribution of a trust, send a proposal for distribution per 701.0817
5. If a power to adjust between principal and income is exercised, consider sending a notice of trustee's power to adjust under 701.1105
6. Before paying attorney fees when a breach of trust claim is made, send notice of intent to pay attorney's fees to QB and any DP or TP under 701.1004
7. If trust is less than \$100,000, consider termination of small trust under 701.0414
8. If similar trusts, consider a combination of trusts under 701.0417
9. If a trust modification or termination of a trust over \$100,000 is necessary or beneficial, consider:
 - NJSA under 701.0111
 - Modification with consent under 701.0411
 - Modification with court approval under 701.0411; 701.0412; 701.0413; 701.0414; 701.0415; 701.0416; or 701.0706
 - Decanting under 701.0418

E. Specialty trust situations

1. Testamentary trusts
 - Determine court filing rules for 2014 (due in 2015)
2. Irrevocable life insurance trusts
 - Consider whether to provide notice of non-application of prudent investor rule to life insurance contracts under 701.0903
3. Trusts that hold unique assets
 - Consider conversion to a directed trust
 - Obtain beneficiary consent, release, or ratification under 701.1009

F. Directed or delegated trusts

May convert existing irrevocable trust through a NJSA, modification with consent, modification with court approval, or decanting

Directed trusts

1. No need for investment advisory contract; agreement is the trust instrument
2. No need for annual investment review by trustee
3. Fee schedules should be reconsidered
4. Confirm custody arrangement; may need custody contract with a qualified custodian
5. Evaluate need for shadow accounting
6. Consider obtaining copy of investment policy statement

Delegated trusts

1. If investment agent selected by trustee, document selection of a qualified investment manager (obtain form ADV?)
2. If investment manager requested by settlor or family, insert authorizing language in trust instrument or obtain beneficiary consent, release, or ratification to hire investment manager
3. Execute investment advisory agreement
4. Prepare investment policy statement
5. Fee schedule should be reconsidered
6. Obtain fee schedule from investment manager and communicate to beneficiaries
7. Confirm custody arrangement; may need custody contract with a qualified custodian
8. Determine need for shadow accounting
9. Monitor investment performance with Reg 9 review

G. Update internal policies and procedures

2. Greatest impact observed – increased flexibility in trust administration. The discussion on administration of trusts has changed from “how do you administer the trust under its terms” to “what’s the best way to administer the trust.” Does it make sense to change the terms of the trust and if so, can we do it and how do we do it?

II. Significant Issues in Implementing the WTC.

A. Understanding the Definition of a Qualified Beneficiary. (§701.0103(21))

1. “Qualified beneficiary” means a beneficiary who, on the date on which the beneficiary’s qualification is determined, satisfies any of the following:

- 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 of appointment that has been irrevocably exercised and notice of the exercise has been given to the trustee, would be any of the following:
 - i. A distributee or permissible distributee of trust income or principal if the interests of the distributees describe in a. terminated on that date without causing the trust to terminate; or
 - ii. A distributee or permissible distributee of trust income or principal if the trust terminated on that date.
2. Credit shelter trust example: Credit shelter family trust pays mandatory income to surviving spouse and discretionary principal to spouse and issue. Upon the surviving spouse's death the spouse has a limited power to appoint among the children, any spouse of a child or any issue. If the limited power is not exercised, the trust terminates and divides into separate share trusts for each child and the issue of that child. If no children or issue survive the surviving spouse, 50% of trust is paid to heirs at law of the deceased spouse and 50% is paid to heirs at law of the surviving spouse. Are the heirs at law qualified beneficiaries?
- a. Surviving spouse and issue are qualified beneficiaries pursuant to §701.0103(21)(a).
 - b. You ignore anyone who can be appointed or has been appointed under a testamentary power of appointment. §701.0103(21)(b).
 - c. §701.0103(21)(b)1. includes those who will take if the interests of the current beneficiaries terminate without causing the trust to terminate. The surviving spouse is one of the current beneficiaries. The trust will terminate if the interest of the surviving spouse terminates. Thus this provision does not apply to the determination of the QB because the trust terminates when the interest of the surviving spouse ends.
 - d. §701.0103(21)(b)2. includes those who are distributees or permissible distributees of trust income or principal if the trust terminates. Assuming children or issue are alive at the time the

QB determination is made, if the credit shelter trust terminates, separate share trusts will be created. The current beneficiaries of those trusts are the children and their issue. Thus the QB under §701.0103(21)(b)2. are the children and their issue.

