



WSSFC 2025

Plenary 2

25 Things Every Lawyer Should Know

Presenters:

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About the Presenters...

Jeffrey M. Glazer is a partner at Ogden Glazer + Schaefer where he manages the firm's food and beverage practice. He has worked with alcohol beverage companies for the past 15+ years and his practice encompasses all 4 tiers of the 3-tier system (don't forget the farmers that make the ingredients!!); OG+S represents a wide array of (farmers), manufacturers, wholesalers, and retailers. He has spoken at numerous events across the country on food and beverage issues and published frequently on topics relevant to the industry. Jeff was the founder of Madison Beer Review and Madison Craft Beer Week.

Jessica Y. Harrison is an attorney with the Madison law firm of Scholz Nonprofit Law, which she joined in 2010. She focuses her practice on serving nonprofits, from initial planning through dissolution. Prior to joining the firm, Jessica clerked for the Honorable Judge Barbara Crabb of the Western District of Wisconsin and worked for East Asian Legal Studies Center at the University of Wisconsin-Madison Law School. She received an undergraduate degree from Duke University, and a master's degree in French literature and a law degree from the University of Wisconsin-Madison.

Kate Knowlton has been practicing since 2001, and has been in solo/small practice since 2004. She incorporated Knowlton Law Group in 2011. For the last 3 years, she was also the Supervising Attorney for the Victim Advocacy Program at Disability Rights Wisconsin. Her primary areas of practice are victim rights enforcement, and family law, with special emphasis in survivor advocacy and representation. Kate earned her J.D. at Marquette University, while teaching English at the secondary level with her degree from UW-Madison.

Kevin Trost is the founding member of Trost, LLC, in Madison. He received his undergraduate degree from Washington University, cum laude, and his law degree from the University of Wisconsin. Kevin has authored four articles for the Wisconsin Lawyer, including his most recent article titled "American Dream Turned Nightmare: Liability for Undisclosed Defects in Real Estate Sales." For over twenty years, Kevin's practice has focused on litigating and resolving disputes regarding real estate, construction, financial services, and contractual matters. He is a member of the State Bars of Wisconsin and Michigan.

Reg P. Wydeven is a partner at McCarty Law LLP in Appleton. As he had always hoped, Reg was lucky enough to follow in his father's footsteps by practicing law at the firm and advising individuals on estate planning, estate settlement and elder law matters. His dad, Dennis, retired from McCarty Law in 2004 and the two worked closely in these areas until that time. Reg assists clients and is a frequent speaker on matters such as estate planning, special needs planning, long-term care planning and asset protection. Reg has been honored as a "Rising Star" for his work in elder law and also received the local "Future 15 Young Professional Award." He also writes a weekly FYI column for [The Post Crescent](#), which provides legal commentary on a wide array of topics including estate planning, product liability, investments, and unconventional legal news. Reg was raised in Kimberly, and lives in the childhood home of his wife, Mary, two doors down from where he grew up. They have two children, Ebben and Matthew. Little-known fact: Reg graduated from law school with the 14th Dalai Lama in 1998 when the University of Wisconsin Law School awarded him an honorary degree.

Digital Assets

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- 1.WTF is BTC?**
- 2.Hacking and Scams! Oh My!**
- 3.Tokens v. Coins**
- 4.Of Stable Coins and USD**
- 5. Is it a “Security” or Not?**



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Cryptocurrency and Blockchains: Smart Contracts – Part 1

Blockchain operates with coins and tokens, runs on "gas," and can be used to sell a variety of items, including unique artworks and flight insurance. The words sound familiar; learn more about the underlying concepts in this first part of a two-part series about digital currency systems.

By Jeffrey M. Glazer

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Have you heard? Gas prices are up.

As of early November, it cost an exorbitant \$50-\$94 to conduct a single transaction on the Ethereum blockchain.¹ If you want to transfer a non-fungible token (NFT), the cost is as much as \$190 per party to the transaction.² On the Ethereum blockchain, the computing resources necessary to make or otherwise interact with a block on the chain, that is, the resource that makes the blockchain run, is called *gas*.³ The price of gas is tied to the price of Ether, the coin underlying the Ethereum blockchain; when coin value increases, the cost of gas increases, too.

Blockchains Demystified

In the abstract, blockchain technology is relatively easy to understand. It's basically a log sheet on the world's fanciest legal pad. You can think of it this way. Draw three lines vertically down the length of a legal pad. Each row is a transaction. In the first column is the sending user; the second column is the receiving user; the third column is the thing being transferred. Add a date and time stamp for each transaction. The one unassailable rule is that you are not allowed to erase any of the entries. You get paid to add entries to the log (this is the "gas").

Jeffrey M. Glazer, Chicago-Kent 2004, is a clinical associate professor at the [U.W. Law & Entrepreneurship Clinic](#), Madison. [Get to know the author: Check out Q&A below.](#)



When you get to the end of a legal pad, you give it a unique number and encrypt it. Encryption requires a really big, absolutely unique number, and calculating the number requires a lot of computing resources and complicated math. For the use of your resources to calculate the number (called “mining”), you receive a coin.⁴

Now, imagine that every person in your network is also keeping a yellow legal pad on which they are recording transactions. Each time a person finishes a legal pad, you make a copy of the whole legal pad and give it to every person in the network, and each person verifies that they got it from you. On a new legal pad, note the unique number of the block – that is, the legal pad – that came before it and start all over again.

You created a blockchain. The legal pads are the “blocks”; noting the last number of the last block on the new one makes it a “chain.” It is immutable (transactions are always added, they are never removed). It is public (anyone in the world can view it). And it is trusted (everyone has verified the exact same copy; this is called “consensus”). It would be very difficult to hack this system to alter a recorded transaction.

Of Coins and Contracts

Bitcoin is a blockchain. So is Ethereum. For purposes of this article, both operate in the same way except for one major difference. In the third column on our legal pad, we noted “the thing being transferred.” On some networks you can send only one type of thing – a “coin.” A coin is simply a digital representation of value⁵ – just like a dime or a quarter. And just like a dime or a quarter, each coin has a value.⁶ For example, a Bitcoin is currently valued at \$49,119.40.⁷ On the Bitcoin network you can only send Bitcoins (or fractions of a Bitcoin).

On the Ethereum network, “the thing being transferred” is less like a coin and more like a bottomless bucket. You can put whatever you want into that bucket. Just as important, you can continue to interact with the bucket after you register it on the blockchain. You could put a coin (or lots of coins) in it.

Put Tokens in the Bucket

A token is like a coin, except that it is not created as a reward for mining. There are two (basic) classes of tokens: security tokens and utility tokens.

Security Tokens. Security tokens are tokens received in exchange for investing in an application on the network; the process is similar to receiving stock in exchange for investing in a company. A user purchases a token (and its associated rights, if any), holds it for some period of time as its price fluctuates, then sells the token for a loss or a gain.

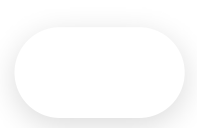
When security tokens are issued to fund the start of a blockchain network (or other business), somewhat confusingly, this is called an initial coin offering (ICO) even though what is being offered might, technically, be a token, not a coin. Just like in a stock raise, the company gets to use the funds raised in the token sale for whatever purposes it discloses in the investment documents.

Security tokens are regulated by the U.S. Securities and Exchange Commission (SEC) as securities. The issuers of security tokens must comply with securities regulations in their respective jurisdictions, and the platforms selling security tokens must be registered securities-trading platforms.⁸

Utility Tokens. On the other hand, utility tokens are not issued in exchange for investment but are issued for the use of the network (or other resource) itself. For example, a company might use a blockchain network as a platform for settling international banking transactions.⁹ The service might settle transactions very quickly but only be able to settle so many transactions in a day before it starts slowing down. So the company issues a token for each transaction that it can process in the day and makes a rule that only people holding a token are allowed to use the network. Utility tokens are not securities.¹⁰

Or maybe an artist puts 1,000 different unique drawings of bored apes on 1,000 different tokens along with a license or assignment of the character's associated intellectual property rights. Each token that has an ape (and its rights) is unique; it is not a fungible good. It is, therefore, an NFT. Now, the artist can sell the tokens that each have a picture of a bored ape on it and its associated intellectual property rights. The purchaser can do whatever they want with the character – they now own it and its intellectual property rights.¹¹ The character (and its associated intellectual property rights) is a token, in a bucket, on a blockchain. It's no pony on a boat, but I think Lyle Lovett would be proud.

Put a Contract in the Bucket



One of the first uses for contracts on a blockchain was for flight insurance.¹² In this case, the contract was straightforward – if a passenger’s flight is delayed by more than some predefined time, the passenger would receive the cost of the flight back. The contract is placed in an Ethereum bucket along with a small piece of code that detects official flight times. When a passenger purchases insurance from a kiosk at a participating airport, the flight is registered with the blockchain insurance contract, which then monitors official times; if the flight time is delayed by more than the set time, it automatically pays out. This is called “parametric insurance.”

Combine the Power of Tokens with the Power of Contracts

Consider, for example, an investment club¹³ that puts a membership agreement and utility tokens on the blockchain. The membership agreement says that anyone who buys a utility token can use the token to vote to collectively decide on an asset to purchase with all money raised as a result of the token sale. The membership agreement also states that each member gets the member’s pro-rata share of the proceeds when the purchased asset is sold. All token holders then vote to use the proceeds of the token sale (hypothetically, maybe it’s \$47 million) to purchase an original copy of the U.S. Constitution.¹⁴ This is a decentralized autonomous organization (DAO).

Conclusion

Because the technology is relatively easy to replicate, new blockchain networks, DAOs, and tokens can pop up overnight. And because the technology is inherently decentralized, the networks are not necessarily based in any particular jurisdiction.¹⁵ There are real and unique legal questions posed not only by the automated nature of blockchain networks but also by the fundamentally decentralized nature of the systems and the new kinds of property that are being generated. Blockchains are commonly cited as having the potential to disrupt almost every industry, from content creation to banking to shipping to insurance.

When are tokens security tokens and when are they utility tokens? Is a DAO a corporate entity or is it more like a partnership? How can nefarious uses of this technology be tracked? What kind of oversight can feasibly be exercised over networks that are so ephemeral? Whose law should apply when networks, users, and assets are spread

around the globe? How can countries work together to create a system that makes sense for such a decentralized, global technology?

The Internal Revenue Service, SEC, Federal Trade Commission, and numerous other United States and international agencies are scrambling to understand the technology and its legal implications. In the next part of this article (coming in April 2022), I will look in depth at the legal issues raised by tokens, decentralized organizations, and decentralized finance.

Meet Our Contributors

If you could get free tickets to any event, what would it be?



I'd like free tickets to the first Moon Base versus Earth interspace soccer tournament brought to you by SpaceX. If the free event tickets include transportation, I'd love to see this as an "away" game. I'm a huge soccer nerd, and ticket prices are likely to be astronomical.

Jeffrey M. Glazer, U.W. Law & Entrepreneurship Clinic, Madison.

Become a contributor! Are you working on an interesting case? Have a practice tip to share? There are several ways to contribute to *Wisconsin Lawyer*. To discuss a topic idea, contact Managing Editor Karlé Lester at (800) 444-9404, ext. 6127, or email klester@wisbar.org. Check out our [writing and submission guidelines](#).

Endnotes

¹ Jamie Redman, *While Ethereum Prices Skyrocket, Ether Gas Fees Surge Fueling Costly Transfers*, Bitcoin.com, <https://news.bitcoin.com/while-ethereum-prices-skyrocket-ether-gas-fees-surge-fueling-costly-transfers/> (Oct. 30, 2021).

² Mark R. Hake, *Fees Threaten Ethereum's Perch as King of NFTs*, InvestorPlace, <https://investorplace.com/2021/10/ethereum-crypto-gas-fees-threaten-nft-king-perch/> (Oct. 11, 2021).

³ *Gas and Fees*, <https://ethereum.org/en/developers/docs/gas/> (last updated Jan. 5, 2022) (“... every block has a base fee, the minimum price per unit of gas for inclusion in this block, calculated by the network based on demand for block space. As the base fee of the transaction fee is burnt, users are also expected to set a tip (priority fee) in their transactions. The tip compensates miners for executing and propagating user transactions in blocks and is expected to be set automatically by most wallets.”).

⁴ For example, a Bitcoin (BTC) or Ether (ETH), the coins for the Bitcoin and Ethereum networks, respectively. One ETH was worth \$3,196.62 on Jan. 9, 2022, and the IRS considers this taxable income.

⁵ Coins are unique to a blockchain, so a miner on the Bitcoin network would receive one Bitcoin and a miner on the Ethereum network would receive one ETH. There are many different networks, hence many different coins. But coins are not infinite; there are only as many as there are encryption numbers generated by miners on the network over its history.

⁶ Unlike American currency, however, the price of a Bitcoin is set by supply and demand, not by the Federal Reserve.

⁷ Market price as of 4:13 p.m. on Dec. 15, 2021.

⁸ U.S. SEC, *Spotlight on Initial Coin Offerings (ICOs)*, www.sec.gov/ICO (last modified July 14, 2021); *SEC v. Ripple Labs*, No. 1:20-cv-10832 (S.D.N.Y. Dec. 22, 2020), www.sec.gov/litigation/complaints/2020/comp-pr2020-338.pdf (unregistered securities offering); *In re Poloniex, LLC*, Admin. Proc. No. 3-20455 (SEC Aug. 9, 2021), www.sec.gov/litigation/admin/2021/34-92607.pdf (unregistered trading platform).

⁹ <https://ripple.com/company> (last visited Jan. 12, 2022).

¹⁰ See Release No. 81207, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO* (July 25, 2017), www.sec.gov/litigation/investreport/34-81207.pdf.

¹¹ <https://boredapeyachtclub.com/#/> (last visited Jan. 12, 2022).

¹² Miranda Wood, *AXA Withdraws Blockchain Flight Delay Compensation Experiment*, Ledger Insights, www.ledgerinsights.com/axa-blockchain-flight-delay-compensation/ (Nov. 11, 2019).

¹³ U.S. SEC, *Investment Clubs and the SEC*, www.sec.gov/reportspubs/investor-publications/investorpubsinvclubhtm.html (last modified March 20, 2018).

¹⁴ Nilay Patel, *From a Meme to \$47 Million: ConstitutionDAO, Crypto, and the Future of Crowdfunding*, The Verge, www.theverge.com/22820563/constitution-meme-47-million-crypto-crowdfunding-blockchain-ethereum-constitution (Dec. 7, 2021).

¹⁵ Thousands of mining nodes are scattered across the world on just the Ethereum blockchain. Etherscan, *Ethereum Node Tracker*, <https://etherscan.io/nodetracker> (last visited Jan. 12, 2022).

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Cryptocurrency & Blockchains: Smart Contracts – Part 2

Here is a look at some of the ways in which decentralization and automation are putting strains on the legal frameworks that structure property ownership, organization, and securities in this part 2 of a two-part series about digital currency systems.

By Jeffrey M. Glazer

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In the [first part of this series](#), published in February 2022,¹ I wrote that the promise of blockchain lies in its ability to decentralize and automate the world we live in. Nonfungible tokens (NFTs) decentralize and automate property ownership, utility tokens have the potential to decentralize and automate financial services, and security tokens have the power to decentralize and automate collective investment.

Part 2, using three case studies, looks at some of the ways in which these movements in decentralization and automation are putting strains on the legal frameworks that structure property ownership, organization, and securities. First, the distinction between utility tokens and security tokens is illustrated by looking at a current enforcement action against Ripple Labs Inc. Second, automation of property ownership and licensing at the heart of NFTs is exemplified by the Bored Ape Yacht Club. The piece ends with an examination of the short-lived ConstitutionDAO and issues related to structuring decentralized organizations.

Fraud does plague the blockchain space,² but such issues are not unique to blockchain and they aren't a focus here. In the late 1990s, the U.S. Department of Justice was concerned about fraud on a new technology called "the internet" in what we now recognize as garden-variety phishing. By the 1970s, people had learned how to hijack telephone systems for their own, occasionally nefarious, purposes. The early 1900s saw hucksters shilling radio waves to cure, for example, infected fallopian tubes.³

Security Versus Utility

Founded in 2012, Ripple Labs Inc. is an early innovator in blockchain technology. The heart of Ripple's technology is RippleNet, a "high-performance global payments" system. The company claims that the network can settle in seconds cross-border payments that normally take 3-5 days. Much of RippleNet's function is accomplished by a related blockchain-based token called XRP. The network ensures its speed by constraining the number of XRP tokens available to use the system, thus preventing the system from being overwhelmed. XRP itself is used to transfer value within RippleNet and reduce reliance on complex inter-bank lending relationships.⁴



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Ripple Labs Inc. and its founders are currently the targets of a Securities and Exchange Commission (SEC) lawsuit related to XRP and the RippleNet infrastructure.

"From at least 2013 through the present, Defendants sold over 14.6 billion units of a digital asset security called 'XRP,' in return for cash or other consideration worth over \$1.38 billion U.S. Dollars ('USD'), to fund Ripple's operations and enrich [the founders]. Defendants undertook this distribution without registering their offers and sales of XRP with the SEC as required by the federal securities laws, and no exemption from this requirement applied."⁵

For its part, Ripple and its founders are arguing that XRP is not a security token but a utility token – that is, it is a digital asset used to make the network work, not an investment.⁶ Thus, it is apparent that this distinction, between security and utility tokens, is a point of major legal significance.

The SEC first identified the security token-utility token distinction in a report of investigation related to an organization called The DAO. While the full story of The DAO is beyond the scope of this article, the short version is that The DAO raised more than \$150 million through the sale of digital tokens; the organization would then use the money to invest in startup projects. The question before the SEC was whether the sale of tokens by The DAO was an unregistered issuance of securities. The SEC found that The DAO's token sale constituted an "investment contract," and thus a security, because

users invested money with a reasonable expectation of profits derived from the managerial efforts of others.⁷ The SEC chose not to bring an enforcement action, but it was clear that token sales that represent an investment are securities.

In the years since the investigation into The DAO, the SEC has clarified its guidance. The SEC focuses on several factors including, for example, whether the token has more utilitarian uses.⁸ Some of those factors include whether the token is “offered broadly to potential purchasers as compared to being targeted to expected users of the goods or services or those who have a need for the functionality of the network[,] ... [t]he digital asset is offered and purchased in quantities indicative of investment intent instead of quantities indicative of a user of the network[,] ... [and] the digital asset can only be used on the network and generally can be held or transferred only in amounts that correspond to a purchaser’s expected use.”

If defendants (including Ripple Labs) only sold XRP to customers for use as a transfer of value within the network, or did not use the money to fund the operations of the company, or only made available an amount of tokens sufficient to use within the network itself at its then-current capacity, there could be a case that XRP is not a security token.

However, the SEC alleges that *despite the token’s later-developed utility*, the fact that XRP was *used* as a security is crucial: “Ripple was able to raise at least \$1.38 billion by selling XRP Ripple used this money to fund its operations without disclosing how it was doing so, or the full extent of its payments to others to assist in its efforts to develop a ‘use’ for XRP and maintain XRP secondary trading markets.”⁹ There is not a final adjudication in this matter yet, and Ripple disagrees with the SEC. But it nonetheless seems clear that to avoid violating securities laws (or at least being sued by the SEC), companies must not use tokens as securities, even if the tokens ultimately serve utility token functions.

The Bored Ape Yacht Club

To be a member of the Bored Ape Yacht Club, a person must own at least one of the 10,000 drawings of apes that are bored with the world and want to live that sweet yacht life. Members get to participate in exclusive events with the likes of Eminem, Snoop Dogg, and Steph Curry.¹⁰ It’s akin to being required to own one of the artworks inside before being allowed into the Louvre.

The art world is rife with looting and fakes, as well as fights between artists and their recording companies and their distribution networks.¹¹ Even worse (from the viewpoint of artists), when art is sold by an artist and the art then increases in value, the owner of the artwork, not the *artist*, realizes that gain. Content creators are tired of being exploited and they don't want to take it anymore.

One solution is absolutely provable provenance and title to each work of art. If the artist can even control downstream uses,¹² then the need for publishers, distributors, and even the “first sale doctrine” goes away. In this way, artists can capture a greater percentage of the revenue generated by their art and can also capture new revenue that the law previously denied them.

When an artist releases a drawing of an ape and wants to monetize that art, the artist can attach a piece of software code, a token if you will, that travels with the work; the token is fixed at the time of creation or publication and cannot be removed. In this way, each work released is absolutely unique – it is, in the language of the internet, nonfungible – and its token proves it. Register the token on a blockchain, and voila! An NFT is born.

At its simplest, an NFT is simply a title or deed. Because it is registered on a blockchain, it is immutable (unchangeable) and thus can't be tampered with. Someone can fake the art, but they cannot fake the blockchain.¹³ Many NFTs are limited to simply representing title to the content. Just as with a work of art, ownership of the NFT does not convey the right to make copies, or derivative works, or any other license of copyright. If *ownership* of the work does not transfer but the purchaser is merely given the right to possession without any additional rights of ownership, the purchaser has a right to use or a “license.” A license does not confer the benefits of ownership.¹⁴

In the normal course, upon the first sale of the art, the artist's right to control what the new owner *does* with the work of art is severed. The first sale doctrine is codified in the Copyright Act.¹⁵ The artist cannot compel the owner to publicly display the work of art, nor can the artist prevent the owner from selling it. If the owner sells it for a profit, the artist receives none of that gain even though it is, likely, the artist's reputation that is a major source of that gain. But these rights only attach to *ownership*.¹⁶

NFTs allow artists to fundamentally change the relationship of the possessor to the thing possessed. No longer must the artist sell title (ownership) in their creations; instead, the content creator can license possession. In this way, NFTs can be used to subvert the

first sale doctrine and control downstream uses. In this author's opinion, this control is great for the content creator, but bad for secondary markets and users.¹⁷

Decentralized Autonomous Organizations

In mid-2021, two Atlanta residents decided they wanted to purchase one of the 13 original prints of the U.S. Constitution going up for sale with Sotheby's Auction House.¹⁸ They needed money, and they needed money fast. They did what any investment fund would do – they formed an organization and went out and raised money. They didn't care who the money came from, only that everyone who put money into the organization understood that it would be used for this investment. The investors did not need to manage the investment; the organization itself would handle the bidding, the holding of the money, and the disbursement of profits when the asset was eventually sold. They raised more than \$40 million; sadly, they did not win the bidding war. *Why* is perhaps even more interesting than the *how*.

In many ways, running this investment business does not require human intervention. Accepting money into a bank account, reconciling that bank account, issuing tax notices, and disbursing money are all actions that can be triggered by outside events and accomplished automatically with relative ease by software. On Jan. 1, for each investor, send tax statements; if sale, then disburse; and so on. Want to decide when to sell? Investor polls other investors, upon majority vote, sell asset. If this were a human-run operation, someone would file to create a limited liability company, limited partnership, or limited liability partnership and manage all of this themselves. It's not much work. With the right software, it's even less work.

Indeed, a simple software program could handle almost all the effort of managing the organization with little human input. If the software program sits on a blockchain, it can be accessible by anyone in the world – opening up the opportunity for investment significantly more than two people from Atlanta might otherwise have. In this way, the software running the organization inside an entry on a blockchain is a decentralized autonomous organization (DAO).

In the absence of a formal, registered corporate entity, this informal organization of investors is a partnership. Wisconsin, like many states including Georgia, has implemented the Uniform Partnership Act. Wisconsin's version is codified at Wis. Stat. chapter 178. The Act defines a *partnership* as “an association of 2 or more persons ... to

carry on as co-owners a business for profit.”¹⁹ The banding together of investors in a DAO meets this definition, of course. In this case, the business is investing, and although the profit is speculative, everyone is putting in cash with the expectation of getting more cash out. One very large problem with partnerships is that the partners²⁰ are personally and jointly and severally liable for the actions of the partnership.²¹ With 8,000 partners spread around the globe collectively owning²² a 235-year-old historically significant document, what could possibly go wrong? Which of the 8,000 investors wants to be on the hook for *that*? Surprise: All of them would be liable!

