



# **WSSFC Substantive Track Session 5**

## **The New Wisconsin Trust Code: How Your Drafting Impacts Who Gets What Information**

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**THE NEW WISCONSIN TRUST CODE:  
HOW YOUR DRAFTING IMPACTS WHO GETS WHAT  
INFORMATION**

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I. WISCONSIN TRUST CODE – NEW WIS. STAT. CHAPTER 701

- A. Based on the Uniform Trust Code which was approved by the National Conference of Commissioners on Uniform State Laws in 2000 and amended in 2001, 2003, 2004, and 2005
- B. Enacted in Wisconsin on December 13, 2013; effective July 1, 2014
- C. Objective – to clarify existing Wisconsin trust laws and create new trust laws where none existed
- D. The WTC establishes default rules
  - 1. As the drafters of the trust we may modify these default rules because, with limited exceptions, the terms of a trust prevail over the statutory provisions [§ 701.0105]
  - 2. Because Wisconsin did not include optional UTC §§ 105(b)(8) and (9), the settlor of the trust may modify the recordkeeping and reporting requirements of the trustee, discussed below, through the terms of the trust

II. DUTIES OF THE TRUSTEE

- A. There are 12 specific duties of the trustee listed in §§ 701.0801 to 701.0807 and §§ 701.0809 to 701.0813

- B. The focus of this presentation is on the duty to inform and report [§ 701.0813]

### III. BENEFICIARY VS. QUALIFIED BENEFICIARY

- A. The UTC and WTC introduce a new concept – Qualified Beneficiary

- B. Easiest to understand using an example, such as the following bypass trust:

1. Created by deceased settlor who is survived by his wife, all of his children, and all of his grandchildren
2. All income is required to be distributed to wife and the trustee may make discretionary principal distributions to wife for her health and support
3. On wife's death, she has the power to appoint the remaining trust assets to anyone other than herself, her estate, her creditors, or the creditors of her estate
4. To the extent not appointed by wife, the remaining trust assets pass to the settlor's then surviving descendants by right of representation
5. If none of the settlor's descendants survive wife, to the extent not appointed by wife, the remaining trust assets pass to the Greater Milwaukee Foundation

- C. Beneficiary [§ 701.0103(3)]

1. A person with an interest in the trust
  - a. Present or future
  - b. Vested or contingent
  - c. Includes holding a power of appointment in a capacity other than trustee, trust protector, or directing party

2. In the bypass trust example, the Beneficiaries are the wife, the children, the grandchildren and more remote descendants, and the Greater Milwaukee Foundation

D. Qualified Beneficiary [§ 701.0103(21)]

1. A person with at least one of the following interests in the trust on the date of determination
  - a. Distributee or permissible distributee (I refer to them as Current Beneficiaries)
  - b. Would be a distributee or permissible distributee if the prior interests terminated without causing the trust to terminate (I refer to them as First Tier Remainder Beneficiaries)
  - c. Would be a distributee or permissible distributee if the trust terminated (I also refer to them as First Tier Remainder Beneficiaries)
2. When making this determination, ignore any power of appointment (unless it has been irrevocably exercised and the trustee has been notified)
3. Using nontechnical terms, the Qualified Beneficiaries are the Current Beneficiaries and the First Tier Remainder Beneficiaries
4. In the bypass trust example, the Qualified Beneficiaries are the wife and the children, not the grandchildren or the Greater Milwaukee Foundation

E. Note that slight changes in the drafting of the dispositive provisions can change whether a beneficiary is a Qualified Beneficiary or what type of Qualified Beneficiary a beneficiary is

1. In the bypass trust example, if the trustee may also make discretionary principal distributions to the children during wife's lifetime, the children become Current Beneficiaries instead of First Tier Remainder Beneficiaries

2. In the bypass trust example, if the trustee may also make discretionary principal distributions to the grandchildren during wife's lifetime, the grandchildren become Current Beneficiaries instead of not being Qualified Beneficiaries at all
3. Whether a beneficiary is a Qualified Beneficiary, and if so, what type of Qualified Beneficiary has a significant impact on what information the trustee is required to give to the beneficiary and what information the beneficiary may request

