



97TH GENERAL ASSEMBLY

State of Illinois

2011 and 2012

SB1294

Introduced 2/8/2011, by Sen. Kirk W. Dillard

SYNOPSIS AS INTRODUCED:

760 ILCS 5/16.3 new
760 ILCS 5/16.4 new
760 ILCS 5/16.5 new
760 ILCS 5/16.6 new
760 ILCS 5/16.7 new

Amends the Trusts and Trustees Act. Adds provisions authorizing an investment trust advisor, distribution trust advisor, and trust protector to be designated in the governing instrument of a trust. Adds provisions concerning the powers of an authorized trustee who has the absolute discretion to invade the principal of a trust. Adds provisions authorizing establishment of a Domestic Asset Protection Trust. Adds provisions concerning the modification or termination of an irrevocable trust. Contains provisions concerning definitions, conditions and requirements, applicability, and other matters. Effective immediately.

LRB097 00144 AJO 47196 b

1 AN ACT concerning civil law.

2 **Be it enacted by the People of the State of Illinois,**
3 **represented in the General Assembly:**

4 Section 5. The Trusts and Trustees Act is amended by adding
5 Sections 16.3, 16.4, 16.5, 16.6, and 16.7 as follows:

6 (760 ILCS 5/16.3 new)

7 Sec. 16.3. Directed trusts.

8 (a) Definitions. In this Section:

9 (1) "Directing party" means any investment trust
10 advisor, distribution trust advisor, or trust protector as
11 provided in this Section.

12 (2) "Distribution trust advisor" means any one or more
13 persons given authority by the governing instrument to
14 direct, consent to, veto, or otherwise exercise all or any
15 portion of the distribution powers and discretions of the
16 trust, including but not limited to authority to make
17 discretionary distribution of income or principal.

18 (3) "Excluded fiduciary" means any fiduciary that by
19 the governing instrument is directed to act in accordance
20 with the exercise of specified powers by a directing party,
21 in which case such specified powers shall be deemed granted
22 not to the fiduciary but to the directing party and such
23 fiduciary shall be deemed excluded from exercising such

1 specified powers. If a governing instrument provides that a
2 fiduciary as to one or more specified matters is to act,
3 omit action, or make decisions only with the consent of a
4 directing party, then such fiduciary is an excluded
5 fiduciary with respect to such matters.

6 (4) "Fiduciary" means any person expressly given one or
7 more fiduciary duties by the governing instrument,
8 including but not limited to a trustee.

9 (5) "Governing instrument" refers to the instrument
10 stating the terms of a trust, including but not limited to
11 any court order or nonjudicial settlement agreement
12 establishing, construing, or modifying the terms of the
13 trust in accordance with Section 16.1, 16.4, or 16.6 or
14 other applicable law.

15 (6) "Investment trust advisor" means any one or more
16 persons given authority by the governing instrument to
17 direct, consent to, veto, or otherwise exercise all or any
18 portion of the investment powers of the trust.

19 (7) "Power" means authority to take or withhold an
20 action or decision, including but not limited to an
21 expressly specified power, the implied power necessary to
22 exercise a specified power, and authority inherent in a
23 general grant of discretion.

24 (8) "Trust protector" means any one or more persons
25 given any one or more of the powers specified in subsection
26 (d), whether or not designated with the title of trust

1 protector by the governing instrument.

2 (b) Powers of investment trust advisor. An investment trust
3 advisor may be designated in the governing instrument of a
4 trust. The powers of an investment trust advisor may be
5 exercised or not exercised in the sole and absolute discretion
6 of the investment trust advisor, and are binding on all other
7 persons, including but not limited to each beneficiary,
8 fiduciary, excluded fiduciary, and any other party having an
9 interest in the trust. The governing instrument may use the
10 title "investment trust advisor" or any similar name or
11 description demonstrating the intent to provide for the office
12 and function of an investment trust advisor. Unless the terms
13 of the governing instrument provide otherwise, the investment
14 trust advisor has the authority to:

15 (1) direct the trustee with respect to the retention,
16 purchase, transfer, assignment, sale, or encumbrance of
17 trust property and the investment and reinvestment of
18 principal and income of the trust;

19 (2) direct the trustee with respect to all management,
20 control, and voting powers related directly or indirectly
21 to trust assets, including but not limited to voting
22 proxies for securities held in trust;

23 (3) select and determine reasonable compensation of
24 one or more advisors, managers, consultants, or
25 counselors, including the trustee, and to delegate to them
26 any of the powers of the investment trust advisor in

1 accordance with subsection (b) of Section 5.1; and

2 (4) determine the frequency and methodology for
3 valuing any asset for which there is no readily available
4 market value.

5 (c) Powers of distribution trust advisor. A distribution
6 trust advisor may be designated in the governing instrument of
7 a trust. The powers of a distribution trust advisor may be
8 exercised or not exercised in the sole and absolute discretion
9 of the distribution trust advisor, and are binding on all other
10 persons, including but not limited to each beneficiary,
11 fiduciary, excluded fiduciary, and any other party having an
12 interest in the trust. The governing instrument may use the
13 title "distribution trust advisor" or any similar name or
14 description demonstrating the intent to provide for the office
15 and function of a distribution trust advisor. Unless the terms
16 of the governing instrument provide otherwise, the
17 distribution trust advisor has authority to direct the trustee
18 with regard to all decisions relating directly or indirectly to
19 discretionary distributions to or for one or more
20 beneficiaries.

21 (d) Powers of trust protector. A trust protector may be
22 designated in the governing instrument of a trust. The powers
23 of a trust protector may be exercised or not exercised in the
24 sole and absolute discretion of the trust protector, and are
25 binding on all other persons, including but not limited to each
26 beneficiary, investment trust advisor, distribution trust

1 advisor, fiduciary, excluded fiduciary, and any other party
2 having an interest in the trust. The governing instrument may
3 use the title "trust protector" or any similar name or
4 description demonstrating the intent to provide for the office
5 and function of a trust protector. The powers granted to a
6 trust protector by the governing instrument may include but are
7 not limited to authority to do any one or more of the
8 following:

9 (1) modify or amend the trust instrument to achieve
10 favorable tax status or respond to changes in the Internal
11 Revenue Code, federal laws, State law, or the rulings and
12 regulations under such laws;

13 (2) increase, decrease, or modify the interests of any
14 beneficiary or beneficiaries of the trust;

15 (3) modify the terms of any power of appointment
16 granted by the trust; provided, however, such modification
17 or amendment may not grant a beneficial interest to any
18 individual, class of individuals, or other parties not
19 specifically provided for under the trust instrument;

20 (4) remove, appoint, or remove and appoint, a trustee,
21 investment trust advisor, distribution trust advisor,
22 another directing party, investment committee member, or
23 distribution committee member, including designation of a
24 plan of succession for future holders of any such office;

25 (5) terminate the trust, including determination of
26 how the trustee shall distribute the trust property to be

1 consistent with the purposes of the trust;

2 (6) change the situs of the trust, the governing law of
3 the trust, or both;

4 (7) appoint one or more successor trust protectors,
5 including designation of a plan of succession for future
6 trust protectors;

7 (8) interpret terms of the trust instrument at the
8 request of the trustee;

9 (9) advise the trustee on matters concerning a
10 beneficiary; or

11 (10) amend or modify the trust instrument to take
12 advantage of laws governing restraints on alienation,
13 distribution of trust property, or to improve the
14 administration of the trust.

15 (e) Duty and liability of directing party. Each directing
16 party is a fiduciary of the trust unless the governing
17 instrument provides otherwise; provided, however, the
18 governing instrument may not exonerate a directing party from
19 the duty to act or withhold acting as the directing party in
20 good faith reasonably believes is in the best interests of the
21 trust. A directing party who the governing instrument specifies
22 is a fiduciary is subject to the same duties and standards that
23 are applicable to a trustee of a trust as provided by
24 applicable law, except to the extent the governing instrument
25 provides otherwise.