Lawyers in Wisconsin and other states have developed statutorily recognized organizations that limit the personal liability of owners. However, to take advantage of these statutes, one must *register* the company with the relevant jurisdiction and maintain organizational charter documents such as articles and operating agreements that often require potential owners to read, understand, or even negotiate the terms of their relationship to the organization. These organizational types have a big disadvantage to the kind of activity contemplated by ConstitutionDAO: they are neither decentralized nor particularly autonomous.

Limiting Personal Liability. The perplexing, and as yet unsolved, question then remains: how can a DAO effectively limit the personal liability of its owners? It is not an easy question to answer, but three major trends are developing.

The first major trend is somewhat obvious: gloss over the “decentralized” and “autonomous” prescriptions and simply form a limited liability company and pretend it’s a DAO.²³

The second major trend involves a hotbed of blockchain and cryptocurrency innovation: the state of Wyoming.²⁴ Under Wyoming law, an organization can register as a DAO with Wyoming’s Secretary of State; it is a variant of their limited liability company statutes.²⁵ The Wyoming-based DAO may be either “member managed” or “algorithmically managed” but “an algorithmically managed decentralized autonomous organization may only form under this chapter if the underlying smart contracts are able to be updated, modified or otherwise upgraded.”²⁶ The statute relieves members of fiduciary duties that might otherwise exist by operation of law.²⁷ By default, members vote pro rata in accordance with the member’s contribution of digital assets to the organization; if no contribution of digital assets is required to be a member, then the system is one member one vote.²⁸ The statute also relieves members of their rights to

be provided information about the operations of the company.²⁹ While these are the major substantive provisions, the statute contains more details; a Wyoming DAO is otherwise treated as a Wyoming LLC. Again, not particularly decentralized, nor particularly autonomous, but it at least recognizes that organizations may exist that will be run completely by smart contracts.³⁰

The third major trend that is developing is an obscure entity not found in every state but pioneered here in Wisconsin: the unincorporated cooperative association.³¹ The unincorporated cooperative association *does* require a filing of articles of organization with the state³² and importantly also provides for the limitation of liability of its members.³³

“Where it differs from an LLC is in the distribution of financial returns based on patronage activity, voting based on membership (one-member, one vote) or based on patronage, which allows for the integration of DAO based governance principles, such as rage quitting and quadratic voting.”³⁴

Not every state has this entity option and not many lawyers are well versed in the details of cooperative organizations.

So, *why* did ConstitutionDAO lose its bid for the U.S. Constitution? It was *not* for lack of money to *purchase* the asset. Rather, “it lost because it had not raised enough money to establish a reserve required to maintain and care for the document on an ongoing basis.”³⁵ In other words, it lost because it wasn’t a centralized organization. As the kids say these days: “womp womp.”³⁶

Conclusion

Technology is running faster than the law. As blockchain technology moves closer to the mainstream and more public-use cases are coming to light, its global, decentralized nature is disrupting long-standing legal frameworks. Lines continue to be blurred over whether, when, and how money raised by the sale of tokens used to operate a blockchain application are securities and subject to oversight by the SEC. Long-standing, court-developed bargains between the users and owners of copyrighted works are being sidestepped. The very nature of organizations, first popularized in 1602 by the Dutch East India Company to manage risk and liability for shipping goods from the Netherlands to India, are, ironically, wholly insufficient for global ownership of

decentralized and fully automated organizations. There are not a lot of answers today, so lawyers must help clients identify and manage these risks.

Meet Our Contributors

What famous person would you like to have dinner with? Where would you dine and what would you talk about?



I would like to have dinner with Elon Musk to discuss that Moon versus Earth soccer match that he gave me free tickets to at the end of the last article I wrote (*Wisconsin Lawyer*, Feb. 2022). We'd have a salad of rocket, sunchokes, and starfruit.

Jeffrey M. Glazer, *U.W. Law & Entrepreneurship Clinic*, Madison

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Endnotes

¹ Jeffrey M. Glazer, *Cryptocurrency and Blockchains: Smart Contracts – Part 1*, 95 Wis. Law. 14 (Feb. 2022).

² See, for example, Steven Spoerl, *Scammy NFT Site Sweeps Up Some Madison Musicians*, www.tonemadison.com/articles/scammy-nft-site-sweeps-up-some-madison-musicians (Feb. 2, 2022), regarding recent NFT fraud involving Madison-area musicians.

³ Jonathan J. Rusch, *The “Social Engineering” of Internet Fraud*, https://web.archive.org/web/20080617150031/http://www.isoc.org/isoc/conferences/inet/99/proceedings/3g/3g_2.htm (last visited March 9, 2022) (“Another situation involved Yahoo email users who reportedly received emails from a person who falsely identified himself as a Yahoo employee. The ‘employee’ told each recipient that he had won a 56K modem from Yahoo, but that he would have to supply his name, address, telephone number, and credit card number to pay for shipping. A number of recipients did so before

Yahoo learned of the false email and contacted everyone who had responded to it.”); Ron Rosenbaum, *Secrets of the Little Blue Box*, Esquire (Oct. 1971), www.lospadres.info/thorg/lbb.html (“But with your beeper box, once you hop onto a [phone] trunk, say from a Holiday Inn 800 [toll-free] number, they don’t know where you are, or where you’re coming from, they don’t know how you slipped into their lines and popped up in that 800 number. They don’t even know anything illegal is going on. And you can obscure your origins through as many levels as you like. You can call next door by way of White Plains, then over to Liverpool by cable, and then back here by satellite. You can call yourself from one pay phone all the way around the world to a pay phone next to you. And you get your dime back too.”); Randy Dotinga, *Americans Fell for a Theranos-Style Scam 100 Years Ago. Will We Ever Learn?* Leaps.org (Feb. 19, 2020), <https://leaps.org/americans-fell-for-a-theranos-style-scam-100-years-ago-will-we-ever-learn/> (“Enter radionics, the (supposed) science of better health via radio waves. ... Detecting illness and fixing it required machinery – Dynamizers, Radioclasts and Oscillocasts – that could cost hundreds of dollars each. Thousands of physicians bought them. Fortunately, they could work remotely, for a fee. The worried-and-potentially-unwell just needed to send a blood sample and, of course, a personal check.”).

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⁵ *SEC v. Ripple Labs Inc.*, No. 20 CIV 10832 (S.D.N.Y. 2020), www.sec.gov/litigation/complaints/2020/comp-pr2020-338.pdf, and accompanying press release: <https://www.sec.gov/news/press-release/2020-338>.

⁶ See Ripple and XRP websites, *supra* note 4. Throughout this article, XRP is repeatedly referenced as a “digital asset.”

⁷ SEC, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO*, Release No. 81207 (July 25, 2017), www.sec.gov/litigation/investreport/34-81207.pdf. See *id.* at 5-6 (“A DAO Token granted

the DAO Token holder certain voting and ownership rights. According to promotional materials, The DAO would earn profits by funding projects that would provide DAO Token holders a return on investment.”); *id.* at 11-15 (this is called the “Howey Test” and it is commonly applied to determine the existence of securities).

⁸ Bill Hinman, *Framework for ‘Investment Contract’ Analysis of Digital Assets* 6-7 (April 3, 2019), www.sec.gov/files/dlt-framework.pdf; Bill Hinman & Valerie Szczepanik, *Statement on “Framework for ‘Investment Contract’ Analysis of Digital Assets,”* www.sec.gov/news/public-statement/statement-framework-investment-contract-analysis-digital-assets.

⁹ *SECv. Ripple Labs*, www.sec.gov/litigation/complaints/2020/comp-pr2020-338.pdf, at 2.

¹⁰ <https://boredapeyachtclub.com/#/>. See Samantha Hissong, *The NFT Art World Wouldn’t Be the Same Without This Woman’s ‘Wide-Awake Hallucinations,’* Rolling Stone (Jan. 26, 2022), www.rollingstone.com/culture/culture-features/seneca-bored-ape-yacht-club-digital-art-nfts-1280341/; Van Isle Marina, *Yacht Life: 8 Things You’ll Love About Living on a Yacht*, <https://vanislemarina.com/yacht-life-8-things-youll-love-about-living-on-a-yacht/> (last visited March 9, 2022); Adlan Jackson, *How to Sneak Into a Bored Ape Yacht Club Party*, The Verge (Dec. 13, 2021), www.theverge.com/22824387/bored-ape-yacht-club-nft-party-new-york; David James Young, *Eminem Reportedly Spent \$450,000 on a Bored Ape NFT That Looks Like Him*, NME (Jan. 4, 2022), www.nme.com/news/music/eminem-reportedly-spent-450000-on-a-bored-ape-nft-that-looks-like-him-3129215; *NBA Star Steph Curry Aped Into the BAYC. All the Details* (Aug. 28, 2021), www.theboredapegazette.com/post/nba-star-steph-curry-aped-into-the-bayc-all-the-details; @spencerXsays, Twitter, <https://twitter.com/spencerxsays> (last visited March 9, 2022).

¹¹ Tom Mashberg, *Cambodia Says the Met Museum Has Dozens of Its Looted Antiquities*, N.Y. Times (Oct. 24, 2021), www.nytimes.com/2021/10/24/arts/cambodia-met-museum-looted-antiquities.html; Daniel Cassady, *New York Gallery Faces Multi-Million-Dollar Lawsuit Over a Rothko’s Mystery Provenance*, The Art Newspaper (Feb. 2, 2022), www.theartnewspaper.com/2022/02/02/rothko-lawsuit-edward-tyler-nahem-fine-art-galerie-jacques-de-la-beraudiere; Will Butler, *The Joe Rogan Controversy Has a Deeper Cause*, The Atlantic (Feb. 6, 2022),

www.theatlantic.com/ideas/archive/2022/02/neil-young-spotify-joe-rogan-musicians/621503/.

¹² “[D]ownstream uses” means “what later purchasers do with the art.”

¹³ See part I of this series, *supra* note 1.

¹⁴ *Vernor v. Autodesk Inc.*, [621 F.3d 1102](#) (9th Cir. 2010) (“We ... prescribe three considerations that we may use to determine whether a software user is a licensee, rather than an owner of a copy. First, we consider whether the copyright owner specifies that a user is granted a license. Second, we consider whether the copyright owner significantly restricts the user’s ability to transfer the software. Finally, we consider whether the copyright owner imposes notable use restrictions.”).

¹⁵ [17 U.S.C. § 109](#).

¹⁶ [17 U.S.C. § 109](#)(a): “the owner of a particular copy ... lawfully made under this title ... is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy” Compare *Vernor*, 621 F.3d at 1111 (“a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user’s ability to transfer the software; and (3) imposes ... use restrictions.”).

¹⁷ Casey Newton, *Why Gamers Hate Crypto, and Music Fans Don’t*, The Verge (Feb. 4, 2022) www.theverge.com/22917126/nfts-crypto-gamers-music-fans-fandoms.

¹⁸ www.constitutiondao.com/ (last visited March 9, 2022); Anita Ramaswamy & Natasha Mascarenhas, *ConstitutionDAO’s Bold Crypto Bid for US Constitution Falls Short*, TechCrunch (Nov. 18, 2021), <https://techcrunch.com/2021/11/18/constitutiondaos-bold-crypto-bid-for-us-constitution-falls-short/>.

¹⁹ [Wis. Stat. § 178.0102\(11\)](#).

²⁰ [Wis. Stat. § 178.0102\(10\)](#).

²¹ [Wis. Stat. § 178.0306\(1\)](#).

²² [Wis. Stat. § 178.0204](#).

²³ Flamingo, *Organization*, <https://docs.flamingodao.xyz/Organization.html> (last updated Sept. 23, 2020) (“Flamingo is organized as a Delaware limited liability company.”).

²⁴ Elena Botella, *Wyoming Wants to Be the Crypto Capital of the U.S.*, Slate (June 28, 2021), <https://slate.com/technology/2021/06/wyoming-cryptocurrency-laws.html>; Cryptopedia, *Wyoming Laws Regulating Blockchain Businesses*, www.gemini.com/cryptopedia/wyoming-blockchain-bill-law (last updated Dec. 7, 2021).

²⁵ Wyo. Stat. § 17-31-104 (“A decentralized autonomous organization is a limited liability company whose articles of organization contain a statement that the company is a decentralized autonomous organization ...”).

²⁶ Wyo. Stat. § 17-31-105.

²⁷ Wyo. Stat. § 17-31-110 (subject to the “implied contractual covenant of good faith and fair dealing”).

²⁸ Wyo. Stat. § 17-31-111.

²⁹ Wyo. Stat. § 17-31-112.

³⁰ Wyo. Stat. § 17-31-102 (“‘Smart contract’ means an automated transaction ... or any substantially similar analogue, which is comprised of code, script or programming language that executes the terms of an agreement and which may include taking custody of and transferring an asset, administering membership interest votes with respect to a decentralized autonomous organization or issuing executable instructions for these actions, based on the occurrence or nonoccurrence of specified conditions.”).

³¹ Dorsey & Whitney LLP, *Wisconsin Adopts Second Cooperative Statute: The Wisconsin Cooperative Associations Act* (March 2007). Wisconsin adopted its cooperative act, Wis. Stat. chapter 193, in 2007; at that time only Wyoming, Minnesota, Iowa, and Tennessee had such statutes and all were adopted since 2001.

³² [Wis. Stat. § 193.215](#).

³³ [Wis. Stat. § 193.505](#).

³⁴ HAUS, *Members*, <https://daohaus.club/docs/users/membership/> (last visited March 9, 2022) (“Rage Quit allows a member ... of the DAO to leave with all or part of their share of the tokens. Imagine a DAO that has 1000 DAI, 50 Shares, and 50 Loot. That means if you own 10 Shares of the DAO and ragequit all of your shares, you’d leave with 100 DAI, or 10% of the treasury.” – in lawyer words: disassociation with mandatory redemption of interest at the election of the member); Snapshot, *Voting Types*,

<https://docs.snapshot.org/proposals/voting-types> (last visited March 9, 2022) (“Each voter may spread voting power across any number of choices. The results are calculated quadratically, you can test out these calculations here <https://wtfisqf.com/>” – a form of voting similar to rank choice voting); Jacqueline Radebaugh & Yev Muchnik, *Exclusive Report: Solving the Riddle of the DAO with Colorado’s Cooperative Laws*, The Defiant (Dec. 16, 2021), <https://thedefiant.io/solving-the-riddle-of-the-dao-with-colorados-cooperative-laws/>.

³⁵ See Ramaswamy & Mascarenhas, *supra* note 18.

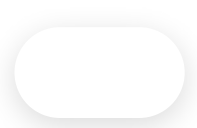
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5 Things Every Lawyer Should Know about Nonprofit Law

Presented by

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Wisconsin Solo and Small Firm Conference

Wisconsin Dells, Wisconsin

October 17, 2025

#1 “Nonprofit” is not a legal term.

A. There’s a distinction between nonprofits and tax-exempt organizations.

1. “Nonprofit” is not a legal term. In general, it means that there are no owners who keep the profits.
2. Every tax-exempt organization is an entity formed under state law.
 - a. In Wisconsin, tax-exempt organizations are usually formed as a nonstock corporation (Chapter 181) or an unincorporated association (Chapter 184).
 - b. A tax-exempt organization is rarely an LLC or cooperative.
3. Tax-exempt status comes through federal law.
 - a. Most common options for small community efforts:
 - 501(c)(3) – charitable, educational, religious, etc.
 - 501(c)(4) – social welfare or civic
 - b. In Wisconsin, generally, organizations recognized as exempt under federal law qualify for state exemption from income tax pursuant to Wis. Stat. s. 202.11(1) and may also qualify for exemption from sales tax and property tax.
 - c. If the form is a nonstock corporation or operated as an unincorporated association, it is taxable ***unless tax-exempt status is sought***, except in rare circumstances:
 - Gross revenue of less than \$5000/year
 - Churches
 - d. If the entity is taxable, required to file Form 1120.
 - *Note:* Many unincorporated associations do not seek IRS recognition and do not file any tax forms.
 - This action is often in error.

- Failing to file creates complications later if the organization seeks tax-exempt status.

B. Another Option: Fiscal Sponsorship

1. Defined: Another tax-exempt organization may receive and spend funds on behalf a project, but they need a written agreement and “control” of the funds.
2. The “sponsoring” organization lends its nonprofit status and as such must ensure that all expenditures are legitimate and activities do not violate its tax status.

Good resource: Greg Colvin, <http://fiscalsponsorship.com/>

#2 **501(c)(3)’s have specific benefits and restrictions.**

“Corporations and any community chest, fund, or foundation, organized and operated exclusively for **religious, charitable, scientific, testing for public safety, literary, or educational purposes**, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.” I.R.C. Sec. 501(c)(3)

A. Exclusively for Exempt Purposes

A 501(c)(3) must be operated “exclusively” for “exempt purposes,” which means there can be no enrichment of insiders (i.e., no sweet deals for officers or directors). Individuals (and their immediate family members) associated with the organization can be subject to “intermediate sanctions” penalties if they receive compensation or benefits that exceed the value of services, goods, or donations they have provided the organization. A 501(c)(3) can lose its tax-exempt status if it improperly enriches insiders.

B. Public Purpose

In addition to meeting a charitable, educational, etc. purpose, the organization must be operated for a public purpose, not for the enrichment of private parties.

It can pay a “fair and reasonable” amount for products or services, but excessive pay is illegal. Finally, a 501(c)(3) cannot give away its assets without receiving fair value in return (either through mission accomplishment or funds) and must beware of subsidizing other non-501(c)(3) organizations.

C. Restriction on Lobbying

“No substantial part [can be] carrying on propaganda,” means the organization cannot engage in a “substantial” amount of lobbying. Advocacy is permitted. Some advocacy is considered “lobbying” and some is educational.

D. No Endorsement of Political Candidates

The organization cannot engage in any campaign activity for or against political candidates. It cannot promote, attack, support, or oppose a candidate for public office. The organization’s volunteers can be politically active as individuals but not on behalf of 501(c)(3).

E. Limited Unrelated Business Income (UBI)

The organization cannot operate for the primary purpose of conducting a trade or business that is not related to its exempt purpose. Unrelated Business Income (UBI) is income from a trade or business, regularly carried on, that is not substantially related to the charitable, educational, or other purpose that is the basis of the organization's exemption (i.e., exempt purpose). The key factor is how the income is earned, not how it is spent. A small amount of unrelated business income is permissible.

F. Public subsidy privilege means stricter regulation

501(c)(3) organizations receive significant public subsidies: tax deductions for donors, eligibility for grants, sales tax exemption, possible property tax exemption.

In exchange, 501(c)(3)’s are subject to more regulation. The law requires transparency and accountability. The Board of Directors must have real control and not simply defer to the founder of the organization. The organization needs independent voices in relation to paid staff or consultants, i.e., arms-length dealings.

Sometimes a “for-profit” structure may be preferable because of this control issue.

#3 501c3’s are further classified as either a private foundation or a public charity.

- A. Private foundations have a small number of donors, and they generally support charitable work.

- B. Public charities receive substantial financial support from the general public, and they generally carry out charitable work.
- C. 501(c)(3) organizations are classified as private foundations unless they can demonstrate that they qualify as a public charity. 501(c)(3)'s have 5 years to establish public charity status.
- D. It's advantageous to be classified as a public charity:
 - 1. Fewer regulatory burdens
 - a. Fewer Taxable Activities: Private foundations face a 2% tax on their net investment income and are subject to taxes and penalties for "jeopardy investments" and "taxable expenditures," such as political lobbying.
 - b. Simpler Reporting: Public charities have a simplified annual filing process (Form 990) compared to the more complex Form 990-PF required of private foundations.
 - c. Lighter Operational Constraints: Private foundations must meet a mandatory annual distribution requirement of roughly 5% of their assets, whereas public charities do not have this strict requirement.
 - 2. More favorable tax treatment for donors
 - a. Higher AGI Limits: Donors to a public charity can deduct a higher percentage of their Adjusted Gross Income (AGI) for cash contributions (up to 60% AGI) and certain appreciated stock compared to donations to a private foundation.
 - b. Greater Deductibility: Gifts to private foundations have lower AGI limits for cash (30% AGI) and stock, making them less appealing for donor tax benefits.
 - 3. More operational flexibility
 - a. Fewer Investment Restrictions: Public charities are subject to fewer restrictions on their investment activities and are not subject to the same "jeopardy investment" rules as private foundations.

- b. Broader Purpose: Public charities often run their own programs and interact with the wider public, while private foundations typically focus on making grants to other public charities.

E. Other classifications: 501(c)(4)

“Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes [and. . .] no part of the net earnings of such entity inures to the benefit of any private shareholder or individual.” I.R.C. Sec. 501(c)(4)

1. Social Welfare

Social welfare refers to the “common good and general welfare” and “civic bettering and social improvements.”

- a. The primary purpose of a social welfare organization’s purpose must be to benefit the community or society as a whole, not just the organization’s members and their families or other select individuals.
- b. Social welfare organizations cannot be operated primarily as “a social club for the benefit, pleasure, or recreation of its members.”
 - Compare to 501(c)(7) social clubs

2. Some of same limitations as a 501(c)(3):

- a. No enrichment of insiders or private parties
- b. No primary purpose of unrelated business

- 3. One important difference is that donations to 501(c)(3)s are tax-deductible to the donor but donations to 501(c)(4)s are **not**.
- 4. Another important difference is that 501(c)(4)s can engage in unlimited lobbying and some political activity, as long as it is not a primary purpose (approximately less than 40% of expenditures).

F. Setting up a new tax-exempt organization, regardless of classification

1. Board of Directors: Identify at least 3 people to serve
2. Articles of Incorporation: File as nonstock corporation (Chapter 181) with DFI
3. Apply for EIN
4. Open bank account for the new entity
5. Adopt Bylaws
6. Adopt Conflict of Interest Policy
7. Sign Incorporator Resolution
8. Adopt Director Resolution ratifying actions of Incorporator
9. File IRS application using pay.gov (Form 1023, Form 1023-EZ, Form 1024, Form 1024-A)
10. If donations $\geq$ \$25,000 in one year, file Form 296 with WI DFI to register as a charitable organization that solicits donations. Consider whether you also need to register in other states.

#4 Directors have both fiduciary duties + protections.

A. Duties of care, loyalty, and obedience:

1. Care: Directors must act in good faith and with the same level of care as an ordinarily prudent person in a similar position. (Don't sleep!)
2. Loyalty: Directors must act in the organization's best interests, not their own. (Don't sneak!)
3. Obedience: Directors must ensure the organization adheres to its mission statement, governing documents, and annual reporting requirements. (Don't slack!)

B. Tax-exempt organizations should have clear internal policies in place in order to prevent mismanagement and promote accountability:

1. Conflict of interest

A Conflict of Interest Policy should be signed by each Director and should be reviewed regularly. The policy requires those with a conflict (or who think they may have a conflict) to disclose the potential conflict. If the remaining Directors determine that there is an actual conflict, the policy prohibits the conflicted Director from voting on any matter in which there is a conflict. For more information, see

2. Financial authority
 3. Whistleblower protections
 4. Document retention
- C. Directors and officers who respect their fiduciary duties are protected from personal liability - with rare exceptions, including material conflict of interest, unlawful conduct, improper personal benefit. Wis. Stats. Section 181.0855.
- D. D&O insurance covers the costs of defense, and is highly recommended.

#5 All tax-exempt organizations have significant compliance obligations.