- e. Thus the heirs at law are not qualified beneficiaries. The qualified beneficiaries only include the surviving spouse, children and any other issue (the descendants.)

B. Modification and Termination of Trusts.

1. Modification or Termination by Consent - §701.0411(1) – consent of the settlor and all beneficiaries. If all beneficiaries do not consent, a court must conclude the interests of a non-consenting beneficiary are adequately protected.
2. Modification or Termination by Consent - §701.0411(2) – court concludes upon consent of all beneficiaries not inconsistent with a material purpose of the trust or continuance is not necessary to achieve any material purpose of the trust. If all beneficiaries do not consent to or sign the NJSA, the interests of a non-consenting beneficiary must be adequately protected.
3. Modification or termination because of unanticipated circumstances or inability to administer trust - §701.0412 – court concludes will further the purposes of the trust if there are circumstances not anticipated by the settlor, or continuation would be impractical, wasteful or impair the trust's administration. Notice to the qualified beneficiaries is required.
4. *Cy Pres* - §701.0413 – court concludes a particular charitable purpose becomes unlawful, impracticable, impossible to achieve or wasteful. Notice to the qualified beneficiaries is required.
5. Termination of a small trust - §701.0414(2) – trustee can terminate a small trust after notice to the qualified beneficiaries if the value of the trust is less than \$100,000.
6. Modification or termination of uneconomic trust - §701.0414(4) – court may terminate, modify or appoint a different trustee if the value of the trust property is insufficient to justify the cost of administration. Notice to the qualified beneficiaries is required.
7. Reformation to correct mistakes - §701.0415 – court may reform trust to conform the terms to the settlor's intent if the terms were affected

by a mistake in fact or law, whether in expression or inducement. Notice to the qualified beneficiaries is required.

8. Modification to achieve settlor's tax objective - §701.0416 – court may modify trust to achieve the settlor's tax objectives, provided that the objectives are not contrary to the settlor's probable intent. Notice to the qualified beneficiaries is required.
9. Combination and division of trusts - §701.0417 – trustee can combine or divide trusts after notice to qualified beneficiaries
10. Trustee's power to appoint assets to new trust (Decanting) - §701.0418 – trustee can decant assets from one trust into a second trust with either notice to the qualified beneficiaries and no objection or with court approval.

C. Nonjudicial Settlement Agreements (NJSA). (§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 the agreement includes terms and conditions that could be approved by a court. §701.0111(5) lists twelve specific matters that may be addressed in a NJSA. This list is not intended to be exclusive.
2. Who are the interested persons?
 - a. Wisconsin law defines an “interested person” 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.”
 - b. Because of the great variety of matters that may be addressed by a NJSA, §701.0111 does not precisely define the “interested persons” who are required to sign the NJSA.
 - c. The consent of the trustee is almost always required since the trustee normally must administer the terms of the NJSA.
 - d. There is no statutory requirement that each interested person sign the NJSA. §701.0111(4) says the agreement is valid only to the extent it includes terms and conditions that could be properly approved by a court.
3. Matters that we have seen addressed in NJSA.
 - a. Approval of accounts.

- b. Resignation or removal of a trustee and appointment of a successor trustee.
- c. Transfer of the place of administration.
- d. Authorization of an investment action – specifically the appointment of an outside investment adviser.
- e. Release of trustee from liability.
- f. Approval of trustee compensation.
- g. Appointment of a directing party to direct investments.
- h. Approval of a distribution upon termination or partial termination of a trust.

4. Can you modify or terminate a trust using a NJSA?

- a. Yes, provided the NJSA includes terms and conditions that could be approved by a court. Look at subchapter IV of the WTC to see what could be approved by a court.

D. Credit Shelter Trusts

- 1. Trust planning is becoming less driven by tax planning. Asset protection (protection from creditors; protection in the event of a divorce; protection for spendthrift beneficiaries; special needs trusts; preservation of assets for children after a second marriage, etc.) is becoming the primary reason for creating a trust.

2.