26 (f) Duty and liability of excluded fiduciary. The excluded

1 fiduciary shall act in accordance with the governing instrument
2 and comply with the directing party's exercise of the powers
3 granted to the directing party by the governing instrument.
4 Unless otherwise provided in the governing instrument, an
5 excluded fiduciary has no duty to monitor, review, inquire,
6 investigate, recommend, evaluate, or warn with respect to a
7 directing party's exercise or failure to exercise any power
8 granted to the directing party by the governing instrument,
9 including but not limited to any power related to the
10 acquisition, disposition, retention, management, or valuation
11 of any asset or investment. Except as otherwise provided in
12 this Section or the governing instrument, an excluded fiduciary
13 is not liable, either individually or as a fiduciary, for any
14 action, inaction, consent, or failure to consent by a directing
15 party, including but not limited to any of the following:

16 (1) if a governing instrument provides that an excluded
17 fiduciary is to follow the direction of a directing party,
18 and such excluded fiduciary acts in accordance with such a
19 direction, then except in cases of willful misconduct on
20 the part of the excluded fiduciary in complying with the
21 direction of the directing party, the excluded fiduciary is
22 not liable for any loss resulting directly or indirectly
23 from following any such direction, including but not
24 limited to compliance regarding the valuation of assets for
25 which there is no readily available market value;

26 (2) if a governing instrument provides that an excluded

1 fiduciary is to act or omit to act only with the consent of
2 a directing party, then except in cases of willful
3 misconduct on the part of the excluded fiduciary, the
4 excluded fiduciary is not liable for any loss resulting
5 directly or indirectly from any act taken or omitted as a
6 result of such directing party's failure to provide such
7 consent after having been asked to do so by the excluded
8 fiduciary; or

9 (3) if a governing instrument provides that, or for any
10 other reason, an excluded fiduciary is required to assume
11 the role or responsibilities of a directing party, then
12 except in cases of willful misconduct, the excluded
13 fiduciary is not liable for any loss resulting directly or
14 indirectly from any act taken or omitted in complying with
15 that requirement.

16 (g) Submission to court jurisdiction; effect on directing
17 party. By accepting an appointment to serve as a directing
18 party of a trust that is subject to the laws of this State, the
19 directing party submits to the jurisdiction of the courts of
20 this State even if investment advisory agreements or other
21 related agreements provide otherwise, and the directing party
22 may be made a party to any action or proceeding if issues
23 relate to a decision or action of the directing party.

24 (h) Duty to inform excluded fiduciary. Each directing party
25 shall keep the excluded fiduciary and any other directing party
26 reasonably informed regarding the administration of the trust

1 with respect to any specific duty or function being performed
2 by the directing party to the extent that the duty or function
3 would normally be performed by the excluded fiduciary or to the
4 extent that providing such information to the excluded
5 fiduciary or other directing party is reasonably necessary for
6 the excluded fiduciary or other directing party to perform its
7 duties, and the directing party shall provide such information
8 as reasonably requested by the excluded fiduciary or other
9 directing party. Neither the performance nor the failure to
10 perform of a directing party's duty to inform as provided in
11 this subsection affects whatsoever the limitation on the
12 liability of the excluded fiduciary as provided in this
13 Section.

14 (i) Reliance on counsel. An excluded fiduciary may, but is
15 not required to, obtain and rely upon an opinion of counsel on
16 any matter relevant to this Section.

17 (j) Applicability. On and after its effective date, this
18 Section applies to:

19 (1) all existing and future trusts that appoint or
20 provide for a directing party, including but not limited to
21 a party granted power or authority effectively comparable
22 in substance to that of a directing party as provided in
23 this Section; or

24 (2) any existing or future trust that:

25 (A) is modified in accordance with applicable law
26 or the terms of the governing instrument to appoint or

1 provide for a directing party; or

2 (B) is modified to appoint or provide for a
3 directing party, including but not limited to a party
4 granted power or authority effectively comparable in
5 substance to that of a directing party, in accordance
6 with (i) a court order, or (ii) a nonjudicial
7 settlement agreement made in accordance with Section
8 16.1, whether or not such order or agreement specifies
9 that this Section governs the responsibilities,
10 actions, and liabilities of persons designated as a
11 directing party or excluded fiduciary.