- A. State corporate renewal. Each year, a corporation must renew its corporate status with the state of incorporation. For Wisconsin corporations, see <https://apps.dfi.wi.gov/apps/corpar/>
- B. IRS Form 990. Tax-exempt organizations do not pay taxes on their revenues, but they must report their financials to the IRS on Form 990. There are several versions, depending on gross revenues. It's important to file: if an organization does not file its Form 990 for three consecutive years, the organization's tax-exempt status will be automatically revoked. See <https://www.irs.gov/charities-non-profits/annual-filing-and-forms>.
- C. Most states require charitable organizations to register to solicit donations, and each state sets its own rules. In Wisconsin, a charitable organization must register to solicit donations when its contributions reach \$25,000 in a calendar year, with some exceptions. See <https://dfi.wi.gov/Pages/BusinessServices/CharitableProfessionalOrganizations/CharitableOrganizationsFAQ.aspx>.
- D. Tax-exempt organization must classify workers appropriately, and pay employment taxes similar to for-profit organizations. See <https://www.irs.gov/newsroom/worker-classification-101-employee-or-independent-contractor>
- E. Additional compliance tips:

1. Remember that the organization must act like a “corporation” and maintain its “corporate shield.” It must file a corporate annual report and follow the Bylaws. Individuals take action “on behalf of corporation” and conflicts of interest among directors, officers, consultants and employees must be avoided. At a minimum, conflicts should be disclosed and appropriate procedures followed.
2. More specific compliance reminders . . .
 - a. File appropriate IRS Form 990, due May 15 if fiscal year is calendar year.
 - b. File Form 990-N if <\$50,000 in gross receipts.
 - c. Pay Employment Taxes. If not paid, Directors & Officers can be held personally liable.
 - d. Don’t misclassify employees as independent contractors.
 - e. See Independent Contractor factors from WI Dept. of Workforce Development.
3. Things to consider . . .
 - a. Consider insurance needs, e.g., Commercial General Liability (CGL) if have offices and/or events.
 - b. Consider Directors & Officers’ Liability Insurance (D&O): Biggest benefit is coverage of defense costs. Even if Directors & officers (and employees) are protected from liability under law, a lawsuit still has to be defended to assert those protections and that can be very expensive.
4. More suggestions . . .
 - a. Set up record keeping at the outset
 - b. Consult with a knowledgeable bookkeeper or accountant
 - c. Record and categorize specific expenses
 - d. Bank statement is not a financial statement
 - e. Keep track of names/addresses of donors and amount
 - f. Keep key organizational documents accessible
 - g. Update addresses with State and Federal authorities: Most filing snafus happen because of out-of-date addresses
 - h. File forms as requested
 - i. File on time, but if miss deadline, file late

Additional Resources

IRS Publication 557, Tax-Exempt Status for Your Organization,

<https://www.irs.gov/pub/irs-pdf/p557.pdf>

IRS Publication 526, Unrelated Business Income, [https://www.irs.gov/pub/irs-](https://www.irs.gov/pub/irs-pdf/p526.pdf)

[pdf/p526.pdf](https://www.irs.gov/pub/irs-pdf/p526.pdf) Life Cycle of an Exempt Organization at irs.gov,

<https://www.irs.gov/charities-non-profits/life-cycle-of-an-exempt-organization>
www.boardsource.org

A Guide for Wisconsin Nonprofit Organizations, State Bar of Wisconsin

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1

#1

“Nonprofit” is not a legal term.

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2

- tax-exempt = incorporation with state +
tax-exempt status with IRS
- Articles must satisfy both state and IRS requirements.
- c3 v c4 v other c's
- set up steps

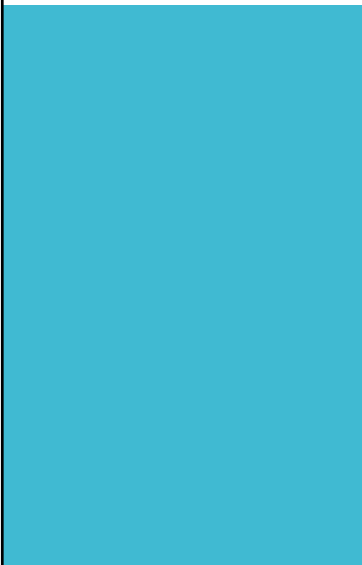
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#2
**501c3's have both benefits and
restrictions.**

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4

- 
- tax-deductible donations, eligibility for grants, sales tax exemption
 - absolute prohibition on political campaign intervention
 - lobbying limitations: while some lobbying is permissible, it cannot be a "substantial part" of the activities
 - Unrelated Business Income

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5

#3
**501c3's are classified as either
a private foundation or a public charity.**

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- private foundation = small number of donors, **support** charitable work
- public charity = substantial financial support from the general public, **carry out** charitable work
- private foundation by default: c3's have 5 years to establish public charity status
- public charity is preferable
 - fewer regulatory burdens
 - more favorable tax treatment for donors
 - more operational flexibility
 - easier annual reporting (Form 990)

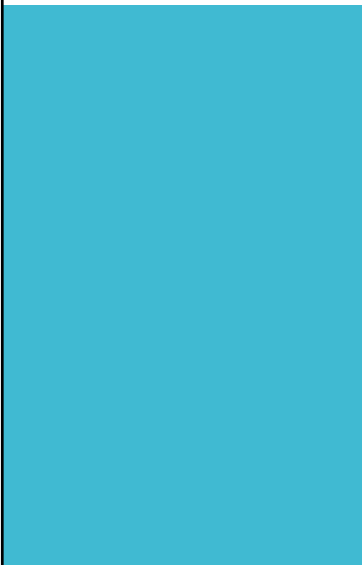
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#4 Directors have both fiduciary duties + protections.

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- 
- duties of care, loyalty, and obedience
 - care: don't sleep
 - loyalty: don't steal
 - obedience: don't slack
 - strong internal policies: conflicts of interest, financial authority, whistleblower protections, and document retention
 - protection from personal liability (with rare exceptions), D&O insurance

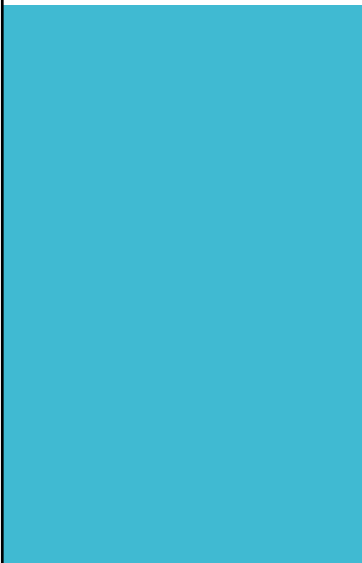
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9

#5
**All tax-exempt organizations have
significant compliance obligations.**

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10

- 
- state corporate renewal
 - IRS Form 990 (auto-revoke after 3 years)
 - register to solicit donations, state by state
 - classify workers appropriately, pay employment taxes (similar to for-profits)

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Thank You

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Materials for 2025 SSF&GP Conference

Friday, October 17, 2025, 8:30AM Plenary: 25 Things Every Lawyer Should Know

CHiPS: Child in Need of Protection and/or Services

Attorney Kate Knowlton, kate@knowltonlawgroup.com

Applicable statute: Wis. Stat. Chapter 48 (Juvenile Justice: chapter 938)

Not reinventing the wheel here; leave it to the experts:

Wisconsin State Law Library:

<https://wilawlibrary.gov/topics/familylaw/chips.php>

Wisconsin Legislative Council:

https://docs.legis.wisconsin.gov/misc/lc/information_memos/2024/im_2024_19

Wisconsin Court System families activity book:

<https://www.wicourts.gov/courts/resources/kid/activitybook/families1.htm>

(specific to attorneys: **Lawyers**

When people go to court, they often have lawyers. Lawyers are also called attorneys. Lawyers give advice to people on their disagreements in court. It is the lawyer's job to talk to the judge and jurors for the people who come to court. You don't have to have a lawyer to go to court. When a lawyer talks for someone who has come to court, it means that the lawyer "represents" the person. Each lawyer represents only one person in court. So, if many people are involved in a disagreement, there might be more than one lawyer in court. All kinds of people have lawyers, even children! Lawyers usually sit next to the person they represent in the court.)



CCIP: Legal Advisor: Kristen Wetzal, power point link:

https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Understanding_the_Juvenile_Court_Process_-_CHIPS_and_Minor_Guardianship_Cases.pdf

DPI: Julie Incitti, School Social Work Consultant

<https://dpi.wi.gov/sspw/pupil-services/school-social-work/contents/child-abuse>

<https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/sswchildabuse.pdf> (excellent Appendix of definitions)

https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Understanding_Guardianships_Legal_Custody_and_Physical_Custody_for_School_Professionals_in_Wisconsin.pdf (excellent Appendix delineating guardianship powers, parental delegation)

Wisconsin DCF - Office of Legal Counsel: Attny. Robert J. Collins II, (former family court judge for Oneida Judiciary) (Medical and Educational Records)

2025, Recent Updates In Practice:

Civil proceedings, standards apply. Careful with records – logistical overlap with kid removal and criminal prosecution. Big issues. Victim rights for kids are applicable and enforceable. Lots of intersection and space for advocacy/investigation

Records: Wis. Stat. §48.396.

TPR Burden (bifurcated process, 1) full evidentiary hearing for fitness, 2) no burden at disposition – ONLY best interest discretionary standard (*State v. H.C.*, June, 2025)

1. TPR is civil process – best interest standard applies – GALs and Judiciary have serious power (*State v. H.C.*)
2. Evidence (rules of evidence) is real: Experts and statistics (*State v. Molde*, June, 2025)
3. Records can (read “shall”) be protected: Wis. Con. Sec. 9m: (2) A victim has an individual interest in privacy guaranteed by sub. (2) (b) and in preserving the atmosphere of trust and confidence necessary to obtain effective medical treatment. *State v. Johnson*, [2023 WI 39, 407 Wis. 2d 195, 990 N.W.2d 174, 19-0664](#).
4. Schools and service providers have separate responsibilities – AND protections
5. Relationships matter: kids continue daily lives while motion/litigation practice keeps “practicing...”

2025 WI 20

Supreme Court of Wisconsin



STATE OF WISCONSIN,
Petitioner-Respondent,
v.
H.C.,
Respondent-Appellant-Petitioner.

No. 2023AP1950
Decided June 3, 2024

REVIEW of a decision of the Court of Appeals
Milwaukee County Circuit Court (Joseph R. Wall, J.), No. 2022TP86

REBECCA GRASSL BRADLEY, J., delivered the majority opinion of the Court, in which ZIEGLER, HAGEDORN, KAROFKY, and PROTASIEWICZ, JJ., joined. ANN WALSH BRADLEY, C.J., filed a concurring opinion, in which DALLET, J., joined.

¶1 REBECCA GRASSL BRADLEY, J. Under WIS. STAT. § 48.426(2) (2021–22),¹ the circuit court’s prevailing consideration during the dispositional phase of a termination of parental rights (TPR) proceeding is the “best interests of the child.” The statute makes no mention of a burden of proof placed on the State or any other party. Appealing an order terminating her parental rights, H.C. argues the Due Process Clause of the

¹ All subsequent references to the Wisconsin Statutes are to the 2021–22 version unless otherwise indicated.

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Fourteenth Amendment² and public policy considerations require the State to prove by clear and convincing evidence—or at least a preponderance of the evidence—that termination is in the best interests of the child. We reject H.C.’s arguments and affirm the court of appeals’ mandate, which leaves the circuit court’s TPR order undisturbed.

¶2 The circuit court determined it was in the best interests of the child to terminate H.C.’s parental rights. The court of appeals affirmed, identifying no error in the circuit court’s exercise of “ultimate discretion in the decision to terminate parental rights.” Nonetheless, the court of appeals asserted that during the dispositional phase of a TPR proceeding, due process requires a child’s best interests be proven by a preponderance of the evidence and the burden of proof is shared by all parties.

¶3 While we agree the circuit court’s order to terminate H.C.’s parental rights should be affirmed, we hold the best interests of the child governing the dispositional phase of a TPR proceeding constitutes a discretionary determination by the circuit court and the statute places no burden of proof on a particular party. Neither the Due Process Clause nor applicable statutory law impose a burden of proof during the dispositional phase of a TPR proceeding.³

I

¶4 Since birth, H.C. has not addressed her son John’s⁴ exceptional medical, developmental, behavioral, and emotional needs, which stem from global development delays, seizures, abnormal brain activity, dysplasia, optic nerve pallor, failure to thrive, congenital cysts, microcephaly, and autism, among other conditions. The record is replete with instances of H.C.’s failure to seek and provide the specialized care John

² “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV, § 1.

³ We affirm the court of appeals because we reach the same conclusion regarding this case’s disposition: the circuit court committed no error when it terminated H.C.’s parental rights. Because the court of appeals’ due process analysis was flawed, however, we reject it.

⁴ John is a pseudonym used for H.C.’s son because he shares her initials.

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required. Additionally, by John's second birthday, he had suffered numerous incidents of physical abuse and neglect at the hands of H.C.

¶5 H.C. also endured her own abuse and neglect. As an at risk youth subject to a child in need of protection or services (CHIPS) order, H.C. lived in a group home while John was an infant, battled drug addiction, and suffered numerous mental health disorders. She was often reported to leave her group home and sleep in abandoned houses. She has a history of being sex trafficked.

¶6 After numerous unsuccessful attempts by Division of Milwaukee Child Protective Services workers to help H.C. adequately care for John, the circuit court ordered that John be taken into custody at the age of two. After John was removed from H.C.'s care, he was found to be in need of protection or services and the court entered a CHIPS dispositional order. Numerous conditions required H.C. to address her addiction and mental health before regaining custody of John.

¶7 Just after John's fourth birthday, the State filed a petition to terminate H.C.'s parental rights, stating continuing CHIPS and a failure to assume parental responsibility as grounds for termination. According to the TPR petition, H.C. had not adequately addressed her struggles with addiction and mental health. She did not follow through with a referral for parenting services, visited John only sporadically, and did not attend John's medical appointments. H.C. continued to live in a group home, was not living independently, and showed no understanding of or ability to care for John's complex needs.

¶8 H.C. pled no contest to the continuing CHIPS ground alleged in the TPR petition. Months later, the circuit court held a grounds hearing and found by clear and convincing evidence that H.C. was an unfit parent under WIS. STAT. § 48.424(4). The court then immediately proceeded to the dispositional hearing.⁵

¶9 During the dispositional hearing, the circuit court heard testimony from John's foster mother, his former case manager, and his current case manager. The court also heard directly from the State's

⁵ By the time of the grounds and dispositional hearings, John was more than five years old.

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counsel, the guardian ad litem (GAL), and H.C.’s counsel. After weighing the WIS. STAT. § 48.426(3) factors in light of the best interests of the child, the court determined termination of H.C.’s parental rights was “unquestionably” in John’s best interests. The court also concluded that even if the State bore the burden of proving termination was in the child’s best interests by a preponderance of the evidence or clear and convincing evidence, “the State has certainly met those two burdens here, and gone beyond them, certainly. It’s really an overwhelming situation.”

¶10 On appeal, the court of appeals affirmed the circuit court’s decision to terminate H.C.’s parental rights because “the circuit court did not erroneously exercise its discretion when it found that it was in John’s best interest to terminate H.C.’s parental rights.” *State v. H.C.*, No. 2023AP1950, unpublished slip op., ¶2 (Wis. Ct. App. Mar. 5, 2024). In response to H.C.’s argument that due process required the State to prove by clear and convincing evidence that termination was in John’s best interests, the court of appeals concluded, “each party bears the burden to show by a preponderance of the evidence that its desired outcome—be it termination or preservation of parental rights—is in the best interest of the child.” *Id.*, ¶¶16, 35.

¶11 The court of appeals relied on *Santosky v. Kramer*, 455 U.S. 745 (1982). *H.C.*, No. 2023AP1950, at ¶26. In that case, the Supreme Court identified three factors—previously specified in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)—influencing the standard of proof by which the State must establish parental unfitness during the grounds phase of a TPR proceeding: “the private interests affected by the proceeding; the risk of error created by the State’s chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.” *Santosky*, 455 U.S. at 754 (citing *Mathews*, 424 U.S. at 335). Applying those three factors to the grounds phase of a TPR proceeding, the Court held the Due Process Clause requires the State to prove grounds for termination with clear and convincing evidence. *Id.* at 747–48, 769.

¶12 Applying *Santosky*, the court of appeals in this case concluded, “due process requires that the best interest of the child be proven by a preponderance of the evidence at the dispositional phase of a proceeding to terminate parental rights.” *H.C.*, No. 2023AP1950, at ¶34. Departing from *Santosky*, the court decided “this burden is not solely placed on the State. . . . [I]t [is] a common burden of proof wherein each party bears the burden to show by a preponderance of the evidence that its desired outcome . . . is in the best interest of the child.” *Id.*, ¶35.

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II

¶13 Whether the statutory scheme governing the dispositional phase of a TPR proceeding imposes a particular burden of proof is a matter of statutory interpretation this court reviews *de novo*. *See St. Croix Cnty. Dep't of Health & Hum. Servs. v. Michael D.*, 2016 WI 35, ¶15, 368 Wis. 2d 170, 880 N.W.2d 107. Whether that statutory scheme comports with the Constitution presents a question of law this court also reviews *de novo*. *Eau Claire Cnty. Dep't of Hum. Servs. v. S.E.*, 2021 WI 56, ¶14, 397 Wis. 2d 462, 960 N.W.2d 391.

III

¶14 A circuit court's decision to terminate parental rights permanently severs "all rights, powers, privileges, immunities, duties and obligations existing between parent and child." WIS. STAT. § 48.40(2). The Children's Code, Chapter 48 of the Wisconsin Statutes, governs. The filing of a petition to terminate parental rights initiates a TPR proceeding. WIS. STAT. § 48.42(1). The petition must allege one or more of the grounds for involuntary termination of parental rights listed in § 48.415, along with a statement of facts. § 48.42(1)(c)2. The parent must be personally served, § 48.42(2), and a hearing on the petition must be held within 30 days. WIS. STAT. § 48.422(1). At the hearing, the court informs the parties of their rights, and the parties tell the court whether they intend to contest the petition. *Id.* If the petition is not contested, the court must nonetheless hear testimony in support of termination. § 48.422(3). Before accepting an admission of the alleged facts, the court must address the parent to determine whether the admission is made voluntarily and with an understanding of the nature of the acts alleged and the potential dispositions. § 48.422(7).

¶15 A parent who contests a TPR petition is entitled to a fact-finding hearing—commonly referred to as the "grounds" phase—during which the court determines whether grounds exist for termination of parental rights. WIS. STAT. §§ 48.422(2), 48.424(1)(a). Any party may request a jury trial, § 48.422(4); traditional rules of evidence apply, WIS. STAT. § 48.299(4)(a); and the State must prove its allegations during this phase by clear and convincing evidence, WIS. STAT. § 48.31(1). If grounds for termination are found, then "the court shall find the parent unfit," unless the court determines the evidence does not warrant termination, in which case it may dismiss the petition. WIS. STAT. §§ 48.424(4), 48.427(2).

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¶16 Upon finding a parent unfit during the grounds phase, the court then holds a dispositional hearing to decide whether parental rights should be terminated. WIS. STAT. § 48.424(4). Even though the parent has already been found unfit during the grounds phase, during the dispositional hearing the court considers whether terminating parental rights is in the “best interests of the child.” WIS. STAT. § 48.426(2). In doing so, the court considers any report submitted by an agency and weighs numerous statutory factors.⁶ § 48.426. Any party may present relevant evidence⁷ and make alternative dispositional recommendations. WIS. STAT. § 48.427(1). In addition to the parties’ presentation of evidence relevant to disposition, the court must afford the child’s foster parent or other physical

⁶ WISCONSIN STAT. § 48.426 outlines the considerations, standard, and factors used by a court during the dispositional phase. It provides as follows: “[i]n making a decision about the appropriate disposition under s. 48.427, the court shall consider the standard and factors enumerated in this section and any report submitted by an agency under s. 48.425.” § 48.426(1). The statute directs, “[t]he best interests of the child shall be the prevailing factor considered by the court.” § 48.426(2). The factors used to determine the best interests of the child include, but are not limited to:

- (a) The likelihood of the child’s adoption after termination.
- (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
- (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
- (d) The wishes of the child.
- (e) The duration of the separation of the parent from the child.
- (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child’s current placement, the likelihood of future placements and the results of prior placements.

WIS. STAT. § 48.426(3).

⁷ Neither common law nor statutory rules of evidence are enforced during a dispositional hearing, except for relevance and materiality. WIS. STAT. § 48.299(4)(b). “[T]he court shall admit all testimony having reasonable probative value,” including hearsay evidence, “if it has demonstrable circumstantial guarantees of trustworthiness.” *Id.*

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custodian “a right to be heard.” § 48.427(1m). After hearing evidence, the court decides whether it is in the best interests of the child to dismiss the petition or enter an order terminating parental rights. § 48.427(2)–(3).

¶17 Relying on *Santosky*’s application of the three *Mathews* factors to the grounds phase of a TPR proceeding, H.C. principally argues constitutional due process requires the State to prove by clear and convincing evidence that termination is in the best interests of the child during the dispositional phase. Also relying on the *Mathews* factors, the court of appeals concluded due process imposes a preponderance of the evidence burden, shared by the parties. Both H.C. and the court of appeals misapply the *Mathews* factors to suggest procedural due process requires something more than what the statutes specify: a disposition in the child’s best interests.

¶18 Due process is not a fixed legal rule and “perhaps can never be[] precisely defined.” *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 24 (1981). Its procedural protections depend on the demands of a particular situation and account for the “governmental and private interests that are affected.” *Mathews*, 424 U.S. at 334. While the “specific dictates of due process generally require[] consideration” of the three *Mathews* factors, *id.* at 334–35, the “nature of the relevant inquiry” and “the fairness and reliability of [] existing [] procedures” and “procedural safeguards” are also considered. *Id.* at 343. At its core, due process requires “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

¶19 *Santosky* did not change the due process analysis. It merely assessed the competing interests at stake during the grounds phase of a TPR proceeding through the lens of the *Mathews* factors and determined the State must prove parental unfitness by clear and convincing evidence. *Santosky*, 455 U.S. at 759–68. Notably, *Santosky* explicitly limits its holding to the factfinding grounds phase of a TPR proceeding. *Id.* at 760 (“After the State has established parental unfitness . . . , the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge.”). The United States Supreme Court has never suggested due process mandates a burden of proof during the dispositional phase of a TPR case, during which no factfinding occurs.

¶20 Standards of proof exist within the “realm of factfinding” to “‘instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of *factual* conclusions for a

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particular type of adjudication.” *Addington v. Texas*, 441 U.S. 418, 423 (1979) (emphasis added) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). At the dispositional hearing, the circuit court does not find facts—it makes a discretionary decision to terminate parental rights, or not. Whatever the court decides, the outcome must be in the child’s best interests, after the court considers such statutory factors as the likelihood of the child’s adoption after termination, whether the child has a substantial relationship with the parent, and how long the child has been separated from his parent. WIS. STAT. § 48.426(3). The very nature of the dispositional hearing does not lend itself to standards of proof, which exist in the realm of factfinding.

¶21 Both the court of appeals and H.C. formulaically apply the *Mathews* factors to the dispositional phase, failing to account for the bifurcated nature of a TPR proceeding. During the grounds phase, the State carries the burden to *prove* a parent unfit by clear and convincing evidence. WIS. STAT. § 48.31(1). Once the State meets its burden and the court finds a parent unfit, the circuit court “shall consider” the best interests of the child with the factors enumerated in WIS. STAT. § 48.426(3) in determining whether to terminate parental rights. WIS. STAT. § 48.426(1). At that point, the proceeding no longer lies within the realm of factfinding.

¶22 Upon reaching the dispositional phase, the private interests of the parties shift dramatically, and the requisite procedural safeguards reflect that shift. While “in general, the party invoking the judicial process in its favor bears the burden of production and persuasion,” *Richards v. First Union Securities, Inc.*, 2006 WI 55, ¶17, 290 Wis. 2d 620, 714 N.W.2d 913, the State has already met that burden during the grounds phase—the factfinding portion of a TPR proceeding. Due process considerations do not require the circuit court to again place the parent’s interests above, or even on an equal footing with, the child’s best interests. Upon a finding of parental unfitness, the best interests of the child prevail.