Year	Federal Estate & Gift Tax Exemption Equivalent	Wisconsin Death Tax and Wis. Gift Tax Exemption	Max. Fed. Estate/ Gift Tax Rates
1985	\$400,000	Inheritance tax and gift tax; tax rate, exemption based on relationship of recipient to transferor	55%
1986	\$500,000	Same	55%
1987 – 1997	\$600,000	Inheritance tax phased out over 5 years beginning in 1987; beginning in 1992 not gift tax and Wis. estate tax is a “pick-up” tax based on federal credit for state death taxes	55%
1998	\$625,000	“Pick-up” estate tax based on federal credit	55%
1999	\$650,000	Same	55%
2000 – 2001	\$675,000	Same	55%
2002 - 2003	\$1,000,000	Decoupled estate tax; \$675,000 Wis. exemption	50% - 49%
2004 – 2005	\$1,500,000	Same	48% - 47%
2006 – 2007	\$2,000,000	Same	46% - 45%
2008	\$2,000,000	Wisconsin estate tax sunsets and is eliminated	45%
2009	\$3,500,000	n/a	45%
2010	\$5,000,000 or \$0	n/a	35% or 0%
2011	\$5,000,000	n/a	35%
2012	\$5,120,000	n/a	35%
2013	\$5,250,000	n/a	40%
2014	\$5,340,000	n/a	40%
2015	\$5,430,000	n/a	40%
2016 and beyond	\$5,450,000, subject to future inflation adjustments	Anticipate no change	40%

3. Example: H dies in 2000. Credit shelter trust funded with \$675,000. Trust is now worth \$1,200,000. W survives and her gross estate is \$3,000,000 (including the credit shelter trust.) Credit shelter trust pays W mandatory income and discretionary principal for health, education, maintenance or support. When W dies, W has a limited power of appointment and, if not exercised, the trust distributes to her children, if they survive her, otherwise to H and W's heirs at law.
 - a. W does not like the credit shelter trust. She has always considered this her money and she does not wish to share information about the trust with her children. There are extra costs associated with the credit shelter trust – trustee fees, fiduciary tax preparation, accounting fees.
 - b. The credit shelter trust no longer provides a tax benefit. W's estate is not subject to estate tax exposure. In fact, the trust will lose a step-up in basis when W dies.
 - c. The counter-argument to terminating the credit shelter trust is that the trust provides asset protection against claims of a beneficiary's creditors; protects the assets in the event of a remarriage of the surviving spouse; provides professional trustee management of assets; protects against a spendthrift spouse; and preserves assets in the event of Medicaid or other public benefit eligibility.
4. Possible solutions to the credit shelter trust problem.
 - a. Make a discretionary distribution of the entire trust to W. The distribution would be tax free. No gift tax exposure would apply to the remainder beneficiaries. W would take a carryover basis in the assets distributed and those assets would receive a step-up in basis when she dies. However, the distribution is probably contrary to the terms of the trust. On the other hand, who will complain?
 - b. W could disclaim her interest in the trust.
 - i. This will cause the trust to terminate and distribute to the remainder beneficiaries (presumably W's children.) See Wis. Stat. §700.27(8)(a).
 - (8)** ACCELERATION OF SUBSEQUENT INTERESTS WHEN PRECEDING INTEREST IS DISCLAIMED.
 - (a)** *Subsequent interest not held by disclaimant.* Unless the inter vivos governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, upon the disclaimer of a

preceding interest, a subsequent interest not held by the disclaimant and limited to take effect in possession or enjoyment after the termination of the interest that is disclaimed accelerates to take effect as if the disclaimant had died immediately before the time when the disclaimed interest would have taken effect in possession or enjoyment or, if the disclaimant is an appointee under a power of appointment and that power of appointment has been exercised, as if the disclaimant had died before the effective date of the exercise of the power of appointment.