12 (760 ILCS 5/16.4 new)

13 Sec. 16.4. Trustee's power to invade principal in trust.

14 (a) Definitions. In this Section:

15 (1) "Absolute discretion" means the right to
16 distribute principal that is not limited or modified in any
17 manner to or for the benefit of one or more beneficiaries
18 of the trust. A power to invade principal that includes
19 purposes such as best interests, welfare, comfort, or
20 happiness shall constitute absolute discretion.

21 (2) "Appointed trust" means any irrevocable trust to
22 which principal is appointed in accordance with subsection
23 (b) or (c).

24 (3) "Authorized trustee" means an entity or
25 individual, other than the settlor, who has authority under

1 the terms of an invaded trust to invade the principal of
2 the trust for the benefit of one or more current
3 beneficiaries.

4 (4) "Code" means the United States Internal Revenue
5 Code of 1986, as amended from time to time, including
6 corresponding provisions of subsequent internal revenue
7 laws and corresponding provisions of State law.

8 (5) "Current beneficiary" or "current beneficiaries"
9 means the person or persons who are currently receiving or
10 eligible to receive distributions of principal or income
11 from the trustee on the date of the exercise of the power.

12 (6) "Invade" means the power to pay directly to the
13 beneficiary of a trust or make application for the benefit
14 of the beneficiary.

15 (7) "Invaded trust" means an existing irrevocable
16 inter vivos or testamentary trust part or all of the
17 principal of which is appointed under subsection (b) or
18 (c).

19 (8) "Limited power of appointment" means the power to
20 appoint the principal or income of the trust to a person or
21 entity other than the trustee, the trustee's creditors, the
22 trustee's estate or the creditors of the trustee's estate.

23 (9) "Principal" includes the income of the trust at the
24 time of the exercise of the power that is not currently
25 required to be distributed, including accrued and
26 accumulated income.

1 (10) "Successor beneficiary" means any beneficiary
2 other than the current and remainder beneficiaries, but
3 does not include a potential appointee of a power of
4 appointment held by a beneficiary.

5 (b) Appointment to appointed trust if absolute discretion.
6 An authorized trustee who has the absolute discretion to invade
7 the principal of a trust may appoint part or all of the
8 principal of the trust in favor of a trustee of an appointed
9 trust for the benefit of one, more than one, or all of the
10 current beneficiaries of the invaded trust (to the exclusion of
11 any one or more of such beneficiaries) and for the benefit of
12 one, more than one, or all of the remainder and successor
13 beneficiaries of the invaded trust (to the exclusion of any one
14 or more of such beneficiaries).

15 (1) If the authorized trustee exercises the power under
16 this subsection, the authorized trustee may grant a power
17 of appointment (including a presently exercisable power of
18 appointment) in the appointed trust to one or more of the
19 current beneficiaries of the invaded trust, provided that
20 the beneficiary granted a power to appoint could receive
21 the principal outright under the terms of the invaded
22 trust.

23 (2) If the authorized trustee grants a power of
24 appointment, the class of permissible appointees in favor
25 of whom a beneficiary may exercise the power of appointment
26 granted in the appointed trust may be broader than or

1 otherwise different from the current, successor, and
2 remainder beneficiaries of the invaded trust.

3 (3) If the beneficiary or beneficiaries of the invaded
4 trust are described as a class of persons, the beneficiary
5 or beneficiaries of the appointed trust may include one or
6 more persons of such class who become includible in the
7 class after the appointment to the appointed trust.

8 (c) Appointment to appointed trust if no absolute
9 discretion. An authorized trustee who has the power to invade
10 the principal of a trust, but who does not have the absolute
11 discretion to invade the principal of the trust, may appoint
12 part or all of the principal of the trust in favor of a trustee
13 of an appointed trust, provided that the current beneficiaries
14 of the appointed trust shall be the same as the current
15 beneficiaries of the invaded trust and the remainder and
16 successor beneficiaries of the appointed trust shall be the
17 same as the remainder and successor beneficiaries of the
18 invaded trust.