¶23 The shifting of the parties’ interests after the grounds phase is reflected in the statutory procedural differences between the factfinding hearing and the dispositional hearing. From the filing of the TPR petition through the conclusion of the factfinding hearing, the statutes provide a parent with significant procedural safeguards. Before a factfinding hearing, a parent must be personally served and the court must hold a plea hearing. Even if the parent does not contest the asserted grounds for termination of parental rights, the circuit court must hear testimony in support of grounds for termination and “make such inquiries as satisfactorily establish there is

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a factual basis for the admission.” WIS. STAT. § 48.422(3), (7). If contested, a parent may request a jury trial on grounds, traditional rules of evidence apply, and the State bears a heightened, clear and convincing burden of proof. As this court has explained, prior to disposition “‘the parent’s rights are paramount.’ . . . [T]he burden is on the government, and the parent enjoys a full complement of procedural rights.” *Sheboygan Cnty. Dep’t of Health & Hum. Servs. v. Julie A.B.*, 2002 WI 95, ¶24, 255 Wis. 2d 170, 648 N.W.2d 402 (quoting *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶22, 246 Wis. 2d 1, 629 N.W.2d 768).

¶24 The factfinding hearing resembles a traditional adversarial proceeding, pitting the petitioner against the allegedly unfit parent. The State’s failure to carry its burden to prove the parent unfit by clear and convincing evidence results in dismissal. Once the State has proven a parent unfit, the Constitution does not obligate the State to prove by clear and convincing evidence (or even a preponderance of the evidence) that termination is in the child’s best interests.

¶25 In contrast to the grounds phase of a TPR case, the dispositional hearing bears little resemblance to an adversarial proceeding. Unlike the factfinding hearing, “any” party may present evidence at disposition. The circuit court may hear statements from certain individuals, such as foster parents and physical custodians, and the court considers any child welfare agency reports. Only basic principles of relevance and materiality constrain the presentation of evidence. After considering all the statements, reports, and evidence bearing on the child’s best interests, the court may dismiss the petition if the court determines termination of parental rights is not in the child’s best interests.

¶26 The discretionary standard governing the circuit court’s dispositional decision is akin to the discretionary standard for criminal sentencing, for which no party bears a particular burden of proof. *See State v. Hubert*, 181 Wis. 2d 333, 345, 510 N.W.2d 799 (Ct. App. 1993). Similar to a TPR disposition, sentencing occurs during the second half of a bifurcated process after the State carries its heightened burden of proof at trial; traditional rules of evidence do not apply, *see State v. Scherreiks*, 153 Wis. 2d 510, 521–22, 451 N.W.2d 759 (Ct. App. 1989); the sentencing court considers a report (the presentence investigation report) before making its decision, WIS. STAT. § 972.15; the sentencing court gives nonparties, such as victims, the ability to make statements to the court, WIS. STAT. § 972.14(3)(a); and the sentencing court must consider and weigh certain factors, *see State v. Gallion*, 2004 WI 42, ¶¶40–41, 270 Wis. 2d 535, 678 N.W.2d 197.

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¶27 Both criminal sentencing and TPR disposition occur *after* the factfinding stage of each underlying proceeding. Once the factfinder finds criminal guilt or grounds for termination, respectively, the circuit court has discretion to determine the appropriate statutorily prescribed constitutional deprivation. At sentencing, the defendant has already been found guilty beyond a reasonable doubt—establishing grounds for punishment. At disposition, the parent has already been found unfit by clear and convincing evidence—establishing grounds for termination of parental rights. The constitutionally required procedural safeguards protecting a parent’s interests during the grounds phase logically end once the State establishes the parent’s unfitness. At that point, the child’s best interests become the court’s paramount consideration as a matter of law. See WIS. STAT. §§ 48.426(2); 48.01(1).

¶28 H.C.’s argument under the Due Process Clause would effectively force a circuit court to disregard the child’s best interests if the State does not meet a certain standard of proof. If the GAL’s evidence or a foster parent’s statement establishes the best interests of the child, H.C.’s argument would compel the court to dismiss the petition because *the State* did not introduce the evidence. Due process is not measured by such rigid and inflexible rules, and the Due Process Clause does not hinder the court from following the legislative directive to consider the child’s best interests as paramount at disposition. Once the court makes a finding of unfitness, the interests at stake shift and the best interests of the child exceed the interests of any other party.

¶29 That is not to say due process is disregarded at the dispositional phase merely because the circuit court’s decision is discretionary. To the contrary, a discretionary standard allows the court to weigh all relevant evidence to determine a child’s best interests without regard for which party bore a burden to produce it. A discretionary decision governed by the child’s best interests in no way lessens the degree of confidence a court must have in its decision. A proper exercise of discretion requires “examin[ing] the relevant facts, appl[ying] a proper standard of law, and using a demonstrative rational process” to “reach[] a conclusion that a reasonable judge could reach.” *Lane v. Sharp Packaging Sys., Inc.*, 2002 WI 28, ¶19, 251 Wis. 2d 68, 640 N.W.2d 788 (citing *Paige K.B. ex rel Peterson v. Steven G.B.*, 226 Wis. 2d 210, 233, 594 N.W.2d 370 (1999)). The statute specifies numerous factors to guide the court in reaching a decision in the best interests of the child.

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¶30 None of the parties argue the statutes require placing a burden of proof on the State (or any party) during a TPR dispositional hearing—and for good reason. Nothing in the statutory text imposes a burden of proving the child’s best interests by a preponderance of the evidence or by clear and convincing evidence at disposition. *See* WIS. STAT. §§ 48.426, 48.427; *State v. B.W.*, 2024 WI 28, ¶121, 412 Wis. 2d 364, 8 N.W.3d 22 (Ziegler, C.J., concurring). We reject H.C.’s public policy argument that the gravity of the circuit court’s decision necessitates placing a burden of proof on the State. The legislature already made the policy choice to omit a burden of proof in favor of requiring the court to enter a disposition in the child’s best interests after hearing from all interested parties. This court interprets the words of the enacted law without adding words to the statute. *State v. Fitzgerald*, 2019 WI 69, ¶30, 387 Wis. 2d 384, 929 N.W.2d 165.

¶31 If neither the Constitution nor public policy requires a heightened burden of proof at disposition, H.C. argues the ordinary burden of proof—a preponderance of the evidence—applies to any civil statute that does not specify one. H.C. cites *T.M.S. v. Rock County Department of Social Services*, 152 Wis. 2d 345, 356, 448 N.W.2d 282 (Ct. App. 1989), for this proposition. In that case, the court of appeals determined the ordinary burden applies to CHIPS dispositional hearings, in the face of statutory silence on the standard of proof. Its reasoning, however, does not extend to TPR dispositional hearings because—unlike the dispositional phase of a TPR proceeding—factfinding is part of the circuit court’s dispositional decision in CHIPS cases. *See* WIS. STAT. §48.355(2) (“[T]he judge shall make written findings of fact and conclusions of law based on the evidence . . . to support the disposition ordered.”). In contrast, “[a]fter receiving any evidence related to the disposition” during a TPR dispositional hearing, “the court shall enter one of the dispositions specified” in § 48.427(2) to (3p). WIS. STAT. § 48.427(1). At disposition in a TPR matter, no factfinding occurs; accordingly, no party bears any burden of proof.

IV

¶32 We hold that WIS. STAT. § 48.426(2) requires the circuit court to decide, in its discretion, whether termination of parental rights is in the best interests of the child, without imposing a burden of proof on any party. The Due Process Clause does not require one. The circuit court in this case applied the correct standard of law in deciding, in its discretion, that John’s best interests were served by terminating H.C.’s parental rights. The court of appeals incorrectly concluded the parties share a common burden to

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prove the child's best interests at disposition by a preponderance of the evidence.

By the Court. — The decision of the court of appeals is affirmed.

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CHIEF JUSTICE ANN WALSH BRADLEY, concurring

ANN WALSH BRADLEY, C.J., with whom REBECCA FRANK DALLET, J.,
joins, concurring.

¶33 I agree with the majority opinion that the circuit court’s order terminating H.C.’s parental rights should be affirmed. As the majority opinion observes, the circuit court here indicated that “even if the State bore the burden of proving termination was in the child’s best interests by a preponderance of the evidence or clear and convincing evidence, ‘the State has certainly met those two burdens here, and gone beyond them, certainly. It’s really an overwhelming situation.’” Majority op., ¶9. I agree with the circuit court’s assessment.

¶34 However, I part ways with the majority’s conclusion that there is “no burden of proof on a particular party” at the dispositional phase of a termination of parental rights (TPR) proceeding. *See id.*, ¶3. In arriving at this conclusion the majority charts a course away from the approach of our sister states and instead makes Wisconsin a national outlier. Although I agree with the majority opinion that neither due process nor public policy requires a clear and convincing evidence burden in this situation, in my view, the general civil burden of preponderance of the evidence should apply, and such a burden should be on the petitioner. Accordingly, I respectfully concur.

¶35 The question of the proper burden of proof (if any) at the dispositional phase of a TPR proceeding has been percolating in this court and the court of appeals for several years.¹ Although previous courts that were presented the issue did not ultimately resolve it, the court today makes a conclusive determination that “the best interests of the child governing the dispositional phase of a TPR proceeding constitutes a discretionary determination by the circuit court and the statute places no burden of proof on a particular party.” *Id.*, ¶3.

¶36 The majority is half right. Of course, it is a discretionary determination. But that does not mean the door is shut on review. Rather,

¹ *See State v. B.W.*, 2024 WI 28, ¶6 n.4, 412 Wis. 2d 364, 8 N.W.3d 22; *State v. A.G.*, 2023 WI 61, ¶58 n.3, 408 Wis. 2d 413, 992 N.W.2d 75 (Dallet, J., dissenting); *see also* Christopher R. Foley, *Left in the Dark: State v. A.G. & Burden of Proof in Involuntary TPR Dispositional Hearings*, WIS. LAW., July/Aug. 2024, at 26.

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it simply means that unless the circuit court makes an error of law or fact, we will defer to the discretion of the circuit court.

¶37 This court has “previously identified two different burdens of proof that apply in civil actions: ‘fair preponderance of the evidence’ and ‘clear and convincing evidence.’” *State v. West*, 2011 WI 83, ¶76, 336 Wis. 2d 578, 800 N.W.2d 929 (quoting *State v. Walberg*, 109 Wis. 2d 96, 102, 325 N.W.2d 687 (1982)). The preponderance standard “applies in ordinary civil actions,” while the clear and convincing standard applies in cases where public policy demands a higher standard of proof than that applied in the ordinary civil action.² *Walberg*, 109 Wis. 2d at 102.

¶38 The part the majority gets wrong is its declaration that there is no burden of proof. It arrives at this conclusion due to the bifurcated nature of TPR proceedings. In the grounds phase, the clear and convincing burden applies. *See* WIS. STAT. § 48.31(1). But in the majority’s view, “[o]nce the State has proven a parent unfit, the Constitution does not obligate the State to prove by clear and convincing evidence (or even a preponderance of the evidence) that termination is in the child’s best interests.” Majority *op.*, ¶24. Public policy does not require a heightened burden and there cannot be a preponderance standard, the majority posits, because there is no factfinding at the dispositional phase of a TPR case. *Id.*, ¶¶30–31.

¶39 In reaching its conclusion that there is no burden in the present situation, the majority observes that nothing in the relevant “statutory text imposes a burden of proving the child’s best interests by a preponderance of the evidence or by clear and convincing evidence at disposition.” *Id.*, ¶30; WIS. STAT. §§ 48.426, 48.427. True enough. But this assertion provides little support for the majority’s analysis because a burden of proof will often not be listed specifically in a statute. Indeed, “the degree of proof required in a particular type of proceeding ‘is the kind of question which has traditionally been left to the judiciary to resolve.’”

² For example, clear and convincing evidence “has been required in such cases as fraud, undue influence, and prosecutions of civil ordinance violations which are also crimes under state law.” *State v. Walberg*, 109 Wis. 2d 96, 102, 325 N.W.2d 687 (1982). Additionally, due process may require clear and convincing evidence where a fundamental liberty interest is at stake. *Steven V. v. Kelley H.*, 2004 WI 47, ¶¶22–23, 271 Wis. 2d 1, 678 N.W.2d 856; *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982).

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Santosky v. Kramer, 455 U.S. 745, 755–56 (1982) (quoting *Woodby v. INS*, 385 U.S. 276, 284 (1966)).³

¶40 I agree with the majority that neither due process nor public policy demands the application of a clear and convincing burden at disposition. By the time a TPR case advances to disposition, the parent has already been found unfit by clear and convincing evidence. This finding does not extinguish a parent’s interest in raising a child, but it does diminish it. *See id.* at 760, 766–67. However, contrary to the majority opinion, I would resolve the issue by concluding that the burden in the dispositional phase of a TPR proceeding is on the petitioner to demonstrate the best interests of the child by a preponderance of the evidence.

¶41 As a starting point for the analysis, applying a burden simply makes sense. A determination of the best interests of the child cannot exist in a vacuum, devoid of any analysis determining which evidence is more persuasive. Instead it rests on the circuit court assessing credibility, weighing the evidence, and arriving at a determination that is supported by the greater weight of the credible evidence, also known as the preponderance of the evidence.

¶42 The preponderance of the evidence burden additionally makes sense in the present context due to the nature of the best interests determination. A best interests determination is binary. That is, when the circuit court makes such a determination it chooses between two options: that termination is in the child’s best interests or that termination is not in the child’s best interests. *See* WIS. STAT. § 48.427(2)–(3); *Oneida Cnty. Dep’t of Soc. Servs. v. Therese S.*, 2008 WI App 159, ¶16, 314 Wis. 2d 493, 762 N.W.2d 122. When deciding between two options, intuitively the one the court must choose is the one which the evidence more heavily supports. By instituting a preponderance burden, I would make explicit what the majority establishes implicitly—that the “greater weight of the credible evidence” must support the best interests finding. *See* Wis. JI—Civil 200 (2004).

³ *See also* *Marquez v. Mercedes-Benz USA, LLC*, 2012 WI 57, ¶¶38–39, 341 Wis. 2d 119, 815 N.W.2d 314 (indicating that when the text of a statute is silent as to the burden of proof, the court’s “determination of the appropriate burden of proof is influenced by the purposes and policies of the statute”).

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¶43 Because of the binary nature of the best interests determination, the majority opinion’s analogy to criminal sentencing is inapposite. *See* majority op., ¶¶26–27. At sentencing, the circuit court is presented with a range of options rather than a binary choice. *See State v. Gallion*, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197; *see also* WIS. STAT. § 939.50(3) (setting forth the permissible range of fines and imprisonment for each level of felony).

¶44 The analogy also does not work because of the nature of the respondent’s right at stake. The majority is correct that in a criminal sentencing proceeding, “the defendant has already been found guilty beyond a reasonable doubt—establishing grounds for punishment.” Majority op., ¶27. As a consequence, a “valid criminal conviction and a prison sentence extinguish a defendant’s right to freedom from confinement.” *Winnebago County v. Christopher S.*, 2016 WI 1, ¶39, 366 Wis. 2d 1, 878 N.W.2d 109 (quoting *Vitek v. Jones*, 445 U.S. 480, 493 (1980)) (internal quotations omitted). However, a similar “extinguishing” of the fundamental right to parent is not occasioned by a finding of parental unfitness. Such a right is certainly diminished by a finding of unfitness at the grounds phase of a TPR proceeding, but it certainly is not reduced to nothing. *See Santosky*, 455 U.S. at 760. There remains the possibility that parental rights will not be terminated despite the finding of unfitness.

¶45 I additionally observe that the preponderance burden is consistent with the “purposes and policies” of the TPR statutes. *See Marquez v. Mercedes-Benz USA, LLC*, 2012 WI 57, ¶¶38–39, 341 Wis. 2d 119, 815 N.W.2d 314. Although WIS. STAT. § 48.01(1) instructs that “the best interests of the child . . . shall always be of paramount consideration” when construing chapter 48, that same section also instructs that “preserv[ing] the unity of the family” is a “paramount goal” of chapter 48. § 48.01(1)(a). A preponderance burden allows the unfit parent and child to share the risk of error roughly in equal fashion, which acknowledges that the parent retains an interest at disposition but also supports the stated purpose of chapter 48—the child’s best interests.

¶46 As stated, the grounds phase is subject to a clear and convincing burden. This higher burden protects the parent’s fundamental rights. However, once grounds are established, the parent’s interest is diminished. Yet there is still a substantial risk of error without a burden of proof. First, an objective preponderance standard encourages uniformity in circuit court dispositional decisions. Second, the child also has an interest in avoiding an error that would sever their natural family. *See* WIS. STAT.

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§ 48.01(1)(a). Finally, a disparity of resources will often exist between the parent and the State. An evidentiary burden would serve to level the playing field. *See Santosky*, 455 U.S. at 763–64.

¶47 Contrary to the majority’s false dichotomy, a conclusion that the best interests determination is discretionary does not preclude the application of a burden of proof. Indeed, burdens of proof do not replace the discretion afforded to circuit courts. They merely inform the court what level of confidence it must have before exercising its discretion in a certain way. Discretionary determinations and burdens of proof coexist in other areas of the law, and there is no reason why they cannot here as well.⁴

¶48 Further, applying a preponderance burden to the dispositional phase would put Wisconsin in good company. The list of states applying a burden of proof to the best interests finding is significant. For example, the Arizona Supreme Court has determined that in its statutory scheme, as I would determine with regard to ours, grounds for terminating parental rights must be established by clear and convincing evidence and best interests by a preponderance of the evidence. *Kent K. v. Bobby M.*, 110 P.3d 1013, 1018 (Ariz. 2005). The preponderance burden likewise applies to the best interests determination in Illinois, Michigan, Missouri, and Washington. *People v. Brenda T.*, 818 N.E.2d 1214, 1228 (Ill. 2004); *In re Moss*, 836 N.W.2d 182, 190 (Mich. Ct. App. 2013); *In re B.H.*, 348 S.W.3d 770, 776 (Mo. 2011); *Matter of Welfare of D.E.*, 469 P.3d 1163, 1171 (Wash. 2020).

¶49 A number of states go further and require that a best interests finding be supported by clear and convincing evidence. *See, e.g., D.H. v.*

⁴ *See, e.g., State ex rel. Warren v. Schwarz*, 211 Wis.2d 710, 726, 566 N.W.2d 173 (Ct. App. 1997) (“Although DOC has the burden of proving the alleged probation violation by a preponderance of the evidence at the revocation hearing, on appeal challenging the division’s decision to revoke, the probationer has the burden of proving the decision was arbitrary and capricious, that is, that the division did not properly exercise its discretion.”); *R.E.H. v. State*, 101 Wis. 2d 647, 653, 305 N.W.2d 162 (Ct. App. 1981) (“The court found that it was not only necessary, but also in R.E.H.’s best interest, to continue the commitment to Lincoln Hills. These findings support the court’s exercise of discretion in continuing the commitment of R.E.H. and are not against the great weight and clear preponderance of the evidence.”).

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State Dep't of Hum. Res., 600 So. 2d 273, 277 (Ala. Civ. App. 1992); *Woodruff v. Keale*, 637 P.2d 760, 770 (Haw. 1981); *In re Adoption of Jayden G.*, 70 A.3d 276, 296 (Md. 2013); *In re Termination of Parental Rts. as to N.J.*, 8 P.3d 126, 133 (Nev. 2000); *In Interest of A.D.*, 416 N.W.2d 264, 267 (S.D. 1987); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007); *In re N.L.*, 207 A.3d 475, 479 (Vt. 2019). By stating that there is no burden at all at the dispositional phase, the majority places Wisconsin in the distinct minority of states that have addressed the question.

¶50 Having determined that the proper burden here is preponderance of the evidence, the question becomes who should bear the burden. As is the general rule, such a burden should fall exclusively on the petitioner who seeks termination. Generally, “the party invoking the judicial process in its favor bears the burden of production and persuasion.” *Richards v. First Union Secs., Inc.*, 2006 WI 55, ¶17, 290 Wis. 2d 620, 714 N.W.2d 913; *Loeb v. Bd. of Regents of Univ. of Wis.*, 29 Wis. 2d 159, 164, 138 N.W.2d 227 (1965) (“A party seeking judicial process to advance his position carries the burden of proof.”).

¶51 In sum, I would place the burden in the dispositional phase of a TPR proceeding on the petitioner to demonstrate the best interests of the child by a preponderance of the evidence. Such a conclusion simply makes intuitive sense, is in harmony with the purpose of chapter 48, and is consistent with the approach taken by the majority of other states addressing the question.

¶52 For the foregoing reasons, I respectfully concur.

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2025 WI 21

Supreme Court of Wisconsin



STATE OF WISCONSIN,
Plaintiff-Respondent-Petitioner,

v.

JOBERT L. MOLDE,
Defendant-Appellant.

No. 2021AP1346-CR
Decided June 13, 2025

REVIEW of a decision of the Court of Appeals
Dunn County Circuit Court (Rod W. Smeltzer, J.) No. 2017CF34

HAGEDORN, J., delivered the majority opinion for a unanimous Court. KAROFKY, J., filed a concurring opinion.

¶1 BRIAN HAGEDORN, J. Under the *Haseltine* rule, witnesses may not testify that they think another witness is telling the truth. Vouching for the credibility of another witness is impermissible under the rules of evidence because it invades the province of the trier of fact—here, the jury. The question in this case is whether an expert witness violated the *Haseltine* rule when she testified that only around one percent of child sexual assault disclosures are false, but did not offer an opinion on whether the victim in this case was telling the truth. We conclude she did not. We hold that statistical evidence alone on the likelihood of false reports does not violate the *Haseltine* rule. The defendant here alleges his counsel was constitutionally deficient for not raising a *Haseltine* objection

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to this testimony. Because such an objection would have failed, the defendant's claim for ineffective assistance of counsel fails as well.

I. BACKGROUND

¶2 The issues in this case arose following allegations that, sometime between January 2011 and January 2012, Lauren¹ was sexually assaulted by her father, Jobert Molde. This came to light in 2017 when Lauren—now age thirteen—attempted suicide. After Lauren's claims were investigated, Molde was charged with one count of first-degree sexual assault of a child who had not attained the age of twelve and one count of incest with a child. The crucial evidence against Molde was Lauren's in-court testimony recounting the assault and a recording of her forensic interview.

¶3 The circuit court granted the State's motion to have the nurse practitioner who conducted the forensic interview testify as an expert at trial. However, she was unavailable, and the circuit court permitted Dr. Alice Swenson—a licensed child abuse pediatrician who supervised Lauren's forensic interview and examination—to testify instead. The record is unclear about what her supervision entailed other than it was in real time; but Dr. Swenson did not personally conduct an evaluation of Lauren. Dr. Swenson testified about her background and work as a licensed child abuse pediatrician, how child forensic interviews tend to proceed, what sort of evidence they look for in a physical forensic exam, background about how children's memories work, Lauren's admission to the hospital, and the possibility of intercourse between an adult and child. She did not testify about Lauren's truthfulness or how likely it is that Lauren was telling the truth during the interview.

¶4 After Dr. Swenson's testimony, one juror submitted two questions, which the circuit court previously instructed was permissible. Following a sidebar, Molde's counsel did not object to the questions being read to the witness:

THE COURT: Doctor, it says how frequent is it for children to make up a story of sexual abuse?

¹ "Lauren" is a pseudonym. See WIS. STAT. § (Rule) 809.86(1), (4).

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THE WITNESS: False disclosures are extraordinarily rare, like in the one percent of all disclosures are false disclosures.

THE COURT: Second part of that is why would they do that?

THE WITNESS: I don't think I really have an answer to that.