#### IV. DUTY TO INFORM AND REPORT [§ 701.0813]

- A. The trustee shall keep the following reasonably informed of the trust administration [§ 701.0813(1)]:
  1. Distributees and permissible distributees (i.e., the Current Beneficiaries)
  2. Other Qualified Beneficiaries (i.e., the First Tier Remainder Beneficiaries) who so request
- B. The trustee shall provide annual trust accountings of receipts and disbursements, as well as a trust balance sheet of assets (with market values if feasible) and liabilities to [§ 701.0813(3)(a)]:
  1. Distributees and permissible distributees (i.e., the Current Beneficiaries)
  2. Other Qualified Beneficiaries (i.e., the First Tier Remainder Beneficiaries) who so request
- C. The trustee shall notify the following of any change in the method or rate of the trustee's compensation [§ 701.0813(2)(d)]:
  1. Distributees and permissible distributees (i.e., the Current Beneficiaries)
  2. Other Qualified Beneficiaries (i.e., the First Tier Remainder Beneficiaries) who so request
- D. All Qualified Beneficiaries have the right to request trust documentation and then the trustee may provide either [§ 701.0813(2)(a)]:

1. The trust instrument, or
  2. Pertinent provisions of the trust
- E. The trustee of an irrevocable trust shall notify all Qualified Beneficiaries of [§§ 701.0813(2)(b) and (c)]:
1. Name, address, and phone number of the trustee
  2. Trust's existence
  3. Name of the settlor
  4. Name, address, and phone number of each directing party and trust protector
  5. Right to request trust documentation
  6. Right to request information about the trust administration
  7. Right to an annual trust accounting
- F. Qualified Beneficiaries may waive their rights under this section [§ 701.0813(4)]
- G. Transition rule [§ 701.0813(5)]
1. The provisions described in paragraphs A (trust administration), C (trustee's compensation), and D (trust documentation) apply to all trusts regardless of when created unless the terms of the trust provide otherwise
  2. The provisions described in paragraphs B (annual accounting) and E (notifications) apply to all trusts unless:
    - a. The trust was irrevocable on June 30, 2014, or
    - b. The trustee of a revocable trust was already serving on June 30, 2014, or
    - c. The terms of the trust provide otherwise

V. POTENTIAL REMEDIES FOR TRUSTEE'S FAILURE TO REPORT

- A. Removal of the trustee [ §§ 701.0706 and 701.1001(2)(g) ]
- B. Reduce or deny compensation to the trustee [ § 701.1001(2)(h) ]
- C. Payment by the trustee of the attorney's fees and costs of the beneficiaries and/or the trust [ § 701.1004 ]

VI. BENEFITS TO TRUSTEES FROM REPORTING TO BENEFICIARIES

- A. In my experience, the two keys to reducing trustee liability to trust beneficiaries are:
  - 1. Create transparency in the administration of the trust through disclosure of information to the trust beneficiaries
  - 2. Follow a process in managing the investment of the trust's assets
  - 3. Results
    - a. Beneficiaries are less likely to make a claim
    - b. If a claim is made, the courts are less likely to hold the trustee liable
- B. The WTC adds another benefit to disclosure – the statute of limitations for commencing an action against a trustee is significantly shorter if the trustee has disclosed sufficient information so that the beneficiary or a representative could have determined the existence of the potential claim
- C. New statute of limitations for breach of trust [ § 701.1005 ]
  - 1. If the information was sufficiently disclosed in a report received by the beneficiary or a representative [ § 701.1005(1) ] – 1 year after the report was sent
  - 2. If not sufficiently disclosed in a report [ § 701.1005(3) ] – 5 years after the earliest of:

- a. The Trustee no longer serving
  - b. Termination of the beneficiary's interest
  - c. Termination of the trust
3. Claim for fraud – applicable Wisconsin law, which is 6 years after discovery for most fraud claims under § 893.93(1)(b)

## VII. OUR JOB AS LAWYERS DRAFTING TRUSTS FOR OUR CLIENTS

- A. Advise our clients about what information the trust beneficiaries will be entitled to receive or request under the Wisconsin Trust Code
- B. Advise our clients about the benefits to the trustee selected by our clients as a result of disclosing information to the trust beneficiaries
- C. Determine if our clients' objective is to restrict the information that is given to certain beneficiaries
- D. When desired by our clients, modify the default rules in the WTC by appropriate drafting of the trust



(18) “Power of appointment” has the meaning given in s. 702.02 (6).