19 (1) If the authorized trustee exercises the power under
20 this subsection, the appointed trust shall include the same
21 language authorizing the trustee to invade the income or
22 principal of a trust as specified in the invaded trust.

23 (2) If the beneficiary or beneficiaries of the invaded
24 trust are described as a class of persons, the beneficiary
25 or beneficiaries of the appointed trust shall include all
26 persons who become includible in the class after the

1 appointment to the appointed trust.

2 (3) If the authorized trustee exercises the power under
3 this subsection and if the invaded trust grants a power of
4 appointment to a beneficiary of the trust, the appointed
5 trust shall grant such power of appointment in the
6 appointed trust and the class of permissible appointees
7 shall be the same as in the invaded trust.

8 (d) Limited power of appointment. An authorized trustee's
9 exercise of the power to invade the principal of a trust under
10 subsections (b) and (c) shall be considered the exercise of a
11 limited power of appointment.

12 (e) Term of appointed trust. The appointed trust to which
13 an authorized trustee appoints the assets of the invaded trust
14 may have a term that is longer than the term specified in the
15 invaded trust, including but not limited to a term measured by
16 the lifetime of a current beneficiary; provided, however, that
17 the appointed trust shall be limited to the same permissible
18 period of the rule against perpetuities that applied to the
19 invaded trust.

20 (f) Divided discretion. If an authorized trustee has
21 absolute discretion to invade the principal of a trust and the
22 same trustee or another trustee has the power to invade
23 principal under the trust instrument which power does not
24 constitute absolute discretion, such authorized trustee having
25 absolute discretion may exercise the power of appointment under
26 subsection (b).

1 (g) Need to invade not required. An authorized trustee may
2 exercise the power to appoint in favor of an appointed trust
3 under subsections (b) and (c) whether or not there is a current
4 need to invade principal under the terms of the invaded trust.

5 (h) Later discovered assets. To the extent the authorized
6 trustee does not provide otherwise:

7 (1) the appointment of all of the assets comprising the
8 principal of the invaded trust in favor of an appointed
9 trust is deemed to include subsequently discovered assets
10 otherwise belonging to the invaded trust and undistributed
11 principal paid to or acquired by the invaded trust
12 subsequent to the appointment in favor of the appointed
13 trust.

14 (2) the appointment of part but not all of the assets
15 comprising the principal of the invaded trust in favor of
16 an appointed trust does not include subsequently
17 discovered assets belonging to the invaded trust and
18 principal paid to or acquired by the invaded trust
19 subsequent to the appointment in favor of the appointed
20 trust; such assets remain the assets of the invaded trust.

21 (i) Other authority to appoint in further trust. This
22 Section shall not be construed to abridge the right of any
23 trustee to appoint property in further trust that arises in
24 accordance with the terms of the governing instrument of a
25 trust, any provision of applicable law, a court order, or a
26 nonjudicial settlement agreement in accordance with Section

1 16.1.

2 (j) No duty to invade. Nothing in this Section is intended
3 to create or imply a duty to exercise a power to invade
4 principal, and no inference of impropriety whatsoever is to be
5 made as a result of an authorized trustee not exercising the
6 power conferred under subsection (b) or (c).

7 (k) Express prohibition. A power authorized by subsection
8 (b) or (c) may not be exercised if expressly prohibited by the
9 terms of the governing instrument, but a general prohibition of
10 the amendment or revocation of the invaded trust or a provision
11 that constitutes a spendthrift clause does not prohibit or
12 limit the exercise of a power under subsection (b) or (c).