Molde's attorney did not object or otherwise challenge Dr. Swenson's answers. The court then permitted Molde's counsel to ask a follow-up question:

[MOLDE'S COUNSEL]: Are there particular studies that have been conducted regarding the reporting of false accusations?

THE WITNESS: There are that I've read, yes. I don't know the names of them off the top of my head.

¶5 The trial proceeded and the jury found Molde guilty on both counts. Following his conviction, Molde moved for postconviction relief. He contended that his trial counsel should have objected to Dr. Swenson's testimony as impermissible vouching, and this failure constituted ineffective assistance of counsel. The circuit court denied the motion, in part because Dr. Swenson did not comment "on the credibility of the victim in this case as to whether she was telling the truth or not."

¶6 Relying on its prior published decisions, the court of appeals held that Dr. Swenson's testimony constituted impermissible vouching, and that Molde's attorney was constitutionally ineffective for failing to object. *State v. Molde*, No. 2021AP1346, unpublished slip op., ¶3–4 (Wis. Ct. App. May 21, 2024). The state petitioned for review, which we granted.

II. DISCUSSION

A. THE LAW

¶7 In Wisconsin, the trier of fact—often a jury—is entrusted with the duty to make factual determinations at trial. *See State v. Maday*, 2017 WI 28, ¶34, 374 Wis.2d 164, 892 N.W.2d 611 (explaining that conveying information to the jury is conveying it to the fact-finder). As part of that role, the jury must decide for itself whether to believe a

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witness's testimony in whole, in part, or not at all. *See Roberts v. State*, 84 Wis. 361, 368, 54 N.W. 580 (1893) (explaining that the jury has the exclusive role to pass on the credibility of the witness).

¶8 In *State v. Haseltine*, the court of appeals considered the testimony of a psychiatrist in a case likewise involving a father's sexual assault of his daughter. 120 Wis. 2d 92, 95–96, 352 N.W.2d 673 (Ct. App. 1984). The psychiatrist, who was qualified as an expert, testified regarding typical patterns of behavior for victims of incest. *Id.* But the court also permitted the psychiatrist to offer his professional opinion that the victim fit the typical case, and that he had “no doubt whatsoever” that the father sexually assaulted his daughter. *Id.* at 96. The court of appeals held that this was error, and laid out some basic principles that continue through our cases today.

¶9 First, the expert's opinion that the victim was telling the truth went too far. The foundation for this is WIS. STAT. § 907.02 (2023–24),² which then, as now, states in relevant part that an expert witness's testimony must “assist the trier of fact.”³ Because the jury is the ultimate arbiter of credibility, “[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth.” *Haseltine*, 120 Wis. 2d at 96. This principle—that vouching for the credibility of another witness is impermissible—has since become known as the *Haseltine* rule.

¶10 Even so, expert testimony that helps the jury assess credibility or understand the victim's testimony is permitted. *Id.* at 96–97. The court explained that expert evidence regarding why incest victims might delay in reporting or recant accusations could aid the jury, which might otherwise “regard such behavior as an indication that the victim was not telling the truth.” *Id.* at 97.

² All subsequent references to the Wisconsin Statutes are to the 2023–24 version unless otherwise indicated.

³ The Wisconsin Rules of Evidence were originally adopted by this court in 1973. 59 Wis. 2d Ri, *et seq.* (1973). The legislature modified the standards for admission of expert testimony in 2011. 2011 Wis. Act 2, § 34m. But the basic principle that expert testimony must “assist the trier of fact” remains the same.

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¶11 Thus, the key principle is this: expert testimony may assist the jury in determining the credibility of another witness, but it may not supplant the jury's role by opining on the witness's credibility. To be sure, any expert testimony should be properly admitted under the appropriate rules. WIS. STAT. § 907.02. And of course, it is subject to thorough vetting and cross-examination by opposing counsel. The jury can then weigh the credibility of the expert testimony and consider that along with other evidence to determine the credibility of the victim and other testifying witnesses. This rule preserves the jury's exclusive role as the trier of fact, while permitting the jury to consider all relevant information in making its ultimate determinations.

¶12 This court has adopted the *Haseltine* rule and applied it in multiple cases. We summarize several key cases that reinforce this distinction.

¶13 In *State v. Robinson*, we permitted the expert testimony of a rape crisis center worker who opined on the common emotional reactions of sexual assault victims following an assault. 146 Wis.2d 315, 431 N.W.2d 165 (1988). We concluded the evidence served “a particularly useful role by disabusing the jury of some widely held misconceptions” about the way sexual assault victims respond emotionally, and noted that the “witness was not asked to draw any inferences or offer any opinions about the complainant in this case.” *Id.* at 333, 335.

¶14 In *State v. Jensen*, we permitted the testimony of a school guidance counselor who testified as an expert that a victim's “‘acting out’ behavior” was “consistent with children who were victims of sexual abuse.” 147 Wis.2d 240, 246, 432 N.W.2d 913 (1988). We held that such testimony permissibly “provided information about behavioral characteristics of child sexual abuse victims that may have been outside the jurors’ common experience.” *Id.* at 252. And the expert did not “explicitly or implicitly conclude that this complainant was a victim of sexual assault.” *Id.* at 255. This left the jury “free to draw its own inferences” —either accepting the expert's testimony or not in determining whether the defendant was guilty. *Id.*

¶15 In *State v. Romero*, decided the same day as *Jensen*, we determined that the lay testimony of a social worker and a police officer was improper. 147 Wis.2d 264, 297, 432 N.W.2d 899 (1988). There, the two witnesses testified that the complainant in that case was telling the truth, a characterization seized on by the prosecutor in closing argument. *Id.* at

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277. We concluded that this “was not helpful to the jury,” but instead “tended to usurp” the jury’s role in “assessing the credibility of a complaining witness.” *Id.* at 278.

¶16 In *State v. Kleser*, we similarly held that a psychologist had crossed the line and vouched for the truthfulness of the complainant’s story. 2010 WI 88, ¶¶98, 101, 328 Wis.2d 42, 786 N.W.2d 144. We explained that improper vouching need not be explicit; implicit vouching can also “invade[] the province of the fact-finder as the sole determiner of credibility.” *Id.*, ¶¶102, 104. We concluded that the psychologist’s testimony “impermissibly suggested both that she believed Kleser’s account and that the events actually unfolded as Kleser had portrayed them.” *Id.*, ¶105.

¶17 Finally, in *State v. Maday*, an expert who conducted a forensic interview of the victim testified regarding her observations during the interview. 374 Wis. 2d 164. In particular, the prosecutor asked whether there was “any indication [the victim] had been coached,” and whether there was “any indication [the victim] was not being honest during her interview.” *Id.*, ¶17, 38. We held that this did not violate the *Haseltine* rule because she offered an opinion only “about indications she is trained to observe during a cognitive graphic interview,” and “did not take that extra step” of opining on the complainant’s veracity. *Id.*, ¶¶38–39. The testimony, we concluded, could have assisted the jury, and did not usurp its role as the sole judge of a witness’s credibility. *Id.*, ¶40.

¶18 From these cases, we see that the main question is whether the testimony assists the jury in assessing the credibility of witnesses, or whether it functionally usurps the jury’s fact-finding role. Generally, expert testimony describing typical behavior by those in similar circumstances can serve to assist the jury.⁴ Provided it meets the other evidentiary requirements for admissibility, generalized evidence and

⁴ Expert evidence of general victim behavior can be particularly helpful in cases of child sexual assault, where the victim’s behavior can often be “beyond the common sense, experience and education of the average juror.” *State v. Lindsey*, 720 P.2d 73, 76 (Ariz. 1986); see also *People v. Julian*, 246 Cal. Rptr. 3d 517, 522 (Cal. Ct. App. 2019) (evidence was “needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children’s seemingly self-impeaching behavior.”).

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personal observations do not, by themselves, run afoul of the *Haseltine* rule. Witnesses cross the line, however, when they take the extra step of implicitly or explicitly opining on whether the complainant is telling the truth. This usurps rather than assists the jury. Whether this has occurred will necessarily be dependent on the facts of a given case.

¶19 The main question presented here is whether expert testimony regarding the likelihood of false reporting, particularly when the evidence demonstrates that false reports are extremely rare, constitutes impermissible vouching. Molde says it does. The court of appeals agreed in a recent case where it held that expert testimony impermissibly vouched for the victim's credibility when two experts testified that 99.2% and 99.33% of victims are truthful. *State v. Mader*, 2023 WI App 35, ¶¶38–39, 408 Wis. 2d 632, 993 N.W.2d 761. It reasoned in part that those percentages amounted to near-mathematical certainty “that false reporting simply does not occur.” *Id.*, ¶39. This violated *Haseltine*, the court of appeals ruled, because the jury would inevitably understand this testimony as a statement that the victim was telling the truth. *Id.*

¶20 Applying this holding (as it was bound to do), the court of appeals in this case held that Dr. Swenson's testimony that false reports in these circumstances happen around 1% of the time—meaning 99% of child sexual assault reports are true—violated *Haseltine*. We see it differently.

¶21 Statistical evidence alone is precisely the kind of generalized evidence that might assist the jury, not usurp its role. It does not matter that typical behavior helps one side or another. Statistical evidence by itself does not tell the jury which category—truthful or untruthful—a particular witness belongs to.⁵ The jury still must assess the credibility of the statistical evidence and that of the expert, and then weigh that along with the other evidence in the case. The *Haseltine* rule is not violated

⁵ Courts around the country have both agreed and disagreed with our conclusion. Compare, e.g., *Alvarez-Madrugal v. State*, 71 N.E.3d 887, 892 (Ind. Ct. App. 2017) (finding that an expert testifying “that less than two to three children out of a thousand are making up claims” is not impermissible vouching), and *State v. Harrison*, 340 P.3d 780 (Or. App. 2014) (finding it was not plain error to admit testimony that 96–98% of victim accusations are true), with *Snowden v. Singletary*, 135 F.3d 732, 737, 739 (11th Cir. 1998) (99.5% is impermissible), and *Powell v. State*, 527 A.2d 276, 279 (Del. 1987) (99% is impermissible).

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simply because generalized or typical evidence strongly suggests a complainant is telling the truth. A *Haseltine* violation requires the “extra step” of the expert actually opining on the truthfulness of the complainant. *Maday*, 374 Wis. 2d 164, ¶39.

¶22 The contention that only some statistical evidence constitutes impermissible vouching—namely, where the percentage of false reporting approaches mathematical certainty—further demonstrates the weakness of the argument. Suppose evidence in a particular category of cases shows a very high rate of false reporting. Should the defendant be prohibited from presenting this generalized evidence simply because it suggests the complainant may not be telling the truth? Few courts would entertain such an argument. If that is the case, why should relevant and sufficiently reliable evidence be excluded when it shows a very low rate of false reporting? If studies show that false reports occur 50% of the time on the one hand, or 1% of the time on the other, we fail to see why the fact-finder should hear evidence of the former, but not the latter. In both cases, the evidence would tend to assist the jury in assessing the credibility of witnesses. Generalized statistical evidence—whether it is favorable to one side or the other—does not by itself constitute vouching for the truthfulness of a particular witness.

¶23 We stress that our conclusion does not mean all such evidence should be admitted or is impervious to attack. The circuit court still must determine such evidence is admissible—including that the expert is qualified and that her conclusions are “the product of reliable principles and methods” that have been applied “reliably to the facts of the case.” WIS. STAT. § 907.02(1). Expert testimony is also subject to other normal evidentiary rules such as the exclusion of evidence that, although otherwise admissible, raises too great a danger of unfair prejudice. *See* WIS. STAT. § 904.03. Molde did not challenge the admissibility of Dr. Swenson’s testimony on these grounds, nor does he raise any similar challenge here. In addition, defendants can always challenge the accuracy of statistical evidence and otherwise attack the credibility of expert witnesses through cross-examination, competing experts, and other means. The adversarial process is designed to assist the trier of fact. We are not persuaded that statistical evidence which strongly supports a complainant’s story necessarily interferes with the fact-finder’s prerogative to determine that witness’s credibility.

¶24 In short, statistical evidence alone—even evidence that demonstrates false reports are extremely rare—does not violate *Haseltine*’s

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anti-vouching rule. To the extent that *Mader* and other court of appeals cases hold to the contrary, they are overruled.

B. APPLICATION

¶25 In this case, we conclude that Dr. Swenson’s statistical testimony did not cross the line into impermissible vouching. Dr. Swenson testified that “false disclosures are extraordinarily rare, like in the one percent of all disclosures are false disclosures.” Dr. Swenson’s answer to the jury question did nothing more than tell the jury that false disclosures are, statistically speaking, uncommon. She did not directly or indirectly comment on the veracity of Lauren’s allegations against her father. Dr. Swenson never indicated that she thought Lauren was telling the truth. The juror’s question was statistical in nature: “[H]ow frequent is it for children to make up a story of sexual abuse?” Dr. Swenson answered the juror’s question directly and did not take that extra step of applying it to Lauren’s testimony.

¶26 Molde contends that Dr. Swenson’s supervision of the forensic interview transformed her testimony into implicit vouching. The jury, Molde argues, would have understood Dr. Swenson’s answer as a personal or particularized endorsement of Lauren’s credibility. But the record does not reflect what this supervision entailed; we have no way of knowing how closely Dr. Swenson got to know Lauren—if at all. We do not believe that Dr. Swenson’s supervisory role automatically transforms her answer to the juror’s question about false reporting into an opinion that Lauren herself was telling the truth.

¶27 Molde’s core legal claim in this case is that he received ineffective assistance of counsel when his lawyer did not raise a *Haseltine* objection to the juror’s questions. Ineffective assistance requires that Molde prove he was prejudiced as a result of his counsel’s constitutionally deficient performance. *State v. Nietzhold*, 2023 WI 22, ¶18, 406 Wis. 2d 349, 986 N.W.2d 795. Because Dr. Swenson offered permissible statistical testimony instead of impermissible vouching, we conclude Molde’s counsel had no duty to object to this admissible testimony. Accordingly, his counsel was not deficient for failing to raise a *Haseltine* objection, and Molde’s ineffective assistance of counsel claim fails.⁶

⁶ See *Strickland v. Washington*, 466 U.S. 668, 697 (1984) (“[T]here is no reason for a court deciding an ineffective assistance claim to approach the

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III. CONCLUSION

¶28 The question in this case is whether Dr. Swenson violated the *Haseltine* rule when—in response to a question from a juror—she testified that around one percent of child sexual assault disclosures are false. We conclude she did not. We hold that statistical evidence alone about the prevalence of false reporting does not violate the *Haseltine* rule. Dr. Swenson did not, either in answering this question or otherwise, offer an opinion that Lauren was telling the truth. Molde contends that his trial counsel was constitutionally deficient for failing to object to this testimony as a violation of the rule against impermissible vouching. Because this was not a *Haseltine* violation, Molde’s counsel was not deficient for failing to raise an improper vouching objection. Therefore, Molde’s ineffective assistance of counsel claim does not succeed. The judgment of the court of appeals is reversed.

By the Court.—The decision of the court of appeals is reversed.

inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.”).

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JUSTICE KAROFSKY, concurring

JILL J. KAROFSKY, J., concurring.

¶29 I write separately to elevate the voice of Lauren,¹ the victim in this case whose courage and perseverance allowed her to overcome the “herculean task of reporting sexual abuse.”² Lauren’s father, Jobert Molde, sexually assaulted her when she was eight or nine years old. Lauren found her voice five years later, after a suicide attempt, when she reported the crime. Lauren found her voice again during her forensic interview when she relayed details of the assault. And at trial, in front of a jury of strangers, she found her voice yet again to testify about the abuse. Lauren managed to state, in open court, that after her father told her “to be his big girl for daddy,” he “had sex” with her by putting his penis in her vagina, which “hurt.” The jury believed her.

¶30 The court of appeals did not. The court of appeals overturned Molde’s conviction of first-degree sexual assault of a child, relying in large part on its determination that Lauren lacked credibility. The court reached this conclusion because “[t]he sexual assault allegation was not independently corroborated by other evidence; there was no physical evidence; there was only one sexual assault that occurred during a one-year period roughly four to five years prior to Lauren’s accusation; and some aspects of Lauren’s story changed over time.” *State v. Molde*, No. 2021AP1346, unpublished slip op., ¶40 (Wis. Ct. App. May 21, 2024).

¶31 These assertions are as disconcerting as they are misguided. They are predicated upon damaging and victim-blaming misperceptions. Disregarding a child victim’s testimony because of delayed reporting, small variations in her narrative, and most alarmingly, the total number of assaults she reported, defies what we know about how child sexual assault victims behave and report.

¶32 *First, delayed disclosure and a lack of corroborating evidence are the norms in child sexual assault cases.* The court of appeals deemed Lauren less credible because she reported the incident four or five years after

¹ To protect the privacy and dignity of the victim in this case, I refer to her using a pseudonym. *See also* Wis. Stat. § (Rule) 809.86 (2021–22).

² *State v. Hineman*, 2023 WI 1, ¶62, 405 Wis. 2d 233, 983 N.W.2d 652 (Karofsky, J., concurring).

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Molde assaulted her, and there was no corroborating evidence. Delayed disclosures are not uncommon. In fact, “70–75% of [child sexual abuse victims] wait[] five years or more before disclosing the abuse.”³ Studies show that only about 30% of those who have experienced child sexual abuse disclosed it during childhood.⁴ There are many reasons for these delays, including “an inability to recognize or articulate sexual abuse, an uncertainty about which adults are safe, a lack of opportunities to disclose, fear of not being believed, trauma . . . , and institutional power dynamics.” *State v. Hineman*, 2023 WI 1, ¶63, 405 Wis. 2d 233, 983 N.W.2d 652 (Karofsky, J., concurring).

¶33 Because delayed disclosure is the norm, corroborating evidence rarely exists. Indeed, child sexual assault cases are challenging to prosecute due to a “lack [of] concrete physical or medical evidence.”⁵ The dearth of corroborating evidence has a number of additional causes besides delayed disclosure. Child sexual assault victims often do not evidence physical injuries because children rarely resist their abusers. Moreover, child sexual assaults often lack witnesses because “people simply do not molest children in front of others,” and because abusers are more likely to be relatives or acquaintances of the child—people who have more opportunities to be alone with the child.⁶ Regardless of the cause, one study showed that “corroborating evidence was only available in 34%

³ Delphine Collin-Vézina et al., *A Preliminary Mapping of Individual, Relational, and Social Factors That Impede Disclosure of Childhood Sexual Abuse*, 43 CHILD ABUSE & NEGLECT 123, 124 (2015).

⁴ Eva Jonzon et al., *Disclosure, Reactions, and Social Support: Findings From a Sample of Adult Victims of Child Sexual Abuse*, 9 CHILD MALTREATMENT 190, 194 (2004); see also Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?*, 11 PSYCH. PUB. POL’Y & L. 194, 196 (2005).

⁵ Marina Moriarty, *Jury Instructions, Not Problematic Expert Testimony, in Child Sexual Assault Cases*, 11 SUFFOLK J. TRIAL & APP. ADVOC. 181, 187–88 (2006).

⁶ Judy Yun, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1749–50 (1983).

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of the cases.”⁷ Another showed that in “85–95% of cases . . . there is no physical evidence of penetration.”⁸

¶34 At Molde’s trial, Dr. Swenson testified in detail about these norms. Dr. Swenson detailed common behaviors of child sexual assault victims, including the prevalence of delayed disclosures and the related lack of corroborating evidence. She explained that delayed disclosure is “the rule and not the exception.” Dr. Swenson further stated that about 90 percent of child sexual assault victims delay reporting, and in 97 percent of sexual abuse cases, there is no finding of penetration during physical examination. Even so, the court of appeals did not seem to account for that evidence.

¶35 *Second, victims often cannot perfectly recall and recite their trauma.* The court of appeals deemed Lauren less credible for omitting a detail from her forensic interview, changing the timing of a conversation with her younger sister, and being unsure whether Molde was clothed when she first entered his bedroom, even though the rest of her account remained notably consistent. These minor inconsistencies do not necessarily suggest a credibility problem. Rather, they illustrate how most victims report after enduring a traumatic event.

¶36 Child sexual assault victims face numerous challenges to reporting their assaults consistently across multiple recitations. The reason for inconsistency is not dishonesty. Rather, trauma reshapes the wiring of the brain, which can impact memory. For that reason, “[v]ictims can . . . find it difficult to provide a neat chronological account” of their assault.”⁹ Instead, victims’ narratives may be “vague, inconsistent, and

⁷ Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS SOC’Y RSCH. CHILD DEV. 5, 19 (1992).

⁸ Madeline L. Porter, *From the Stand to on Tape: Why Recorded Child Victim Testimony Is Safer, More Effective, & Fairer*, 22 U.C. DAVIS J. JUV. L. & POL’Y 37, 42–44 (2018).

⁹ DEBORAH TUEKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS 75 (2021).

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missing peripheral details; and missing time sequencing of details”¹⁰ Said differently, Lauren’s inability to recite the details of her assault with complete consistency is concordant with someone who has experienced trauma. Small variations in her account are not a reasonable credibility measure. In expecting Lauren to meet an impossibly high memory recall standard, the court of appeals perpetuated the misperception that victims’ stories must be precise and consistent, “which presents [an] unfair barrier[] to belief.”¹¹

¶37 *Finally, the number of assaults reported has absolutely nothing to do with credibility.* The court declared that Lauren lacked credibility because she suffered only one assault.

¶38 It is difficult to even begin to respond to such a baseless statement, especially because, as noted above, most sexual assault victims underreport, or never report, their abuse. It would be completely unreasonable to require robbery victims to suffer two or more robberies before believing them. Why place such a burden on child sexual assault victims? And even if such a credibility threshold exists—to be clear it should not—is there a magic number of sexual assaults that a child must endure in order to be credible? Is it two or three or ten? One can only imagine the compounded chilling effect this elevated credibility standard would have on the already delayed and limited reporting of child sexual assault.

¶39 Lauren defied the odds in reporting her abuse. The court of appeals discredited her for reasons that either fail to account for commonplace behaviors of child sexual assault victims or ignore logic and common sense. Child sexual assault victims must overcome near-insurmountable barriers to reporting abuse and achieving justice. When these brave children speak, courts must ensure they are heard.

¹⁰ Jim Hopper, *Important Things To Get Right About the “Neurobiology of Trauma” - Part 1: Benefits of Understanding the Science*, END VIOLENCE AGAINST WOMEN INT’L, Sept. 2020, at 7.

¹¹ TUERKHEIMER, *supra* note 9, at 75; *see also* Gail S. Goodman & Vicki S. Elgeson, *Child Sexual Assault: Children’s Memory and the Law*, 40 U. MIA. L. REV. 181, 190–91 (1985).

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¶40 Lauren, you bravely used your voice. I hear you. I believe you.

I respectfully concur.

2025 Solo & Small Firm Conference

25 Things Every Lawyer Should Know

5 Things to Know About Trusts

Friday, October 17, 2025

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* If you intend to practice in the area of trust and estate planning, I cannot urge you strongly enough to purchase **Eckhardt's Workbook for Wisconsin Estate Planners** published by the Wisconsin Bar Association: <https://marketplace.wisbar.org/store/ak0047-eckhardt%27s-workbook-for-wisconsin-estate-planners/c-25/p-17930> The Workbook contains sample forms and clauses and is a must-have for any estate planner. While I recognize that the Bar Association has asked me to be a presenter here today, I would plug it anyway. Our firm has had a copy of the Workbook since it was first published, and even after practicing for over 27 years, I still consult it regularly.

What is a Trust? A trust is essentially a contract that creates a fiduciary relationship between the Settlor (sometimes referred to as the trustor in other states), or the creator of the trust, and the trustee. The Settlor agrees to create the trust for the benefit of designated beneficiaries and contributes assets to the trust. In exchange, the trustee agrees to manage those assets for the beneficiaries in accordance with the trust's terms.

1. There are Tons of Different Types of Trusts That are Created to Achieve Many Different Goals.

a. Testamentary Trusts vs. Living Trusts.