(19) “Power of withdrawal” means a presently exercisable general power of appointment but does not include any of the following:

(a) A power exercisable by a trustee and limited by an ascertainable standard.

(b) A power exercisable by another person only upon consent of a trustee or of a person holding an adverse interest.

(20) “Property” means anything that may be the subject of ownership, whether real or personal or legal or equitable, or any interest therein.

(21) “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.

(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:

1. A distributee or permissible distributee of trust income or principal if the interests of the distributees described in par. (a) terminated on that date without causing the trust to terminate.

2. A distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(22) “Revocable,” as applied to a trust, means that the trust can be revoked by the settlor without the consent of the trustee or a person holding an adverse interest, regardless of whether the settlor is incapacitated.

(23) “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 of the portion of the trust property attributable to that person’s contribution except to the extent another person has the power to revoke the trust or withdraw that portion.

(24) “Special power of appointment” has the meaning given in s. 702.02 (7).

(25) “Spendthrift provision” means a term of a trust that restrains either or both of a voluntary or involuntary transfer of a beneficiary’s interest.

(26) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, any territory or insular possession subject to the jurisdiction of the United States, and an Indian tribe, band, or nation recognized by federal law or formally acknowledged by a state.

(27) “Terms of a trust” means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

(28) “Trustee” includes an original, additional, and successor trustee, and a cotrustee.

(29) “Trust for an individual with a disability” means a trust that is established for the benefit of an individual with a disability of any age, if the assets of the trust would not be counted as resources of the individual with a disability for purposes of eligibility for medical assistance under subch. IV of ch. 49, if he or she applied for medical assistance and was otherwise eligible.

(30) “Trust instrument” means an instrument, including any amendments or modifications to the instrument under s. 701.0111 or subch. IV, that is executed by the settlor that contains terms of a trust or is created under a statute, judgment, or decree that orders property to be transferred to a trustee to be administered for the benefit of a beneficiary.

(31) “Trust protector” means a person who, in a trust instrument or court order, is granted a power, other than a power of

appointment, in a capacity other than as a trustee or a directing party.

History: 2013 a. 92.

**701.0104 Knowledge.** (1) Subject to sub. (2), a person has knowledge of a fact if any of the following applies:

(a) The person has actual knowledge of the fact.

(b) The person has received a notice or notification of the fact.

(c) The person has reason to know the fact from all the facts and circumstances known to the person at the time in question.

(2) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been received by the employee if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual’s regular duties or the individual knows a matter involving the trust would be materially affected by the information.

History: 2013 a. 92.

**701.0105 Default and mandatory rules.** (1) Except as otherwise provided in the terms of the trust, this chapter governs the duties and powers of trustees, directing parties, and trust protectors; relations among trustees, directing parties, and trust protectors; and the rights and interests of beneficiaries.

(2) The terms of a trust prevail over any provision of this chapter except for the following:

(a) The requirements for creating a trust.

(b) The duty of a trustee or a directing party to act in good faith and in accordance with the terms and purposes of a trust instrument and the interests of the beneficiaries.

(c) The requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful.

(d) The power of a court to modify or terminate a trust under ss. 701.0410 to 701.0416.

(e) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in ss. 701.0501 to 701.0508.

(f) The power of the court under s. 701.0702.

(g) The power of the court under s. 701.0708 (2) to adjust a trustee’s, directing party’s, or trust protector’s compensation specified in the terms of the trust.

(h) The effect of an exculpatory term under s. 701.1008.

(i) The rights under ss. 701.1010 to 701.1013 of a person other than a trustee or beneficiary.

(j) Periods of limitation for commencing a judicial proceeding.