13 (l) Restrictions. An authorized trustee may not exercise a
14 power authorized by subsection (b) or (c) to effect any of the
15 following:

16 (1) to reduce, limit or modify any beneficiary's
17 current right to a mandatory distribution of income or
18 principal, a mandatory annuity or unitrust interest, a
19 right to withdraw a percentage of the value of the trust or
20 a right to withdraw a specified dollar amount provided that
21 such mandatory right has come into effect with respect to
22 the beneficiary;

23 (2) to decrease or indemnify against a trustee's
24 liability or exonerate a trustee from liability for failure
25 to exercise reasonable care, diligence and prudence;

26 (3) to eliminate a provision granting another person

1 the right to remove or replace the authorized trustee
2 exercising the power under subsection (b) or (c);

3 (4) to make a binding and conclusive determination of
4 the value of any asset for purposes of distribution,
5 allocation or otherwise; or

6 (5) to reduce, limit or modify the perpetuities
7 provision specified in the invaded trust in the appointed
8 trust, unless the invaded trust expressly permits the
9 trustee to do so.

10 (m) Exception. Notwithstanding the provisions of paragraph
11 (1) of subsection (l) but subject to the other limitations in
12 this Section, an authorized trustee may exercise a power
13 authorized by subsection (b) or (c) to appoint to an appointed
14 trust; provided, however, that the exercise of such power does
15 not subject the appointed trust to claims of reimbursement by
16 any private or government body and does not at any time
17 interfere with, reduce the amount of, or jeopardize an
18 individual's entitlement to government benefits, including but
19 not limited to Supplemental Security Income and Medicaid.

20 (n) Tax limitations. If any contribution to the invaded
21 trust qualified for the annual exclusion under Section 2503(b)
22 of the Code, the marital deduction under Section 2056(a) or
23 2523(a) of the Code, or the charitable deduction under Section
24 170(a), 642(c), 2055(a) or 2522(a) of the Code, is a direct
25 skip qualifying for treatment under Section 2642(c) of the
26 Code, or qualified for any other specific tax benefit that

1 would be lost by the existence of the authorized trustee's
2 authority under subsection (b) or (c) for income, gift, estate,
3 or generation-skipping transfer tax purposes under the Code,
4 then the authorized trustee shall not have the power to appoint
5 the principal of a trust in accordance with subsection (b) or
6 (c) in a manner that would prevent the contribution to the
7 invaded trust from qualifying for or would reduce the
8 exclusion, deduction, or other tax benefit that was originally
9 claimed with respect to that contribution.

10 (1) Notwithstanding the other provisions of this
11 subsection (n), the authorized trustee may exercise the
12 power to appoint part or all of the invaded trust to a
13 trust as to which the settlor of the invaded trust is not
14 considered the owner under Subpart E of Part I of
15 Subchapter J of Chapter 1 of Subtitle A of the Code even if
16 the settlor is considered such owner of the invaded trust.
17 Nothing in this Section shall be construed as preventing
18 the authorized trustee from appointing part or all of the
19 invaded trust to an appointed trust that is a trust as to
20 which the settlor of the invaded trust is considered the
21 owner under Subpart E of Part I of Subchapter J of Chapter
22 1 of Subtitle A of the Code.

23 (2) During any period when the invaded trust owns
24 subchapter S corporation stock, an authorized trustee may
25 not exercise a power authorized by subsection (b) or (c) to
26 appoint part or all of the S corporation stock to an

1 appointed trust that is not a permitted shareholder under
2 Section 1361(c)(2) of the Code.

3 (3) During any period when the invaded trust owns an
4 interest in property subject to the minimum distribution
5 rules of Section 401(a)(9) of the Code, an authorized
6 trustee may not exercise a power authorized by subsection
7 (b) or (c) to appoint part or all of the interest in such
8 property to an appointed trust that would result in the
9 shortening of the minimum distribution period to which the
10 property is subject in the invaded trust.

11 (o) Limits on compensation of trustee.

12 (1) Unless a court upon application of the trustee
13 directs otherwise, an authorized trustee may not exercise a
14 power authorized by subsection (b) or (c) to change the
15 provisions regarding the determination of the compensation
16 of any trustee.