(1) **Testamentary Trusts.** A testamentary trust is embedded within a person's Last Will and *Testament* and is only created upon the person's death. Here, the settlor is referred to as the Testator.

(2) **Living Trusts.** Unlike a testamentary trust that is only established after death, a living trust, sometimes referred to as an *inter vivos* trust, is established during the settlor's lifetime.

b. Revocable vs. Irrevocable Trusts.

(1) **Revocable Trusts.** As the name implies, a revocable trust can be completely revoked by the settlor, or it can be otherwise modified or amended.

(2) **Irrevocable Trusts.** An irrevocable trust cannot be revoked or modified by the settlor or anyone else.

- A living trust can be set up to be either revocable or irrevocable
- Testamentary trusts are always irrevocable, because they are only created after death
- A revocable trust becomes irrevocable after the settlor dies. Even though the trust becomes irrevocable, if its name says 'Revocable Trust,' the name does not change to 'Irrevocable.'

c. Grantor vs. Non-Grantor Trusts.

(1) **Grantor Trusts.** A grantor trust is one where the trust settlor retains certain powers or interests. These can include the power to revoke or amend the trust, to direct investments, or to retain a right to the income and/or principal of the trust. The key characteristic is that the grantor maintains some degree of control over the trust.

The income generated by a grantor trust is taxed to the grantor, not the trust. This is because the IRS considers the grantor to still have ownership rights over the trust's assets due to the retained control or benefits. This allows for simplified tax reporting, since the trust's income is reported on the grantor's personal tax return.

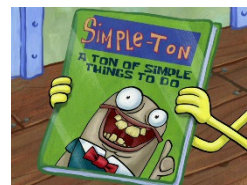
(2) **Non-Grantor Trusts.** A non-grantor trust, in contrast, is one where the settlor relinquishes all control over and benefits from the assets in the trust. Once this trust is established, it is considered a separate legal entity, with its operations and management entirely independent of the settlor.

A non-grantor trust is treated as a separate taxable entity. The trust must obtain its own tax identification number and file its own tax returns. The trust pays taxes on its income at the trust tax rates, which are compressed compared to individual tax rates (a trust hits the top tax bracket of 37% after earning just \$15,650 of income, while an individual must earn \$626,350 of income before being taxed at this rate).

d. Simple vs. Complex Trusts.

(1) **Simple Trust.** A simple trust is a type of non-grantor trust. To be classified as a simple trust, it must meet certain criteria set by the IRS, including:

- It must distribute income earned on trust assets to beneficiaries annually
- It must make no principal distributions
- It must make no distributions to charity



With this type of trust, the trust income is considered taxable to the beneficiaries, even if they do not withdraw income from the trust. The trust reports income to the IRS annually, and it is allowed to take a deduction for any amounts distributed to beneficiaries. The trust itself is required to pay capital gains tax on earnings.

(2) Complex Trusts. A complex trust must also meet certain IRS criteria. For a trust to be complex, it must do at least one of the following each year:

- Refrain from distributing all of its income to trust beneficiaries
- Distribute some or all of the principal assets in the trust to beneficiaries
- Make distributions to charitable organizations

There are also some other rules to keep in mind with complex trusts. First, no principal can be distributed unless all income has been distributed for the year first. Ordinary income takes first place in the distribution line, ahead of dividends, and dividends must be distributed ahead of capital gains. Once those conditions are met, then the principal can be distributed. Finally, all distributions must be equitable for all trust beneficiaries who are receiving them.

e. Inclusion vs. Exclusion Trusts. In the context of estate planning and trusts, “inclusion” and “exclusion” refer to how assets held in a trust are treated for estate tax purposes.

(1) Inclusion Trusts. Assets held in an inclusion trust are included in the grantor’s taxable estate upon their death. They are typically revocable trusts, where the settlor maintains control over the assets during their lifetime, generally resulting in inclusion in the estate.

(2) Exclusion Trust. Assets held in an exclusion trust are excluded from the settlor’s taxable estate upon their death. They are always irrevocable trusts, where the grantor relinquishes control over the assets to exclude them from the estate.

f. Conduit vs. Accumulation Trusts. Conduit and accumulation trusts are estate planning tools designed to hold retirement accounts.

(1) Conduit Trusts. A conduit trust requires the trustee to distribute all withdrawals, including required minimum distributions (RMDs), from the retirement account to the beneficiary in the same year. The distributions are taxed at the beneficiary’s individual income tax rate, which is generally lower than the trust’s income tax rate. However, the beneficiary has immediate access to the funds and can spend them as they wish, which may or may not align with the original account owner’s intentions.

(2) Accumulation Trusts. An accumulation trust allows the trustee to either distribute the withdrawals to the beneficiary or retain them within the trust. If the trust retains the funds, they may be subject to the higher income tax rates at the trust’s level. However, the trustee has more control over when and how the funds are distributed to the beneficiary, allowing for potential future needs and asset protection.

2. Trusts Can Be Established for a Variety of Reasons. People create trusts to accomplish many different objectives.

a. To Avoid Probate. Probate is the court process where the court oversees the distribution of a person's assets upon their passing. Probate is needed in Wisconsin when someone passes, having assets in their name that are 'frozen,' meaning the asset has no joint owner and names no beneficiary, and the cumulative value of those assets exceeds \$50,000.

(1) Revocable Trusts. A revocable trust is the tool that is used most often when a client wants to avoid probate. Transferring an asset into a trust during lifetime, or naming a trust as a beneficiary of an asset, ensures that the asset will not be in the person's name when they die. Hence, it will not be frozen and will avoid probate.

(2) Totten Trusts. A Totten trust is a type of informal, revocable trust established at a financial institution, such as a bank or credit union. The account holder names a beneficiary who will inherit the account balance upon the account holder's death. It is a simple way to transfer bank account assets without going through the probate process.

The account holder is considered both the trust's settlor and trustee. The grantor retains full control of the account during their lifetime. The account holder can change the beneficiary, withdraw all the funds in the account, or close the account at any time before their death.

In Wisconsin, Totten trusts are commonly referred to as Payable on Death (POD) accounts.

Cocktail Party #1: If someone approaches you at a party and asks about a Payable on Death (POD) account, you can say that they must be referring to a "Totten trust," which originated from the 1904 New York Court of Appeals case, *In re Totten*. This case established the legality of a specific type of bank account where a person could deposit funds as a trustee for a named beneficiary, with the beneficiary gaining access to the funds only upon the depositor's death. This arrangement was initially termed a "tentative trust" by the court to differentiate it from traditional trusts requiring more formal procedures but is now commonly referred to as a Payable on Death (POD) account.



b. To Protect Spendthrifts. A trust is a wonderful tool to have 'strings attach' to an inheritance. For example, my wife and I have a trust that provides that, if we pass, my sister will take over as trustee and oversee the assets in the trust for our children, who will become the beneficiaries. As trustee, my sister can use her discretion to distribute funds to our children for their Health, Education, Maintenance and Support (oftentimes referred to as a 'HEMS' standard). Then, when our kids hit predetermined ages, the funds in the trust are turned over to them (e.g., 1/3 at age 25, 1/2 at age 30, and the balance at age 35). This prevents the children from receiving their inheritance at too young an age and being financially exploited or just blowing through the money.

c. To Protect Special Needs Beneficiaries. A special needs trust (SNT) is designed to hold assets for the benefit of a disabled beneficiary who is typically receiving some type of needs-based government benefits, such as Supplemental Security Income (SSI) and/or Medicaid.

Generally, if a disabled individual has resources available to them to meet their basic human needs, the government believes they do not need any further assistance. Accordingly, if a special needs person is the beneficiary of a HEMS trust, they will not qualify for needs-based government assistance. So, a SNT is designed to provide for these beneficiaries without jeopardizing their eligibility. Funds in the trust can be used for basically anything other than housing expenses.

Cocktail Party Nugget #2: SNTs can hold the assets of the individual (a first-party SNT) or assets of others to provide for the individual, such as parents or grandparents (a third-party SNT). First-party and third-party SNTs are the same except for the dispositive provisions upon the beneficiary's death: any funds remaining in a first-party trust must be paid back to the State (known as a "payback provision"), while the settlor of a third-party trust can dictate where any remaining funds are to be distributed.



Cocktail Party Nugget #3: First-party or third-party SNTs can be 'private,' or drafted by an attorney on behalf of a client who chooses a trustee to oversee the funds, which is often a family member or a corporate trustee. They can also be 'pooled' or 'community' SNTs, which are managed by a non-profit organization that pools the assets of multiple beneficiaries. In Wisconsin, we have two pooled trusts: Wispact and Life Navigators.

d. To Maximize the Use of Each Spouse's Estate Tax Exemption. At death, each person can leave their heirs up to \$13,990,000 before estate, or death, taxes would apply. There is no estate tax, however, between spouses.

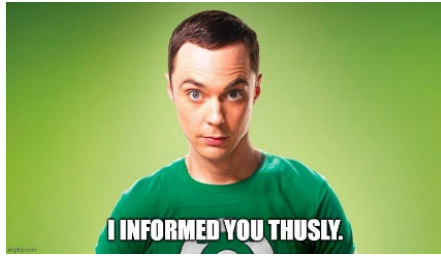
For example, if my wife and I had a combined net worth of \$29 million and we had a "sweetheart" plan (if I die, I leave everything to her and vice versa) and I died, there would be no estate tax consequences for my wife. However, upon her passing, she could only leave \$13,990,000 to our kids tax-free. Therefore, approximately \$15 million would be subject to the estate tax of 40%. By leaving everything to my wife, I wasted my ability to transfer \$13.99 million to our kids tax-free.

So, we could create a joint revocable trust that provided that, upon one of our deaths, the trust is split into two separate trusts: the "survivor's trust" (sometimes referred to as the A Trust), and the "family trust" (sometimes referred to as the Credit Shelter Trust or B Trust).

If I died, we would transfer the maximum amount of the estate tax exemption, or \$13,990,000, into the family trust. The funds in this trust are considered "mine" by the IRS, but they are parked there to take care of my wife for the rest of her lifetime. Once funded, this trust is irrevocable.

The remaining \$15.1 million would be transferred to the survivor's trust. The funds in this trust are considered my wife's. She is entitled to any income or principal of the trust, and she can amend it at any time.

Then, if my wife passes away in 2026, when the estate tax exemption is set to increase to \$15 million, the funds in the family trust would transfer to our kids tax-free, as they came from me. The \$15.1 million in the survivor's trust would transfer to our kids as well, but only \$100,000 would be taxed.



Cocktail Party Nugget #4. Since the introduction of estate tax portability as part of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, fewer A/B trust are used. **Portability** allows a surviving spouse to utilize the deceased spouse's unused federal estate and gift tax exemption by making an election on federal estate tax return (Form 706). This means the surviving spouse can potentially double the amount they can pass to heirs tax-free.

Using my above example, upon my death, our trust could provide that all of the assets in it would go to my wife. She would then file a 706 on behalf of my estate to 'port' my \$13.99 million exemption to her. Now, when she passes in 2026, she gets my \$13.99 million added to her \$15 million. We can, again, drastically reduce any death taxes without having to go through the exercise of dividing assets between two trusts and filing a tax return each year for the family trust.

e. To Prevent a Surviving Spouse from 'Changing the Plan.' Some couples worry that if one of them passes, the survivor will be bamboozled by a young 'gold-digger' who convinces the survivor to amend the trust and leave everything to them (e.g. Anna Nicole Smith).

One method to prevent this from happening is to make the couple's joint trust irrevocable upon the death of the first spouse. However, this does not prevent the survivor from simply spending the money on the gold-digger during their lifetime.

Alternatively, the couple could look at a Qualified Terminable Interest Property (QTIP) trust, sometimes called a Marital trust), which is a type of trust that allows a settlor to provide for their surviving spouse while still controlling where the remaining assets go after the surviving spouse's death. It ensures that the surviving spouse receives income and, if necessary, principal from the trust during their lifetime, but the assets ultimately pass to beneficiaries chosen by the settlor.

QTIP trusts are often used when:



- A couple wants to maximize each spouse's ability to transfer assets to their children tax-free, but are worried that simply using portability would not prevent the survivor from freely spending or redirecting the funds in the trust; or
- A couple is in a second marriage and wants to provide for one another at death but also ensure the survivor does not change things to leave all the assets strictly to their own kids.

f. To Further Avoid Estate Taxes. Sometimes couples will have assets that exceed the amount of their combined estate tax exemptions (\$28+ million). In these cases, using family trusts and survivors' trusts will help reduce, but not prevent, estate taxes. There is a myriad of trust types that can be used to help avoid these taxes, including:

(1) Intentionally Defective Grantor Trusts. An Intentionally Defective Grantor Trust (IDGT) is a type of irrevocable trust designed to remove assets from a grantor's estate for estate tax purposes while maintaining certain income tax benefits for the grantor. It's a powerful estate planning tool that allows individuals to minimize estate taxes by transferring appreciating assets to the trust, where future growth occurs outside of their taxable estate. The "defective" aspect refers to the trust being treated as a grantor trust for income tax purposes, meaning the grantor continues to pay income taxes on the trust's earnings.

(2) Spousal Lifetime Access Trusts. A Spousal Lifetime Access Trust (SLAT) is an irrevocable trust that allows one spouse to transfer assets to a trust for the benefit of the other spouse (the beneficiary spouse), and potentially other beneficiaries like children, while still providing the grantor spouse with some indirect access to the assets. This allows the grantor spouse to reduce their taxable estate while still potentially benefiting from the assets through their spouse.

(3) Grantor Retained Annuity Trusts. A Grantor Retained Annuity Trust (GRAT) is a type of irrevocable trust used in estate planning to minimize gift and estate taxes when transferring wealth to beneficiaries. It allows the settlor to transfer assets into the GRAT and receive a fixed or increasing stream of annuity payments for a set period. At the end of that period, any remaining assets in the trust pass to the designated beneficiaries, potentially with little or no gift tax implications.

(4) Grantor Retained Income Trusts. A Grantor Retained Income Trust (GRIT) allows the settlor to transfer assets to it while still being able to receive net income from trust assets. The grantor maintains this right for a fixed number of years.



When assets are transferred to a GRIT, they are valued at a discount. This discount depends on the number of years for which the grantor plans to draw income from the trust. If the grantor outlives the initial term over which they receive income from the trust, any remaining assets pass on to the beneficiaries at a reduced gift tax value. The principal value of the assets included in the trust are excluded from the grantor's estate for estate and gift tax purposes.

Caution #1: The key thing to know about setting up a GRIT for the purpose of minimizing estate taxes is that the grantor must outlive the initial term. If the grantor dies during the period in which they are still receiving income from the trust assets, then the assets are still included in the grantor's taxable estate and no estate or gift tax benefit would be had.

Caution #2: Unlike other trusts, there are specific rules on who cannot be a beneficiary of a GRIT, including spouses, parents or spouse's parents, children or spouse's children, or siblings or spouse's siblings (or their spouses). Aunts, uncles, nieces, nephews and other more distant relatives can be named as beneficiaries of a GRIT, however.



(5) Qualified Personal Residence Trusts. A Qualified Personal Residence Trust (QPRT) is an irrevocable trust designed to help reduce estate taxes when transferring a personal residence to beneficiaries. It involves transferring a home into a trust while retaining the right to live in it for a specified period. If the grantor survives the trust term, the home passes to the beneficiaries with reduced tax implications.

(6) Irrevocable Life Insurance Trusts. An Irrevocable Life Insurance Trust (ILIT) owns and controls a life insurance policy, typically insuring the life of the settlor. The main purpose of an ILIT is to remove the life insurance policy and its death benefit from the grantor's taxable estate, potentially reducing or eliminating estate taxes, and/or providing cash to pay any resulting estate taxes.

(7) **Generation-Skipping Trusts.** A generation-skipping trust (GST) allows a settlor to transfer wealth to individuals who are at least two generations younger, often grandchildren or great-grandchildren. The primary purpose is to minimize estate taxes that would typically apply if the wealth were passed down through each generation.

g. To Further Avoid Estate Taxes and Benefit Charity.

(1) **Charitable Remainder Trusts.** A Charitable Remainder Trust (CRT) is an irrevocable trust designed to benefit both a charity and the donor (or other designated beneficiaries). It involves donating assets to the trust, receiving income from the trust for a set period (often a lifetime), and then having the remaining assets pass to a chosen charity according to Fidelity Charitable. This structure allows donors to make a charitable contribution while also potentially reducing their tax burden and generating income. There are two main types of CRTs:

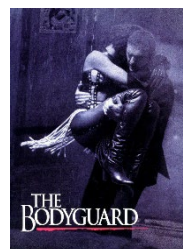
(A) **Charitable Remainder Annuity Trusts.** A Charitable Remainder Annuity Trust (CRAT) is an irrevocable CRT that provides a fixed income stream to a designated beneficiary (which can be the donor or another individual) for a specified period (usually a lifetime or a term of years), after which the remaining assets in the trust are transferred to a charity. It's a split-interest trust, meaning it benefits both non-charitable and charitable beneficiaries.

(B) **Charitable Remainder Unitrusts.** A Charitable Remainder Unitrust (CRUT) is a type of irrevocable trust designed to provide income to one or more beneficiaries, with the remainder of the trust assets eventually going to a designated charity. It is a way to donate assets to a charity while still receiving income from those assets for a period of time, often for life.

(2) **Charitable Lead Trusts.** A Charitable Lead Trust (CLT) is a trust designed to benefit both a charity and non-charitable beneficiaries, like family members. It is structured so that a charity receives income payments for a set period (the "lead interest"), and then the remaining assets are distributed to non-charitable beneficiaries, often family members.

h. To Protect Assets from Creditors. An Asset Protection Trust (APT) involves a settlor transferring assets to an irrevocable trust to be managed for the benefit of designated beneficiaries, shielding them from creditors and potential lawsuits. It is a way to safeguard wealth by removing ownership from the individual and placing it under the control of the trust.

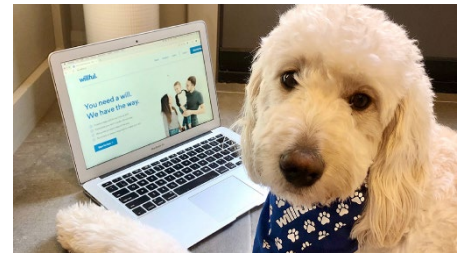
They can be established in the U.S., known as Domestic Asset Protection Trusts (DAPT). Popular DAPT states are Nevada, Delaware and Alaska. They can also be established in a foreign jurisdiction, known as Foreign or Offshore APTs, such as the Cayman Islands or Cook Islands. Foreign trusts offer stronger protection but come with much higher costs, risk and complexities.



CAUTIONARY NOTE: Asset Protection Trusts are the epitome of 'I Can't Have My Cake and Eat It, Too.' The assets are protected from creditors because they aren't 'mine;' however, because the assets are not mine, I cannot access them and use them how I want.

i. To Minimize Estate Taxes AND Protect Assets from Creditors. A Dynasty Trust is a type of irrevocable trust designed to pass wealth and assets to multiple generations of a family while minimizing estate, gift, and generation-skipping transfer (GST) taxes. It allows the settlor to remove assets from their taxable estate, potentially avoiding significant tax burdens for future beneficiaries. Dynasty trusts can last for extended periods, potentially for multiple generations, allowing for long-term wealth management and asset protection. Dynasty Trusts are typically only set up for clients having tens and tens of millions of dollars.

j. To Protect Pets. A Pet Trust allows pet owners to provide for the care of their pets after the owner's death or incapacitation. It allows owners to leave money and specific instructions for the care of their animals, ensuring they are well-cared for even after the owner is no longer able to do so.



k. To Minimize Income Taxes. A Stand-Alone Retirement Trust (SRT) is specifically designed to be the beneficiary of an IRA, 401(k) or other retirement account upon the settlor's death. The sole purpose of an SRT is to receive and manage retirement funds, as they provide beneficiaries the ability to stretch IRA distributions over a longer window of time, as opposed to being cashed in at death, saving lots on taxes. They can either be conduit trusts or accumulation trusts. Accumulation trusts also can provide creditor protection.

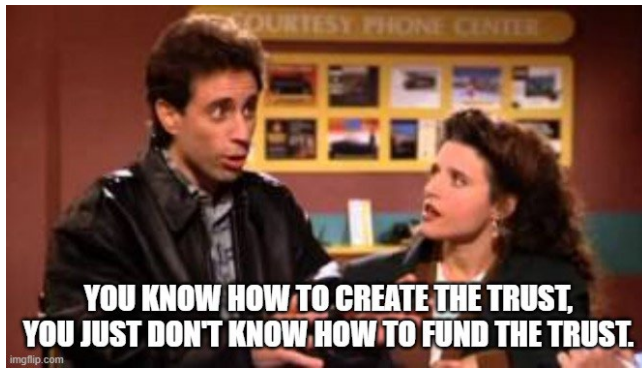
l. To Plan for Business Succession. Trusts can be used for business succession planning to ensure ownership and management seamlessly shift to the key individuals when a founder steps down because of retirement, sale, incapacity or death. Business succession trusts typically include various provisions, including:

- Identifying future leadership to run the business once the current owners move on
- Defining ownership structure for who will inherit shares or units of the company
- Managing potential disputes so family members or other stakeholders can avoid conflicts
- Financial continuity to ensure there is enough cash flow or insurance to cover expenses

m. To Prevent Conflicts of Interest. A Blind Trust is a legal arrangement where assets or investments are placed under the control of a trustee, and the settlor has no knowledge or control over the specific assets or how they are managed. This separation of knowledge and control helps avoid conflicts of interest, especially for individuals in high-profile or sensitive positions, like politicians or corporate executives, such as President Trump.

3. Trusts, by Themselves, Do Not Avoid Probate. As we previously discussed, probate is needed in Wisconsin when someone passes and has assets in their name that become 'frozen,' meaning the asset has no joint owner and names no beneficiary.

A trust can be a helpful tool to avoid probate, as assets in a trust are not in the person's name when they die. Hence, it will not be frozen and will avoid probate. **HOWEVER**, for this to be effective, the asset must either be retitled into the trust during the settlor's lifetime or designate the trust as a beneficiary. The trust, by itself, does not avoid probate – it must be **"funded."**



4. Trusts Only Control What is in Them. If a client creates a QTIP trust for the benefit of a spouse, but has a life insurance policy that designates their parents as beneficiaries and dies, the proceeds get paid to the parents – the trust has no control over assets with named beneficiaries. Likewise, if a client has an asset in their name (not the trust) and the asset has no named beneficiary when the client dies, the client’s Will dictates where that asset would go. Or, in the event the client died without a Will, then Wisconsin’s rules of intestacy dictate where the asset goes.

Example: Let’s say I bought hunting land, and it is registered in my name alone. I have a Will in place that leaves all my assets to my children when I die. Then, let’s say I get married, and I decide to create a QTIP trust for my wife. If I die without updating my Will, the hunting land will pass to my children (and require probate).

5. While Trusts Can Avoid Probate, Administering Them is Not Necessarily Faster. A typical probate can take up to a year. It usually takes a few weeks to have a personal representative appointed. Once appointed, a PR has to publish a notice to creditors, which must appear in the local newspaper once a week for three consecutive weeks. Then, creditors have a three-month window to file a claim against the estate.

A PR has six months to prepare and file an estate inventory, which is a list of the decedent’s assets and their corresponding values. The PR must file any tax returns on behalf of the estate and pay any resulting taxes. Next, the PR must then prepare a final accounting, showing what the estate assets sold for, what bills were paid and what remains to be distributed. Once approved, the PR then distributes the assets to the estate’s beneficiaries and collects receipts from them.

When the settlor of a trust dies, the successor trustee must go through the same process as a personal representative going through probate by having to provide notice to creditors. Further, the trustee must notify the trust’s qualified beneficiaries of the trust’s existence, the settlor’s identity, and the trustee’s contact information, within a reasonable time after accepting the trusteeship.