(k) The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

(L) The jurisdiction of the court and venue for commencing a proceeding as provided in ss. 701.0202, 701.0203, and 701.0204.

(m) The jurisdiction of the court under ss. 701.0807 (4), 701.0808 (9), and 701.0818 (12).

(n) The legal capacity under s. 701.0818 (2) (c) in which a trust protector who is also serving as a trustee or a directing party must exercise any power granted to the trust protector.

History: 2013 a. 92; 2013 a. 151 s. 28.

**701.0106 Common law of trusts; principles of equity.**

The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state.

History: 2013 a. 92.

resulting from the trustee providing information to the directing party that is related to the power granted to the directing party.

(b) Except as otherwise provided in this chapter, a trustee does not have a duty to provide any information to the directing party that the directing party does not request.

(7) A trustee shall, in accordance with s. 701.1004, pay or reimburse a directing party for attorney fees and costs to defend any claim made against the directing party.

(8) Sections 701.0701, 701.0708, 701.0709, 701.1001 to 701.1003, and 701.1005 to 701.1010 apply to a directing party as if the directing party was a trustee.

(9) A person who accepts an appointment as a directing party of a trust submits to the jurisdiction of the courts of this state, as provided in s. 701.0202 (1).

History: 2013 a. 92, 151.

**701.0809 Control and protection of trust property.** A trustee shall take reasonable steps to take control of and protect the trust property.

History: 2013 a. 92.

**701.0810 Record keeping and identification of trust property.** (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.

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

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

History: 2013 a. 92.

**701.0811 Enforcement and defense of claims.** A trustee shall take reasonable steps to enforce claims of the trust known to the trustee and to defend claims against the trust known to the trustee.

History: 2013 a. 92.

**701.0812 Collecting trust property; duties of successor trustees.** (1) A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a trustee or former trustee, or a trust protector or former trust protector.

(2) A successor trustee does not have a duty to examine the accounts of a former trustee.

History: 2013 a. 92.

**701.0813 Duty to inform and report.** (1) A trustee shall keep the distributees or permissible distributees of trust income or principal, and other qualified beneficiaries who so request, reasonably informed about the administration of the trust. Unless unreasonable under the circumstances, a trustee shall promptly respond to a qualified beneficiary's request for information related to the administration of the trust.

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

(a) Upon the request of a qualified beneficiary for a copy of the trust instrument, promptly furnish to the qualified beneficiary either a copy of the portions of the trust instrument relating to the interest of the qualified beneficiary or a copy of the trust instrument.

(b) Within a reasonable period of time 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 after the date on which the trustee acquires knowledge of the creation of an irrevocable trust, or the date on which the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the

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

1. The trust's existence.

2. The identity of the settlor or settlors.

3. The name, address, and telephone number of each directing party and trust protector.

4. The right to request a copy of the documentation referred to in par. (a).

5. The right to request information under sub. (1).

6. The right to a trustee's report as provided in sub. (3).

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

(e) Upon receiving a petition to the court for action under ss. 701.0411 to 701.0416 that does not identify each trust protector and each directing party of the trust, notify the petitioning party of the identity of each trust protector and directing party, including the name, address, and telephone number of each trust protector and directing party, who is serving at the time the petition is filed.

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

1. A report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation.

2. A listing of the trust assets and, if feasible, their respective market values.

(b) Upon a vacancy in a trusteeship, unless a cotrustee remains in office, the former trustee shall send a report containing the information described under par. (a) 1. to the qualified beneficiaries. A personal representative or guardian may send the qualified beneficiaries a report containing the information described in par. (a) 1. 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 under this section. A qualified beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

(5) Subsections (2) (b) and (c) and (3) do not apply to a trustee who accepts a trusteeship 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.

History: 2013 a. 92.

**701.0814 Discretionary powers; tax savings.** (1) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute," "sole," or "uncontrolled," the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. A court may not determine that a trustee abused its discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion.

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

(a) A person other than a settlor who is a beneficiary and a trustee, directing party, or trust protector of a trust that confers on the trustee, directing party, or trust protector a power to make discretionary distributions to or for the trustee's, directing party's, or trust protector's personal benefit may exercise the power only in accordance with an ascertainable standard.