17 (2) The compensation payable to the trustee or trustees
18 of the invaded trust may continue to be paid to the
19 trustees of the appointed trust during the term of the
20 appointed trust and may be determined in the same manner as
21 otherwise would have applied in the invaded trust;
22 provided, however, that no trustee may receive any
23 termination fee or other compensation imposed upon assets
24 distributed due to the appointment of property from the
25 invaded trust to an appointed trust pursuant to subsection
26 (b) or (c).

1 (p) Written instrument. The exercise of a power to invade
2 principal under subsection (b) or (c) must be made by an
3 instrument in writing, signed and acknowledged by the trustee,
4 and filed with the records of the invaded trust and the
5 appointed trust.

6 (q) Terms of appointed trust. Any reference to the
7 governing instrument or terms of the governing instrument in
8 this Act includes the terms of an appointed trust established
9 in accordance with this Section.

10 (r) Grantor. The grantor of an invaded trust is considered
11 for all purposes to be the grantor of any appointed trust
12 established in accordance with this Section.

13 (s) Application. Unless the invaded trust expressly
14 provides otherwise, this Section applies to the following
15 trusts:

16 (1) an inter vivos or testamentary trust governed by
17 the laws of this State, including a trust whose governing
18 law has been changed to the laws of this State; and

19 (2) an inter vivos or testamentary trust that has a
20 trustee who is an individual domiciled in this State or a
21 trustee which is an entity having an office in this State,
22 provided that a majority of the trustees select this State
23 as the location for the principal place of administration
24 of the trust by an instrument in writing, signed and
25 acknowledged by a majority of the trustees, and the
26 instrument exercising this selection is maintained with

1 the records of the invaded trust and the appointed trust.

2 (760 ILCS 5/16.5 new)

3 Sec. 16.5. Qualified dispositions in trust.

4 (a) Purpose. The purpose of this Section is to provide a
5 means for establishing a Domestic Asset Protection Trust, which
6 is a self-settled irrevocable spendthrift trust, whereby the
7 assets held in the trust will be protected from creditor's
8 claims, as long as the transfers are not fraudulent and are
9 completed at a time that the transferor has no need of asset
10 protection as determined under this Section and applicable law
11 of this State.

12 (b) Definitions. In this Section:

13 (1) "Claim" means a right to payment, whether or not
14 the right is reduced to judgment, liquidated,
15 unliquidated, fixed, contingent, matured, unmatured,
16 disputed, undisputed, legal, equitable, secured or
17 unsecured.

18 (2) "Code" means the United States Internal Revenue
19 Code of 1986, as amended from time to time, including
20 corresponding provisions of subsequent internal revenue
21 laws.

22 (3) "Creditor" means, with respect to a transferor, a
23 person who has a claim.

24 (4) "Debt" means liability on a claim.

25 (5) "Disposition" means a transfer, conveyance or

1 assignment of property (including a change in the legal
2 ownership of property occurring upon the substitution of
3 one trustee for another or the addition of one or more new
4 trustees), or the exercise of a power so as to cause a
5 transfer of property, to a trustee or trustees, but shall
6 not include the release or relinquishment of an interest in
7 property that was the subject of a qualified disposition.

8 (6) "Person" means an individual, a corporation, a
9 company, an association, a firm, a partnership, a society,
10 a joint-stock company, business trust, estate, trust,
11 limited liability company, limited liability partnership,
12 joint venture, government, or any other legal or commercial
13 entity.

14 (7) "Property" means real property, personal property,
15 and any interests in real, personal, or other property.

16 (8) "Qualified disposition" means a disposition by or
17 from a transferor to a qualified trustee or qualified
18 trustees, with or without consideration by means of a trust
19 instrument.