Sometimes, however, a client will establish a trust that does not name one or all of the client’s heirs-at-law, or the interested parties for a probate, as trust beneficiaries. If the trustee notifies these people of the trust and details about their rights, they then have four months from the date of receiving the notice to object to it. If the trustee does not provide notice to the interested parties, they have **one year** from the settlor’s death to contest it.

6. Other Cocktail Party Trust Nuggets:

- Granting general **Powers of Appointment** to trust beneficiaries may cause the assets in the trust to be included in the beneficiaries' taxable estates.
- **Nonjudicial Settlement Agreements** can be used to modify an otherwise irrevocable trust.
- **Trust Protectors** can be used to modify potentially problematic administrative provisions in an otherwise irrevocable trust.
- The **Public Trust Doctrine** is a legal principle asserting that certain natural resources, like navigable waters and shorelines, are held by the government in trust for the benefit of the public, ensuring their use and enjoyment. The government has a duty to manage these resources responsibly, prioritizing public access and sustainable use. Historically, it focused on navigation, commerce, and fishing, but has expanded to include recreation and environmental protection. It has nothing to do with estate planning but is cool.
- In 1861, Pennsylvania clergyman M.R. Watkinson wrote to the Secretary of the Treasury, Salmon P. Chase, suggesting the inclusion of the phrase "**In God We Trust**" on U.S. coins. This was during the Civil War, a time of national division and religious fervor, and the idea resonated with many Americans. The phrase first appeared on the two-cent coin in 1864. The phrase became the official national motto of the U.S. in 1956 during the Cold War, amidst concerns about the Soviet Union's atheistic ideology. The phrase was added to all paper currency starting in 1957, starting with the one-dollar silver certificate. This also has nothing to do with estate planning but is interesting.



FINAL Cocktail Party Tip: If someone approaches you claiming to have an easy question about trusts, they're probably lying!

If you intend to do any trust or estate planning, please buy
Eckhardt's Workbook for Wisconsin Estate Planners!



WISCONSIN STATUTES

HOME INSPECTORS

440.97 Definitions. In this subchapter:

- (1) "Client" means a person who contracts with a home inspector for a home inspection.
- (2) "Compensation" means direct or indirect payment, including the expectation of payment whether or not actually received.
- (2m) "Defect" means a condition of any component of an improvement that a home inspector determines, on the basis of the home inspector's judgment on the day of an inspection, would significantly impair the health or safety of occupants of a property or that, if not repaired, removed, or replaced, would significantly shorten or adversely affect the expected normal life of the component of the improvement.
- (3) "Dwelling unit" means a structure or that part of a structure that is used or intended to be used as a home, residence or sleeping place by one person or by 2 or more persons who are maintaining a common household, to the exclusion of all others.
- (4) "Home inspection" means the process by which a home inspector examines the observable systems and components of improvements to residential real property that are readily accessible.
- (5) "Home inspection report" means a written opinion of a home inspector concerning all of the following:
 - (a) The condition of the improvements to residential real property that contains not more than 4 dwelling units.
 - (b) The condition of mechanical and structural components of the improvements specified in par. (a).
- (6) "Home inspector" means an individual who, for compensation, conducts a home inspection.
- (7) "Technically exhaustive" means the extensive use of measurements, instruments, testing, calculations and other means to develop scientific or engineering findings, conclusions or recommendations.

History: [1997 a. 81](#); [2017 a. 338](#); [2021 a. 17](#).

440.971 Registry established. The department shall establish a registry of home inspectors.

History: [1997 a. 81](#).

440.9712 Registration required.

- (1) Except as provided in s. [440.9715](#), no individual may act as a home inspector, use the title "home inspector", use any title or description that implies that he or she is a home inspector or represent himself or herself to be a home inspector unless the individual is registered under this subchapter.
- (1m) No business entity may provide home inspection services unless each of the home inspectors employed by the business entity is registered under this subchapter.
- (2) No business entity may use, in connection with the name or signature of the business entity, the title "home inspectors" to describe the business entity's services, unless each of the home inspectors employed by the business entity is registered under this subchapter.

History: [1997 a. 81](#).

440.9715 Applicability. A registration is not required under this subchapter for any of the following:

- (1) An individual who conducts a home inspection while lawfully practicing within the scope of a license, permit or certificate granted to that individual by a state governmental agency.
- (2) An individual who constructs, repairs or maintains improvements to residential real property, if the individual conducts home inspections only as part of his or her business of constructing, repairing or maintaining improvements to real property and if the individual does not describe himself or herself as a registered home inspector or convey the impression that he or she is a registered home inspector.

- (3) An individual who conducts home inspections in the normal course of his or her employment as an employee of a federal, state or local governmental agency.

History: [1997 a. 81](#).

440.972 Registration of home inspectors.

- (1) The department shall register an individual under this subchapter if the individual does all of the following:
- (a) Submits an application for registration to the department on a form provided by the department.
 - (b) Pays the fee specified in s. [440.05 \(1\)](#).
 - (bg) Submits evidence satisfactory to the department that he or she has completed at least 40 hours of instruction approved by the department under s. [440.974 \(1\) \(ag\)](#).
 - (c) Submits evidence satisfactory to the department that he or she is not subject to a pending criminal charge, or has not been convicted of a felony, misdemeanor or other offense, the circumstances of which substantially relate to the practice of home inspection.
 - (d) Passes an examination under s. [440.973 \(1\)](#).
- (1m) The department shall register an individual under this subchapter if the individual is registered or licensed in good standing as a home inspector in another state, the individual complies with sub. [\(1\) \(a\)](#), [\(b\)](#), [\(c\)](#), and [\(d\)](#), and the other state has requirements that the department determines meet or exceed those required under sub. [\(1\)](#).
- (2) The renewal date for certificates granted under this section is specified under s. [440.08 \(2\) \(a\) 38g.](#), and the renewal fee for such certificates is determined by the department under s. [440.03 \(9\) \(a\)](#).

History: [1997 a. 81](#); [2007 a. 20](#); [2021 a. 17](#).

Cross-reference: See also ch. [SPS 131](#), Wis. adm. code.

440.973 Examinations.

- (1) No person may be registered under this subchapter unless he or she passes an examination approved by the department. In approving an examination under this subsection, the department shall consider the use of an examination that is similar to an examination that is required for membership in the American Society of Home Inspectors.
- (2) The department shall conduct examinations for home inspector registration at least semiannually at times and places determined by the department.
- (3) An individual is not eligible for examination unless the individual has satisfied the requirements for registration under s. [440.972 \(1\) \(a\)](#) and [\(b\)](#) at least 30 days before the date of the examination.

History: [1997 a. 81](#); [2021 a. 17](#).

Cross-reference: See also ch. [SPS 131](#), Wis. adm. code.

440.974 Rules.

- (1) The department shall promulgate rules necessary to administer this subchapter, including rules to establish all of the following:
- (a) Standards for acceptable examination performance by an applicant for registration.
 - (ag) Standards for instruction for purposes of the requirement under s. [440.972 \(1\) \(bg\)](#).
 - (b) Subject to s. [440.975](#), standards for the practice of home inspection by home inspectors and standards for specifying the mechanical and structural components of improvements to residential real property that are included in a home inspection. The rules promulgated under this paragraph shall include standards for the inspection of carbon monoxide detectors. The rules promulgated under this paragraph may not require a home inspector to use a specified form for the report required under s. [440.975 \(3\)](#).
 - (c) Subject to s. [440.975](#), the information that a home inspector is required to provide to a client concerning the results of the home inspection conducted by the home inspector.

- (2) The department shall promulgate rules establishing continuing education requirements for individuals registered under this subchapter. The rules promulgated under this subsection shall require the completion of at least 40 hours of continuing education every 2 years, except that the rules may not require continuing education for an applicant for renewal of a registration that expires on the 1st and 2nd renewal dates after the date on which the department initially granted the registration.

History: [1997 a. 81](#); [2009 a. 158](#); [2013 a. 124](#); [2021 a. 17](#).

Cross-reference: See also ch. [SPS 131](#), Wis. adm. code.

440.975 Standards of practice.

- (1) In this section, “reasonably competent and diligent inspection” means an inspection that complies with the standards established under this subchapter or the rules promulgated under this subchapter.
- (2) A home inspector shall perform a reasonably competent and diligent inspection to detect observable conditions of an improvement to residential real property. Except for removing an access panel that is normally removed by an occupant of residential real property, this subsection does not require a home inspector to disassemble any component of an improvement to residential real property. A reasonably competent and diligent inspection under this subsection is not required to be technically exhaustive.
- (3) After completing a home inspection, a home inspector shall submit a written report to a client that does all of the following:
- (a) Lists the components of an improvement to residential real property that the home inspector is required to inspect under the rules promulgated under s. [440.974 \(1\) \(b\)](#).
 - (b) Lists the components of an improvement to residential real property that the home inspector has inspected.
 - (bm) States the property address, the name of the home inspector who conducted the home inspection, the date of the home inspection, the names of the individuals who prepared the report, the date the report was prepared, and, if applicable, the date the report was revised.
 - (cm) Describes any defect that is detected by the home inspector during his or her home inspection. A home inspector shall use the term “defect” in describing a condition in the written report required under this subsection if the home inspector believes the condition satisfies the definition of “defect” under s. [440.97 \(2m\)](#).
- (cr)
1. Includes a summary page that includes at least all of the following:
 - a. A list of conditions, labeled as defects, that are observed under par. [\(cm\)](#) to be defects, as defined in s. [440.97 \(2m\)](#).
 - b. Other than items labeled as defects, a listing of components needing repairs, components needing further evaluation, items to monitor, and maintenance items.
 2. The summary page shall include references to the page, heading, or item number in the detailed account for further information.
 3. The summary page shall include all of the following statements:

NOTE: This summary page is provided for convenience and is not a substitute for reading the entire report and should not be relied upon as the complete list for the client's reference.

For the purposes of the report, “defect,” as defined in section 440.97 (2m), Wis. Stats., means a condition of any component of an improvement that a home inspector determines, on the basis of the home inspector's judgment on the day of an inspection, would significantly impair the health or safety of occupants of a property or that, if not repaired, removed, or replaced, would significantly shorten or adversely affect the expected normal life of the component of the improvement. The contract of sale may define “defect” to also include a condition that would have a significant adverse effect on the value of the property, but such a condition may not be labeled a defect in the report unless it meets the definition in section 440.97 (2m), Wis. Stats.

NOTE: A home inspector may not report on the market value or marketability of a property or whether a property should or should not be purchased.

- (d) Provides any other information that the home inspector is required to provide under the rules promulgated under s. [440.974 \(1\) \(c\)](#).
- (4) A home inspector is not required to report on any of the following:
 - (a) The life expectancy of an improvement to residential real property or a component of an improvement to residential real property.
 - (b) The cause of the need for any major repair to an improvement to residential real property or a component of an improvement to residential real property.
 - (c) The method of making any repair or correction, the materials needed for any repair or correction or the cost of any repair or correction.
 - (d) The suitability for any specialized use of an improvement to residential real property.
 - (e) Whether an improvement to residential real property or a component of an improvement to residential real property complies with applicable regulatory requirements.
 - (f) The condition of any component of an improvement to residential real property that the home inspector was not required to inspect under the rules promulgated under s. [440.974 \(1\) \(b\)](#).
- (5) A home inspector may not report, either in writing or verbally, on any of the following:
 - (a) The market value or marketability of a property.
 - (b) Whether a property should or should not be purchased.
- (6) This section does not require a home inspector to do any of the following:
 - (a) Offer a warranty or guarantee of any kind.
 - (b) Calculate the strength, adequacy or efficiency of any component of an improvement to residential real property.
 - (c) Enter any area or perform any procedure that may damage an improvement to residential real property or a component of an improvement to residential real property, or enter any area or perform any procedure that may be dangerous to the home inspector or to other persons.
 - (d) Operate any component of an improvement to residential real property that is inoperable.
 - (e) Operate any component of an improvement to residential real property that does not respond to normal operating controls.
 - (f) Disturb insulation or move personal items, furniture, equipment, vegetation, soil, snow, ice or debris that obstructs access to or visibility of an improvement to residential real property or a component of an improvement to residential real property.
 - (g) Determine the effectiveness of a component of an improvement to residential real property that was installed to control or remove suspected hazardous substances.
 - (h) Predict future conditions, including the failure of a component of an improvement to residential real property.
 - (i) Project or estimate the operating costs of a component of an improvement to residential real property.
 - (j) Evaluate acoustic characteristics of a component of an improvement to residential real property.
 - (k) Inspect for the presence or absence of pests, including rodents, insects and wood-damaging organisms.
 - (L) Inspect cosmetic items, underground items or items not permanently installed.
 - (m) Inspect for the presence of any hazardous substances.
- (7) A home inspector may not do any of the following:
 - (a) Perform or offer to perform any act or service contrary to law.
 - (b) Deliver a home inspection report to any person other than the client without the client's consent.
 - (c) Perform a home inspection for a client with respect to a transaction if the home inspector, a member of the home inspector's immediate family or an organization or business entity in which the home inspector has

an interest, is a party to the transaction and has an interest that is adverse to that of the client, unless the home inspector obtains the written consent of the client.

- (d) Accept any compensation from more than one party to a transaction for which the home inspector has provided home inspection services without the written consent of all of the parties to the transaction.
- (e) Pay or receive, directly or indirectly, in full or in part, for a home inspection or for the performance of any construction, repairs, maintenance or improvements regarding improvements to residential real property that is inspected by him or her, a fee, a commission, or compensation as a referral or finder's fee, to or from any person who is not a home inspector.
- (8) This section does not prohibit a home inspector from doing any of the following:
 - (a) Reporting observations or conditions in addition to those required under this section or the rules promulgated under this section.
 - (b) Excluding a component of an improvement to residential real property from the inspection, if requested to do so by his or her client.
 - (c) Engaging in an activity that requires an occupation credential if he or she holds the necessary credential.

History: [1997 a. 81](#); [2017 a. 338](#); [2021 a. 17](#).

Cross-reference: See also ch. [SPS 131](#), Wis. adm. code.

440.976 Disclaimers or limitation of liability. No home inspector may include, as a term or condition in an agreement to conduct a home inspection, any provision that disclaims the liability, or limits the amount of damages for liability, of the home inspector for his or her failure to comply with the standards of practice prescribed in this subchapter or in rules promulgated under this subchapter.

History: [1997 a. 81](#).

440.977 Liability of home inspectors.

- (1) Notwithstanding s. [893.54](#), an action to recover damages for any act or omission of a home inspector relating to a home inspection that he or she conducts shall be commenced within 2 years after the date that a home inspection is completed or be barred. The period of limitation under this subsection may not be reduced by agreement.
- (2) A home inspector is not liable to a person for damages that arise from an act or omission relating to a home inspection that he or she conducts if that person is not a party to the transaction for which the home inspection is conducted.

History: [1997 a. 81](#).

440.978 Discipline; prohibited acts.

- (1) Subject to the rules promulgated under s. [440.03 \(1\)](#), the department may make investigations or conduct hearings to determine whether a violation of this subchapter or any rule promulgated under this subchapter has occurred.
- (2) Subject to the rules promulgated under s. [440.03 \(1\)](#), the department may reprimand a home inspector or deny, limit, suspend or revoke a certificate under this subchapter if the department finds that the applicant or home inspector has done any of the following:
 - (a) Made a material misstatement in an application for a certificate or renewal of a certificate.
 - (b) Engaged in conduct while practicing as a home inspector that evidences a lack of knowledge or ability to apply professional principles or skills.
 - (c) Subject to ss. [111.321](#), [111.322](#) and [111.335](#), been arrested or convicted of an offense committed while registered under this subchapter.
 - (d) Advertised in a manner that is false, deceptive or misleading.
 - (e) Advertised, practiced or attempted to practice as a home inspector under another person's name.

- (f) Allowed his or her name to be used by another person while the other person was practicing or attempting to practice as a home inspector.
- (g) Subject to ss. [111.321](#), [111.322](#) and [111.34](#), practiced as a home inspector while the individual's ability to practice was impaired by alcohol or other drugs.
- (h) Acted as a home inspector in connection with a transaction in which he or she was also an appraiser or broker.
- (i) Performed, or agreed to perform, for compensation any repairs, maintenance or improvements on any property less than 2 years after he or she conducts a home inspection, without the written consent of the property owner given before the home inspection occurred.
- (j) Prevented or attempted to prevent a client from providing a copy of, or any information from, a home inspection report done by the home inspector in connection with a transaction to any interested party to the transaction.
- (k) Failed to provide a home inspection report to a client by the date agreed on by the home inspector and the client or, if no date was agreed on, within a reasonable time after completing the inspection.
- (m) Violated this subchapter or any rule promulgated under this subchapter.
- (3) In addition to or in lieu of proceeding under sub. [\(2\)](#), the department may assess against a person who has engaged in any of the practices specified in sub. [\(2\)](#) a forfeiture of not more than \$1,000 for each separate offense.
- (5) The department may, as a condition of removing a limitation on a certificate issued under this subchapter or of reinstating a certificate that has been suspended or revoked under this subchapter, do any of the following:
 - (a) Require the home inspector to obtain insurance against loss, expense and liability resulting from errors and omissions or neglect in the performance of services as a home inspector.
 - (b) Require the home inspector to file with the department a bond that is furnished by a company authorized to do business in this state and is in an amount approved by the department.

History: [1997 a. 81](#); [2021 a. 17](#).

Cross-reference: See also ch. [SPS 131](#), Wis. adm. code.

440.979 Report by department. The department shall submit an annual report to the legislature under s. [13.172 \(2\)](#) that describes all of the following:

- (1) The number of home inspectors who are registered under this subchapter.
- (2) The number and nature of complaints regarding home inspections that are received by the department from clients of home inspectors.
- (3) The number and nature of complaints regarding home inspections that are received by the department from persons who are not clients of home inspectors.
- (4) An estimate of the cost of complying with this subchapter that is incurred by home inspectors.
- (5) The cost incurred by the department in carrying out its duties under this subchapter.

History: [1997 a. 81](#); [1999 a. 32](#) s. [311](#).

WISCONSIN ADMINISTRATIVE CODE

Section SPS 131.31 - General requirements

- (1) A home inspector shall perform a reasonably competent and diligent home inspection of the readily accessible installed systems and components required to be inspected under s. SPS

131.32 to detect observable conditions of an improvement to residential real property. A reasonably competent and diligent home inspection is not required to be technically exhaustive.

(2) This section does not require a home inspector to do any of the following:**(a)** Offer a warranty or guarantee of any kind.**(b)** Calculate the strength, adequacy or efficiency of any component of an improvement to residential real property.**(c)** Enter any area or perform any procedure that may damage an improvement to residential real property or a component of an improvement to residential real property, or enter any area or perform any procedure that may be dangerous to the home inspector or to other persons.**(d)** Operate any component of an improvement to residential real property that is inoperable.**(e)** Operate any component of an improvement to residential real property that does not respond to normal operating controls.**(f)** Disturb insulation or move personal items, furniture, equipment, vegetation, soil, snow, ice or debris that obstructs access to or visibility of an improvement to residential real property or a component of an improvement to residential real property.**(g)** Determine the effectiveness of a component of an improvement to residential real property that was installed to control or remove suspected hazardous substances.**(h)** Evaluate acoustic characteristics of a component of an improvement to residential real property.**(i)** Project or estimate the operating costs of a component of an improvement to residential real property.**(j)** Predict future conditions, including the failure of component of an improvement to residential real property.**(k)** Inspect for the presence or absence of pests, including rodents, insects and wood-damaging organisms.**(m)** Inspect for the presence of any hazardous substances.**(n)** Disassemble any component of an improvement to residential real property, except for removing an access panel that is normally removed by an occupant of residential real property.

(3) This section does not prohibit a home inspector from doing any of the following:**(a)** Reporting observations or conditions in addition to those required under this section.**(b)** Excluding a component of an improvement to residential real property from the inspection, if requested to do so by his or her client.**(c)** Engaging in an activity that requires an occupation credential if he or she holds the necessary credential.

Wis. Admin. Code Department of Safety and Professional Services § SPS 131.31

Section SPS 131.32 - Mechanical and structural components included in a home inspection

A reasonably competent and diligent home inspection shall meet the standards in subs. (1) to (11) and shall include an inspection of, and report on, all of the following items that are present on the property at the time of the home inspection:

(1) FOUNDATIONS. A home inspector shall observe and describe the type and condition of the foundation.

(2) COLUMNS. A home inspector shall observe and describe the type and condition of columns.

(3) FLOORING SYSTEMS. A home inspector shall observe and describe the type and condition of flooring systems.

(4) ROOFS.**(a)** A home inspector shall observe and describe the condition of all of the following:**1.** Roof coverings, including type.**2.** Roof drainage systems.**3.** Flashings.**4.** Skylights, chimneys and roof penetrations.**5.** Signs of leaks or abnormal condensation on building components.**(b)** A home inspector shall describe the methods used to observe the roof.**(c)** A home inspector is not required to do any of the following:**1.** Walk on the roofing.**2.** Observe attached accessories, including, but not limited to, solar systems, antennae and lightning

arrestors.**3.** Observe internal gutter and downspout systems and related underground drainage piping.

(5) EXTERIORS.(a) A home inspector shall observe and describe the condition of all of the following:**1.** Wall claddings, including type.**2.** Flashings and trim.**3.** Entryway doors and at least one window per side of a dwelling unit.**4.** Garage door operators, including whether any garage door operator automatically reverses or stops when meeting reasonable resistance during closing.**5.** Decks, balconies, stoops, steps and porches including railings.**6.** Eaves, soffits and fascias.**7.** Grading, drainage, driveways, patios, walkways, and retaining walls that abut the dwelling unit.**(b)** A home inspector shall operate all entryway doors, garage doors, and at least one window per side of a dwelling unit.**(c)** A home inspector is not required to observe the following:**1.** Storm windows, storm doors, screening, shutters, awnings, and similar seasonal accessories.**2.** Locks, latches or other security devices or systems.**3.** Intercom systems.**4.** Fences or privacy walls.**5.** Insulation or vapor barriers in exterior walls.**6.** Safety glazing.**7.** Garage door operator remote control transmitters.**8.** Geological or soil conditions.**9.** Recreational facilities.**10.** Out-buildings other than garages and carports.**11.** Trees, shrubs and other vegetation.

(6) PLUMBING SYSTEMS.(a) A home inspector shall observe and describe the condition of all of the following:**1.** Interior water supply and distribution system, including piping materials, supports, fixtures, faucets, functional flow and drainage, leaks and cross connections.**2.** Interior drain, waste and vent system, including traps, drain, waste, and vent piping, piping supports and leaks.**3.** Hot water systems, including water heating equipment, normal operating controls, automatic safety controls, and the exterior surfaces of chimneys, flues, and vents.**4.** Fuel storage and distribution systems, including interior fuel storage equipment, supply piping, venting, supports and leaks.**5.** Sump pumps.**(b)** A home inspector shall operate all plumbing fixtures, including their faucets and accessible exterior faucets attached to the dwelling unit.**(c)** A home inspector is not required to do any of the following:**1.** State the effectiveness of anti-siphon devices.**2.** Determine whether the water supply and waste disposal systems are public or private.**3.** Operate automatic safety controls or sump pumps equipped with internal or water dependent switches.**4.** Operate any valve except water closet flush valves, fixture faucets and hose faucets.**5.** Observe water conditioning systems, fire and lawn sprinkler systems, on-site water supply quantity and quality, on-site disposal systems, foundation drainage systems, or spas.**6.** Observe the interior of flues, chimneys and vents, or solar water heating systems.**7.** Observe any exterior plumbing components such as water mains or swimming pools.**8.** Determine water temperature.**9.** Determine the proper sizing, design or use of plumbing materials.