(b) A trustee, directing party, or trust protector may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee, directing party, or trust protector personally owes another person.

(2) Subject to sub. (3), if a trustee, directing party, or trust protector defends or prosecutes any proceeding in good faith, whether successful or not, the trustee, directing party, or trust protector is entitled to receive from the trust the necessary expenses and disbursements, including reasonable attorney fees, incurred. This subsection does not preclude a court from ordering another party to reimburse the trust for these expenses and disbursements as provided in sub. (1).

(3) (a) A trustee may pay costs or attorney fees incurred in any proceeding from the trust property without the approval of any person and without court authorization, unless the court orders otherwise as provided in par. (c).

(b) If a claim or defense based upon a breach of trust is made against a trustee, directing party, or trust protector in a proceeding, the trustee shall provide notice to each qualified beneficiary, directing party, and trust protector of the trustee's intention to pay costs or attorney fees incurred in the proceeding from the trust prior to making payment. The notice shall inform each qualified beneficiary, directing party, and trust protector of the right to apply to the court for an order prohibiting the trustee from paying attorney fees or costs from trust property. If a trustee is served with a motion for an order prohibiting the trustee from paying from the trust attorney fees or costs in the proceeding and the trustee pays attorney fees or costs from the trust before an order is entered on the motion, the trustee, directing party, or trust protector and their respective attorneys who have been paid attorney fees or costs from trust property are subject to the remedies in pars. (c) and (d).

(c) 1. If a claim or defense based upon breach of trust is made against a trustee, directing party, or trust protector in a proceeding, a party may move the court for an order to prohibit the trustee from paying costs or attorney fees from trust property.

2. Except as provided in subd. 3., if the moving party demonstrates to the court that there is a reasonable basis for the court to find that a breach of trust occurred, the court shall enter an order prohibiting the payment of further attorney fees and costs from trust property and shall order attorney fees or costs previously paid from trust property in such proceeding to be refunded, unless the court finds good cause to allow attorney fees and costs to be paid from the trust. A trustee, directing party, or trust protector may offer evidence to rebut the evidence submitted to the court by the moving party.

3. The court may defer ruling on a motion to prohibit a trustee from paying costs or attorney fees from trust property until discovery is taken by the parties.

4. An order entered under this paragraph does not limit a trustee's, directing party's, or trust protector's right to seek an order allowing the payment of some or all of the attorney fees or costs incurred in the proceeding from trust property, including any fees required to be refunded, after the claim or defense is finally determined by the court. If a claim or defense based upon a breach of trust is withdrawn, dismissed, or resolved without a determination by the court that the trustee committed a breach of trust, after the entry of an order prohibiting payment of attorney fees and costs pursuant to this paragraph, the trustee may pay costs or attorney fees incurred in the proceeding from the trust property without further court authorization.

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

(e) Subject to s. 701.1005, nothing in this subsection limits the power of the court to review fees and costs or the right of any interested persons to challenge fees and costs after payment, after an accounting, or after conclusion of the litigation.

(f) Notice under par. (b) is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a

breach of trust or resolved without a determination by the court that the trustee has not committed a breach of trust.

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

History: 2013 a. 92.

**701.1005 Limitation of action against trustee.** (1) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date on which the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust.

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

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

- (a) The removal, resignation, or death of the trustee.
- (b) The termination of the beneficiary's interest in the trust.
- (c) The termination of the trust.

(4) Subsections (1) and (3) do not apply to a claim for fraud. The time for asserting a claim for fraud is governed by applicable law.

History: 2013 a. 92.

**701.1006 Reliance on trust instrument.** A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

History: 2013 a. 92.

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

History: 2013 a. 92.

**701.1008 Exculpation of trustee.** (1) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it does any of the following:

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

(b) Was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship with 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 that the exculpatory term was fair under the circumstances existing at the time the trust instrument was signed and that the existence and contents of the exculpatory term were adequately communicated to the settlor.

History: 2013 a. 92.

**701.1009 Beneficiary's consent, release, or ratification.** A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the