- ii. This would not be a qualified disclaimer. A gift tax return filing would be triggered for W, but no gift tax should be due because W's estate is less than the estate tax exemption amount.
 - iii. W's children will take a carryover basis in the trust property distributed. No step-up in basis will apply at W's death.
- c. The interested parties could enter into a NJSA and agree to terminate the trust and distribute all of the assets to W.
- i. The trustee may prefer this over the discretionary distribution that may be contrary to the terms of trust.
 - ii. The NJSA should articulate the reason why a court could terminate such a trust.
 - iii. Will all the beneficiaries (including the heirs at law) sign off on the NJSA? Can you proceed with a NJSA signed only by the QB?
 - iv. Who gets the trust assets upon termination? Does the trust instrument specify?
 - v. If the trust instrument does not specify the remainder beneficiary upon termination and all trust principal is paid to W, is this a gift by W's children to her? How do you value this gift?
 - vi. What if W dies within one year of the trust termination? Does IRC §1014(e) apply and cause W to lose her step-up in basis?
 - (e) Appreciated property acquired by decedent by gift within 1 year of death
 - (1) In general
 - In the case of a decedent dying after December 31, 1981, if—

(A) appreciated property was acquired by the decedent by gift during the 1-year period ending on the date of the decedent's death, and

(B) such property is acquired from the decedent by (or passes from the decedent to) the donor of such property (or the spouse of such donor), the basis of such property in the hands of such donor (or spouse) shall be the adjusted basis of such property in the hands of the decedent immediately before the death of the decedent.

- d. The trustee or W could petition the court for a termination under §§701.0411(2), 701.0412 or 701.0416.
 - i. This would limit the trustee's risk.
 - ii. Trust would incur the cost of a court petition and hearing.
 - iii. Not certain how the court would react to the petition.
 - iv. May still have gift tax issues, depending on the terms of the trust.

E. Directed Trusts (§701.0808; §701.0902)

1. 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.
2. How does a Directed Trust work?
 - a. 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).
 - b. 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).

- c. 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).
- d. 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:
 - i. Provide advice to, consult with, monitor or evaluate a directing party's conduct;
 - ii. Inform or warn a beneficiary, third party or the directing party that the trustee disagrees with the actions or directions of the directing party;
 - iii. Prevent a directing party from giving a direction or taking any action;
 - iv. Compel a directing party to redress the directing party's actions or directions. §701.0808(3).
- e. 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.
- f. 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).
- g. Division of the investment duties and powers between a directing party and a trustee with respect to directed trust property.
 - i. A directing party who has power over directed trust property shall (§701.0902(1)):
 - Direct the trustee on any investment transaction of the directed trust property and the investment and reinvestment of principal and income.

- Direct the trustee on the management, control and voting of the directed trust property.
 - Select and determine the compensation of any outside investment manager and delegate authority to them pursuant to §881.01(10).
 - 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.
- ii. 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)):
- Prepare or review investment policy statements.
 - Perform investment or suitability reviews.
 - Determine or verify the value of directed trust property.
 - Monitor the conduct or investment performance of the directing party.
3. A Directed Trust is different than a Delegated Trust.
- a. 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.
 - b. 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.
 - c. In a directed trust, the trustee has no discretionary investment duties regarding the directed trust property.
 - d. 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.
 - e. 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)?

4. This is still a developing area of the WTC.
 - a. We have created directed, delegated, and full investment management fee schedules in recognition of these different investment responsibilities under a trust.
 - b. Individual outside investment advisers seem to like the idea of a directed trust; their compliance departments seem to prefer the delegated trust investment services.
 - c. We have not noticed a preferred method for drafting directed trusts. It does not appear the issue of investment management of a trust has yet to become a key discussion item when drafting a trust.

F. Duty to Inform and Report; Trust Accountings (§701.0813)

1. Trustee shall keep CB and other QB who so request, reasonably informed about the administration of a trust. Unless unreasonable, the trustee shall promptly respond to a QB's request for information about the trust. (This applies to new trust and old trusts.)
 - a. What does this mean?
 - b. Note: UTC requires the trustee to keep the QB reasonably informed of the material facts necessary for them to protect their interests. The WTC eliminated this provision.
 - c. UTC comments to section 813 state that the duty to keep CB and other QB who so request reasonably informed would ordinarily be satisfied by providing the beneficiary with an annual accounting.
 - d. Restatement (Second) of Trusts, section 179, comment d states: "Ordinarily the trustee is not under a duty to the beneficiary to furnish information in the absence of a request for such information."
 - e. After the effective date of the WTC, our trust company received an opinion letter from a Wisconsin law firm stating

there is no duty in Wisconsin to furnish an accounting for a trust that became irrevocable before July 1, 2014.