(7) ELECTRICAL SYSTEMS.(a) A home inspector shall observe and describe the condition of all of the following:**1.** Service entrance conductors.**2.** Service equipment, grounding equipment, main over current device.**3.** Main and distribution panels, including their location.**4.** Amperage and voltage ratings of the service, including whether service type is overhead or underground.**5.** Branch circuit conductors, their over current devices, and the compatibility of their ampacities and voltages, including any aluminum branch circuit wiring.**6.** The operation of a representative number of installed lighting fixtures, switches and receptacles located inside the house, garage and any exterior walls.**7.** The polarity and grounding of all receptacles within 6 feet of interior plumbing fixtures, in the garage or carport, and on the exterior of inspected structures.**8.** The operation of ground fault circuit interrupters.**9.** The functionality of the power sources for smoke detectors.**(b)** A home inspector is not required to do any of the

following:**1.** Insert any tool, probe or testing device inside the panels.**2.** Test or operate any over current device except ground fault circuit interrupters.**3.** Dismantle any electrical device or control other than to remove the covers of the main and auxiliary distribution panels.**4.** Observe low voltage systems, telephones, security systems, cable TV, intercoms, or other ancillary wiring that is not a part of the primary electrical distribution systems.**5.** Measure amperage, voltage or impedance.

(8) INTERIORS.**(a)** A home inspector shall observe and describe the condition of all of the following:**1.** Walls, ceilings and floors.**2.** Steps, stairways, balconies and railings.**3.** Counters and all sink base cabinets.**4.** A random sample of doors and windows.**5.** Separation walls, ceilings, and doors between a dwelling unit and an attached garage or another dwelling unit.**6.** Signs of water penetration into the building or signs of abnormal or harmful condensation on building components.**(b)** A home inspector is not required to observe any of the following:**1.** Paint, wallpaper, and other cosmetic finish treatments on the interior walls, ceilings and floors.**2.** Carpeting.**3.** Draperies, blinds or other window treatments.**4.** Household appliances.**5.** Recreational facilities or another dwelling unit.

(9) HEATING SYSTEMS.**(a)** A home inspector shall observe and describe the condition of all of the following within a permanently installed heating system:**1.** Heating equipment and distribution systems.**2.** Normal operating controls and energy source.**3.** Automatic safety controls.**4.** Exterior surfaces of chimneys, flues and vents.**5.** Solid fuel heating devices.**6.** The presence of an installed heat source in each room.**(b)** A home inspector shall operate the systems using normal operating controls and open readily accessible access panels provided by the manufacturer or installer for routine homeowner maintenance.**(c)** A home inspector is not required to do any of the following:**1.** Operate heating systems when weather conditions or other circumstances may cause equipment damage.**2.** Operate automatic safety controls.**3.** Ignite or extinguish fuel fires.**4.** Observe the interior of flues, fireplace insert flue connectors, humidifiers, electronic air filters, or the uniformity or adequacy of heat supply to the various rooms.**5.** Observe a heat exchanger unless it is readily observable and normally accessible to an occupant of a dwelling unit.

(10) CENTRAL AIR CONDITIONING.**(a)** A home inspector shall observe and describe the condition of all of the following:**1.** Cooling and air handling equipment, including type and energy source.**2.** Normal operating controls.**3.** The presence of an installed cooling source in each room.**(b)** A home inspector shall operate the systems, using normal operating controls, and open readily accessible access panels provided by the manufacturer or installer for routine homeowner maintenance.**(c)** A home inspector is not required to do any of the following:**1.** Operate cooling systems when weather conditions or other circumstances may cause equipment damage.**2.** Observe non-central air conditioners.**3.** Observe the uniformity or adequacy of cool-air supply to the various rooms.**4.** Operate electronic air filters.**5.** Observe the pressure of the system coolant or determine the presence of leakage.**6.** Test the electrical current drawn by the unit.

(11) INSULATION AND VENTILATION.**(a)** A home inspector shall observe and describe the condition of all of the following:**1.** The presence or absence of insulation in unfinished spaces.**2.** Ventilation of attics and foundation areas.**3.** Kitchen, bathroom, and laundry venting systems.**(b)** A home inspector is not required to observe any of the following:**1.** Concealed insulation.**2.** Venting equipment which is integrated with household appliances.

Wis. Admin. Code Department of Safety and Professional Services § SPS 131.32

Section SPS 131.33 - Contents of a home inspection report

(1) After completing a home inspection, a home inspector shall submit a written report to a client that does all of the following:**(a)** Lists the items described in s. SPS 131.32 that a home inspector is required to inspect.**(b)** Lists the items described in s. SPS 131.32 that a home inspector has inspected.**(bm)** States the property address, the name of the home inspector who conducted the home inspection, the date of the home inspection, the names of the individuals who prepared the report, the date the report was prepared, and, if applicable, the date the report was revised.**(c)** Describes the condition of any item identified in s. SPS 131.32.**(d)** Describes any defect that is detected by the home inspector during his or her home inspection. A home inspector shall use the term "defect" in describing a condition in the written report required under this subsection if the home inspector believes the condition satisfies the definition of "defect" under s. 440.97(2m), Stats.**(e)** Lists any material adverse facts that a home inspector has knowledge of or has observed.**(f)** A summary page that includes at least all of the following:**1.** A list of conditions, labeled as defects, that are observed under par. (d) to be defects.**2.** Other than items labeled as defects, a listing of components needing repairs, components needing further evaluation, items to monitor, and maintenance items.**3.** References to the page, heading, or item number in the full written report for further information.**4.** The disclosures required under s. 440.975(3) (cr) 3, Stats.

(2) A home inspector is not required to report on any of the following aspects of items identified in s. SPS 131.32:**(a)** Their life expectancy.**(b)** The reason for the necessity of a major repair.**(c)** The method of making any repair or correction, the materials needed for any repair or correction, or the cost of any repair or correction.**(d)** The suitability for any specialized use of an improvement to residential real property.**(e)** Whether they comply with applicable regulatory requirements.

(4) A home inspector is not required to retain inspectors or investigators to perform follow-up inspections or investigations of any material adverse facts that a home inspector has knowledge of or has observed under sub. (1) (d).

REAL ESTATE CONDITION REPORT

DISCLAIMER

THIS CONDITION REPORT CONCERNS THE REAL PROPERTY LOCATED AT _____
_____ IN THE _____
(CITY) (VILLAGE) (TOWN) OF _____, COUNTY OF _____
_____ STATE OF WISCONSIN.

THIS REPORT IS A DISCLOSURE OF THE CONDITION OF THAT PROPERTY IN COMPLIANCE WITH SECTION 709.02 OF THE WISCONSIN STATUTES AS OF _____ (MONTH) _____ (DAY), _____ (YEAR). IT IS NOT A WARRANTY OF ANY KIND BY THE OWNER OR ANY AGENTS REPRESENTING ANY PARTY IN THIS TRANSACTION AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THAT THE PARTIES MAY WISH TO OBTAIN.

A buyer who does not receive a fully completed copy of this report within 10 days after the acceptance of the contract of sale or option contract for the above-described real property has the right to rescind that contract (Wis. Stat. s. 709.02), provided the owner is required to provide this report under Wisconsin Statutes chapter 709.

NOTICE TO PARTIES REGARDING ADVICE OR INSPECTIONS

Real estate licensees may not provide advice or opinions concerning whether or not an item is a defect for the purposes of this report or concerning the legal rights or obligations of parties to a transaction. The parties may wish to obtain professional advice or inspections of the property and to include appropriate provisions in a contract between them with respect to any advice, inspections, defects, or warranties.

A. OWNER'S INFORMATION

A1. In this form, "aware" means the "owner(s)" have notice or knowledge.

A2. In this form, "defect" means a condition that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the property; or that if not repaired, removed, or replaced would significantly shorten or adversely affect the expected normal life of the premises.

A3. In this form, "owner" means the person or persons, entity, or organization that owns the above-described real property. An "owner" who transfers real estate containing one to four dwelling units, including a condominium unit and time-share property, by sale, exchange, or land contract is required to complete this report.

Exceptions: An "owner" who is a personal representative, trustee, conservator, or fiduciary appointed by or subject to supervision by a court, and who has never occupied the property transferred is not required to complete this report. An "owner" who transfers property that has not been inhabited or who transfers property in a manner that is exempt from the real estate transfer fee is not required to complete this report. (Wis. Stat. s. 709.01)

A4. The owner represents that to the best of the owner's knowledge, the responses to the following questions have been accurately checked as "yes," "no," or "not applicable (N/A)" to the property being sold. If the owner responds to any question with "yes," the owner shall provide, in the additional information area of this form, an explanation of the reason why the response to the question is "yes."

A5. If the transfer is of a condominium unit, the property to which this form applies is the condominium unit, the common elements of the condominium, and any limited common elements that may be used only by the owner of the condominium unit being transferred.

A6. The owner discloses the following information with the knowledge that, even though this is not a warranty, prospective buyers may rely on this information in deciding whether and on what terms to purchase the property. The owner hereby authorizes the owner's agents and the agents of any prospective buyer to provide a copy of this report, and to disclose any information in the report, to any person in connection with any actual or anticipated sale of the property.

CAUTION: The lists of defects following each question below are examples only and are not the only defects that may properly be disclosed in response to each respective question.

B. STRUCTURAL AND MECHANICAL

	YES	NO	N/A
B1. Are you aware of defects in the roof? Roof defects may include items such as leakage or significant problems with gutters or eaves.	☐	☐	☐
B2. Are you aware of defects in the electrical system? Electrical defects may include items such as electrical wiring not in compliance with applicable code, knob and tube wiring, 60 amp service, or aluminum-branch circuit wiring.	☐	☐	☐
B3. Are you aware of defects in part of the plumbing system (including the water heater, water softener, and swimming pool)? Other plumbing system defects may include items such as leaks or defects in pipes, toilets, interior or exterior faucets, bathtubs, showers, or any sprinkler system.	☐	☐	☐
B4. Are you aware of defects in the heating and air conditioning system (including the air filters and humidifiers)? Heating and air conditioning defects may include items such as defects in the heating ventilation and air conditioning (HVAC) equipment, supplemental heaters, ventilating fans or fixtures, or solar collectors.	☐	☐	☐
B5. Are you aware of defects in a woodburning stove or fireplace or of other defects caused by a fire in a stove or fireplace or elsewhere on the property? Such defects may include items such as defects in the chimney, fireplace flue, inserts, or other installed fireplace equipment; or woodburning stoves not installed pursuant to applicable code.	☐	☐	☐
B6. Are you aware of defects related to smoke detectors or carbon monoxide detectors or a violation of applicable state or local smoke detector or carbon monoxide detector laws? NOTE: State law requires operating smoke detectors on all levels of all residential properties and operating carbon monoxide detectors on all levels of most residential properties (see Wis. Stat. ch. 101).	☐	☐	☐
B7. Are you aware of defects in the basement or foundation (including cracks, seepage, and bulges)? Other basement defects may include items such as flooding, defects in drain tiling or sump pumps, or movement, shifting, or deterioration in the foundation.	☐	☐	☐
B8. Are you aware of defects in any structure on the property? Structural defects with respect to the residence or other improvements may include items such as movement, shifting, or deterioration in walls; major cracks or flaws in interior or exterior walls, partitions, or the foundation; wood rot; and significant problems with driveways, sidewalks, patios, decks, fences, waterfront piers or walls, windows, doors, floors, ceilings, stairways, or insulation.	☐	☐	☐
B9. Are you aware of defects in mechanical equipment included in the sale either as fixtures or personal property? Mechanical equipment defects may include items such as defects in any appliance, central vacuum, garage door opener, in-ground sprinkler, or in-ground pet containment system that is included in the sale.	☐	☐	☐
B10. Are you aware of rented items located on the property such as a water softener or other water conditioner system or other items affixed to or closely associated with the property?	☐	☐	☐
B11. Are you aware of basement, window, or plumbing leaks, overflow from sinks, bathtubs, or sewers, or other ongoing water or moisture intrusions or conditions?	☐	☐	☐
B12. Explanation of "yes" responses _____			

C. ENVIRONMENTAL

	YES	NO	N/A
C1. Are you aware of the presence of unsafe levels of mold?	☐	☐	☐
C2. Are you aware of a defect caused by unsafe concentrations of, or unsafe conditions relating to, radon, radium in water supplies, high voltage electric (100 KV or greater) or steel natural gas transmission lines located on but not directly serving the property, lead in paint, lead in soil, or other potentially hazardous or toxic substances on the property? NOTE: Specific federal lead paint disclosure requirements must be complied with in the sale of most residential properties built before 1978.	☐	☐	☐

	YES	NO	N/A
C3. Are you aware of the presence of asbestos or asbestos-containing materials on the property?	☐	☐	☐
C4. Are you aware of the presence of or a defect caused by unsafe concentrations of, unsafe conditions relating to, or the storage of hazardous or toxic substances on neighboring properties?	☐	☐	☐
C5. Are you aware of current or previous termite, powder post beetle, or carpenter ant infestations or defects caused by animal, reptile, or insect infestations?	☐	☐	☐
C6. Are you aware of water quality issues caused by unsafe concentrations of or unsafe conditions relating to lead?	☐	☐	☐
C7. Are you aware of the manufacture of methamphetamine or other hazardous or toxic substances on the property?	☐	☐	☐
C8. Explanation of "yes" responses _____			

D. WELLS, SEPTIC SYSTEMS, STORAGE TANKS

	YES	NO	N/A
D1. Are you aware of defects in a well on the property or in a well that serves the property, including unsafe well water? Well defects may include items such as an unused well not properly closed in conformance with state regulations, a well that was not constructed pursuant to state standards or local code, or a well that requires modifications to bring it into compliance with current code specifications. Well water defects might include, but are not limited to, unsafe levels of bacteria (total Coliform and E. coli), nitrate, arsenic, or other substances affecting human consumption safety.	☐	☐	☐
D2. Are you aware of a joint well serving the property?	☐	☐	☐
D3. Are you aware of a defect related to a joint well serving the property?	☐	☐	☐
D4. Are you aware that a septic system or other private sanitary disposal system serves the property?	☐	☐	☐
D5. Are you aware of defects in the septic system or other private sanitary disposal system on the property or any out-of-service septic system that serves the property and that is not closed or abandoned according to applicable regulations? Septic system defects may include items such as backups in toilets or in the basement; exterior ponding, overflows, or backups; or defective or missing baffles.	☐	☐	☐
D6. Are you aware of underground or aboveground fuel storage tanks on or previously located on the property? (If "yes," the owner, by law, may have to register the tanks with the Wisconsin Department of Agriculture, Trade and Consumer Protection at P.O. Box 8911, Madison, Wisconsin, 53708, whether the tanks are in use or not. Regulations of the Wisconsin Department of Agriculture, Trade and Consumer Protection may require the closure or removal of unused tanks.)	☐	☐	☐
D7. Are you aware of defects in the underground or aboveground fuel storage tanks on or previously located on the property? Defects in underground or aboveground fuel storage tanks may include items such as abandoned tanks not closed in conformance with applicable local, state, and federal law; leaking; corrosion; or failure to meet operating standards.	☐	☐	☐
D8. Are you aware of an "LP" tank on the property? (If "yes," specify in the additional information space whether the owner of the property either owns or leases the tank.)	☐	☐	☐
D9. Are you aware of defects in an "LP" tank on the property?	☐	☐	☐
D10. Explanation of "yes" responses _____			

E. TAXES, SPECIAL ASSESSMENTS, PERMITS, ETC.

	YES	NO	N/A
E1. Have you received notice of property tax increases, other than normal annual increases, or are you aware of a pending property reassessment?	☐	☐	☐
E2. Are you aware that remodeling was done that may increase the property's assessed value?	☐	☐	☐

	YES	NO	N/A
E3. Are you aware of pending special assessments?	☐	☐	☐
E4. Are you aware that the property is located within a special purpose district, such as a drainage district, that has the authority to impose assessments against the real property located within the district?	☐	☐	☐
E5. Are you aware of any proposed construction of a public project that may affect the use of the property?	☐	☐	☐
E6. Are you aware of any remodeling, replacements, or repairs affecting the property's structure or mechanical systems that were done or additions to this property that were made during your period of ownership without the required permits?	☐	☐	☐
E7. Are you aware of any land division involving the property for which a required state or local permit was not obtained?	☐	☐	☐
E8. Explanation of "yes" responses _____			

F. LAND USE

	YES	NO	N/A
F1. Are you aware of the property being part of or subject to a subdivision homeowners' association?	☐	☐	☐
F2. If the property is not a condominium unit, are you aware of common areas associated with the property that are co-owned with others?	☐	☐	☐
F3. Are you aware of any zoning code violations with respect to the property?	☐	☐	☐
F4. Are you aware of the property or any portion of the property being located in a floodplain, wetland, or shoreland zoning area?	☐	☐	☐
F5. Are you aware of nonconforming uses of the property? A nonconforming use is a use of land, a dwelling, or a building that existed lawfully before the current zoning ordinance was enacted or amended, but that does not conform to the use restrictions in the current ordinance.	☐	☐	☐
F6. Are you aware of conservation easements on the property? A conservation easement is a legal agreement in which a property owner conveys some of the rights associated with ownership of his or her property to an easement holder such as a governmental unit or a qualified nonprofit organization to protect the natural habitat of fish, wildlife, or plants or a similar ecosystem, preserve areas for outdoor recreation or education, or for similar purposes.	☐	☐	☐
F7. Are you aware of restrictive covenants or deed restrictions on the property?	☐	☐	☐
F8. <i>Other than public rights of ways</i> , are you aware of nonowners having rights to use part of the property, including, but not limited to, private rights-of-way and easements other than recorded utility easements?	☐	☐	☐
F9. Are you aware of the property being subject to a mitigation plan required under administrative rules of the Wisconsin Department of Natural Resources related to county shoreland zoning ordinances, which obligates the owner of the property to establish or maintain certain measures related to shoreland conditions and which is enforceable by the county?	☐	☐	☐
F10. The use value assessment system values agricultural land based on the income that would be generated from its rental for agricultural use rather than its fair market value. When a person converts agricultural land to a non agricultural use (e.g., residential or commercial development), that person may owe a conversion charge. For more information visit https://www.revenue.wi.gov/Pages/FAQS/slf-useassmt.aspx or (608) 266-2486.			
a. Are you aware of all or part of the property having been assessed as agricultural land under Wis. Stat. s. 70.32 (2r) (use value assessment)?	☐	☐	☐
b. Are you aware of the property having been assessed a use-value assessment conversion charge relating to this property? (Wis. Stat. s. 74.485 (2))	☐	☐	☐
c. Are you aware of the payment of a use-value assessment conversion charge having been deferred relating to this property? (Wis. Stat. s. 74.485 (4))	☐	☐	☐

	YES	NO	N/A
F11. Is all or part of the property subject to or in violation of a farmland preservation agreement? Early termination of a farmland preservation agreement or removal of land from such an agreement can trigger payment of a conversion fee equal to 3 times the class 1 "use value" of the land. Visit https://datcp.wi.gov/Pages/Programs_Services/FarmlandPreservation.aspx for more information.	☐	☐	☐
F12. Is all or part of the property subject to, enrolled in, or in violation of the Forest Crop Law, Managed Forest Law, the Conservation Reserve Program, or a comparable program?	☐	☐	☐
F13. Are you aware of a dam that is totally or partially located on the property or that an ownership in a dam that is not located on the property will be transferred with the property because it is owned collectively by members of a homeowners' association, lake district, or similar group? (If "yes," contact the Wisconsin Department of Natural Resources to find out if dam transfer requirements or agency orders apply.)	☐	☐	☐
F14. Are you aware of boundary or lot line disputes, encroachments, or encumbrances (including a joint driveway) affecting the property? Encroachments often involve some type of physical object belonging to one person but partially located on or overlapping on land belonging to another; such as, without limitation, fences, houses, garages, driveways, gardens, and landscaping. Encumbrances include, without limitation, a right or claim of another to a portion of the property or to the use of the property such as a joint driveway, liens, and licenses.	☐	☐	☐
F15. Are you aware there is not legal access to the property?	☐	☐	☐
F16. Are you aware of federal, state, or local regulations requiring repairs, alterations, or corrections of an existing condition? This may include items such as orders to correct building code violations.	☐	☐	☐
F17. Are you aware of a pier attached to the property that is not in compliance with state or local pier regulations? See http://dnr.wi.gov/topic/waterways for more information.	☐	☐	☐
F17m. Are you aware of a written agreement affecting riparian rights related to the property?	☐	☐	☐
F17n. Are you aware that the property abuts the bed of a navigable waterway that is owned by a hydroelectric operator? <i>Under Wis. Stat. s. 30.132, the owner of a property abutting the bed of a navigable waterway that is owned by a hydroelectric operator, as defined in s. 30.132 (1) (b), may be required to ask the permission of the hydroelectric operator to place a structure on the bed of the waterway.</i>	☐	☐	☐
F18. Are you aware of one or more burial sites on the property? (For information regarding the presence, preservation, and potential disturbance of burial sites, contact the Wisconsin Historical Society at 800-342-7834 or www.wihist.org/burial-information).	☐	☐	☐
F19. Explanation of "yes" responses _____ _____ _____ _____			

G. ADDITIONAL INFORMATION

	YES	NO	N/A
G1. Have you filed any insurance claims relating to damage to this property or premises within the last five years?	☐	☐	☐
G2. Are you aware of a structure on the property that is designated as a historic building or that all or any part of the property is in a historic district?	☐	☐	☐
G3. Are you aware of any agreements that bind subsequent owners of the property, such as a lease agreement or an extension of credit from an electric cooperative?	☐	☐	☐
G4. Are you aware of other defects affecting the property? Other defects might include items such as drainage easement or grading problems; excessive sliding, settling, earth movements, or upheavals; or any other defect or material condition.	☐	☐	☐
G4m. Is the owner a foreign person, as defined in 26 USC 1445 (f)? (E.g. a nonresident alien individual, foreign corporation, foreign partnership, foreign trust, or foreign estate.) Section 1445 of the Internal Revenue Code (26 USC 1445), also known as the Foreign Investment In Real Property Tax Act or FIRPTA, provides that a transferee (buyer) of a U.S. real property interest must be notified in writing and must withhold tax if the transferor (seller) is a foreign person, unless an exception under FIRPTA applies to the transfer.	☐	☐	☐

G5. The owner has owned the property for _____ years.

G6. The owner has lived in the property for _____ years.

G7. Explanation of "yes" responses _____

Notice: You may obtain information about the sex offender registry and persons registered with the registry by contacting the Wisconsin Department of Corrections at <http://www.doc.wi.gov> or by phone at 608-240-5830

OWNER'S CERTIFICATION

NOTE: Wisconsin Statute section 709.035 requires owners who, prior to acceptance of a purchase contract or an option to purchase, obtain information that would change a response on this report to submit a complete amended report or an amendment to the previously completed report to the prospective buyer within 10 days of acceptance.

The owner certifies that the information in this report is true and correct to the best of the owner's knowledge as of the date on which the owner signs this report.

Owner _____	Date _____
Owner _____	Date _____
Owner _____	Date _____
Owner _____	Date _____
Owner _____	Date _____

CERTIFICATION BY PERSON SUPPLYING INFORMATION

A person other than the owner certifies that the person supplied information on which the owner relied for this report and that the information is true and correct to the best of the person's knowledge as of the date on which the person signs this report.

Person _____	Items _____	Date _____
Person _____	Items _____	Date _____
Person _____	Items _____	Date _____

BUYER'S ACKNOWLEDGEMENT

The prospective buyer acknowledges that technical knowledge such as that acquired by professional inspectors may be required to detect certain defects such as the presence of asbestos, building code violations, and floodplain status.

I acknowledge receipt of a copy of this statement.

Prospective buyer _____	Date _____
Prospective buyer _____	Date _____
Prospective buyer _____	Date _____
Prospective buyer _____	Date _____
Prospective buyer _____	Date _____

Information appearing in italics is supplemental in nature and is not required pursuant to Section 709.03 of the Wisconsin Statutes.