- f. According to the comments to UTC section 813, the trustee may be required to provide advance notice of transactions involving real estate, closely held assets or other interests that are difficult to value or replace in order to enable the beneficiary to take action to protect their interests.
 - g. Most corporate trustees believe the best practice is to give all CB an annual accounting. This has the extra advantage of triggering the one year statute of limitations under §701.1005(1).
 - h. Options for a trustee who wants to send an accounting and receives an objection from a co-trustee or other CB:
 - i. Seek a waiver. A QB may waive the right to information about a trust under §701.0813(5).
 - ii. Obtain a limited power of attorney appointing a representative. A representative can be appointed under a financial power of attorney form that specifically authorizes the representative to represent the interests of a beneficiary with respect to matters related to a trust. See §701.0303(3).
 - iii. Obtain an opinion letter that the beneficiary is reasonably informed. The trustee could seek and obtain an opinion letter from counsel for the family or from an individual co-trustee that the CB who do not receive accountings know of the existence of the trust and of the CB's right to request distributions or information about the trust.
2. Other new notice requirements.
- a. Notice of acceptance of trusteeship (§701.0813(2)(b)) (applies only to new trusts). A trustee must notify the QB of the acceptance of the trusteeship and the trustee's name, address and telephone number.
 - b. Notice of an irrevocable trust (§701.0813(2)(c)) (applies only to new trusts). The trustee must notify the QB that a revocable trust has become irrevocable or that an irrevocable trust has been created, identify the settlor, report the name, address and telephone number of the trustee and any directing party or trust protector,

disclose the right of a QB to request information about the trust and the right of a QB to request an annual trust accounting.

- c. Notice of change in trustee compensation (§701.0813(2)(d)) (applies to old and new trusts). The trustee must notify the CB and any QB who so request, of any change in the method or rate of the trustee's compensation.
 - d. Notice to petitioner of the identity of any directing party or trust protector (§701.0813(2)(e)) (applies to old and new trusts). Upon receipt of a court petition that does not identify the directing parties or trust protectors of trust, the trustee must inform the petitioner of the identity of the directing parties and trust protectors.
3. Annual trust accounting (§701.0813(3)) (applies only to new trusts). At least annually, upon the termination of a trust and upon a change in trustees, a trustee shall send the CB and any other QB who requests, a report of the trust's assets, liabilities, receipts, disbursements, trustee's compensation and the value, if feasible, of the respective market values of each asset.
 4. The WTC authorizes "silent trusts." The duty to inform and report is not a mandatory duty and the trust instrument may include provisions that specifically direct the trustee not to provide information about the trust to certain beneficiaries. Conditions could be inserted that inform the trustee when the beneficiaries can receive information, such as attainment of a certain age or permission to send information from a specified person.
- G. Nonapplication of the Prudent Investor Rule to Life Insurance Contracts Owned by Trusts (§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.
- 4. Should the trustee opt into §701.0903(4)?
 - a. Does the ILIT still make sense? Given the increase in the estate tax exemption amounts, should the trust be terminated?
 - b. Do the CB (and the settlor) want the trustee to review the life insurance contracts?
 - c. Is the trustee being compensated to review the life insurance contracts?
 - d. Consider opting into §701.0903 if the ILIT will continue, the CB and the settlor do not expect the trustee to review the life insurance contracts and the trustee is not being paid to review the life insurance contract. See a sample notice of the election to be governed by §701.0903 attached as an exhibit.
 - e. Corporate trustees may not be allowed by their regulators to opt into §701.0903. We have been informed by several national corporate trustees that the OCC is continuing to require corporate trustees to conduct a review of the life insurance contracts. This is a developing area of the law. If any trustee decides to opt in, at a minimum we recommend that the trustee provide the insured with annual information about the life insurance contracts that would allow the settlor or CB to review the contract. For permanent insurance, this would mean the trustee should annually request an in-force illustration of the life insurance contract and provide that information to the settlor and CB.

III. What's Next?

A. Current Legislative Environment.

B. WTC Trailer Bill Study Group.

1. Nonjudicial settlement agreements.
2. Representation.
3. Decanting – conform to new uniform law on decanting.
4. Self-settled trusts and other revisions to subchapter V on creditor rights
5. Duty to inform and report.
6. Principal and income act and prudent investor act updates.
7. Attorney fees – review standard
8. Uniform law on powers of appointment.
9. Uniform law on fiduciary access to digital assets.
10. Probate code updates.