20 (9) "Qualified trustee" means a person who:

21 (A) in the case of a natural person, is a resident
22 of this State other than the transferor or, in all
23 other cases, is authorized by the law of this State to
24 act as a trustee and whose activities are subject to
25 supervision by the Federal Deposit Insurance
26 Corporation, the Director of the Division of Banking of

1 the Department of Financial and Professional
2 Regulation, the Comptroller of the Currency, the
3 Office of Thrift Supervision, or any successor to such
4 an agency;

5 (B) maintains or arranges for custody in this State
6 of some or all of the property that is the subject of
7 the qualified disposition, maintains records for the
8 trust on an exclusive or nonexclusive basis, prepares
9 or arranges for the preparation of fiduciary income tax
10 returns for the trust or otherwise materially
11 participates in the administration of the trust; and

12 (C) is not the transferor nor a natural person who
13 is a nonresident of this State nor an entity that is
14 not authorized by the law of this State to act as a
15 trustee or whose activities are not subject to
16 supervision as provided in subparagraph (b) (9) (A).

17 (10) "Spouse" and "former spouse" mean only persons to
18 whom the transferor was married at, or before, the time the
19 qualified disposition is made.

20 (11) "Transferor" means a person who, directly or
21 indirectly, makes a disposition or causes a disposition to
22 be made as an owner of property, as a trustee, or as a
23 holder of a power of appointment that authorizes the holder
24 to appoint in favor of any one or more of the holder, the
25 holder's creditors, the holder's estate or the creditors of
26 the holder's estate.

1 (12) "Trust instrument" means an instrument appointing
2 a qualified trustee for the property that is the subject of
3 a disposition, which instrument:

4 (A) expressly incorporates the law of this State to
5 govern the validity and construction of the trust, or
6 permits, whether expressly or otherwise, the transfer
7 of the situs of a trust having a non-Illinois trustee
8 to a qualified trustee who has an office in this State
9 for the administration of the trust and who makes this
10 State the principal place of administration of the
11 trust;

12 (B) is irrevocable, but a trust instrument shall
13 not be deemed revocable on account of its inclusion of
14 one or more of the following:

15 (i) a transferor's power to veto a
16 distribution from the trust;

17 (ii) an inter vivos power of appointment,
18 other than an inter vivos power to appoint to the
19 transferor, the transferor's creditors, the
20 transferor's estate or the creditors of the
21 transferor's estate, exercisable by will or other
22 written instrument of the transferor effective
23 only upon the transferor's death;

24 (iii) a testamentary power of appointment;

25 (iv) the transferor's potential or actual
26 receipt of income, including rights to such income

1 retained in the trust instrument;

2 (v) the transferor's potential or actual
3 receipt of income or principal from a charitable
4 remainder unitrust or charitable remainder annuity
5 trust as such terms are defined in Section 664 of
6 the Code; and the transferor's right, at any time
7 and from time to time by written instrument
8 delivered to the trustee, to release such
9 transferor's retained interest in such a trust, in
10 whole or in part, in favor of a charitable
11 organization that has or charitable organizations
12 that have a succeeding beneficial interest in such
13 trust;

14 (vi) the transferor's receipt each year of a
15 percentage (not to exceed 5%) specified in the
16 trust instrument of the initial value of the trust
17 assets or the value determined from time to time
18 pursuant to the trust instrument or of a fixed
19 amount that on an annual basis does not exceed 5%
20 of the initial value of the trust assets or of the
21 current value of the trust assets as determined
22 from time to time in average of multiple years or
23 otherwise;

24 (vii) the transferor's potential or actual
25 receipt or use of principal if such potential or
26 actual receipt or use of principal would be the

1 result of a qualified trustee acting:

2 (aa) in the discretion of such qualified
3 trustee or qualified trustees;

4 (bb) pursuant to a standard that governs
5 the distribution of principal and does not
6 confer upon the transferor a substantially
7 unfettered right to the receipt or use of the
8 principal;

9 (cc) at the discretion of an advisor who is
10 acting in such advisor's discretion; or
11 pursuant to a standard that governs the
12 distribution of principal and does not confer
13 upon the transferor a substantially unfettered
14 right to the receipt of or use of principal;

15 (viii) the transferor's right to remove a
16 trustee or advisor and to appoint a new trustee or
17 advisor;

18 (ix) the transferor's potential or actual use
19 of real property held under a qualified personal
20 residence trust with the meaning of such term as
21 described in Section 2702(c) of the Code or the
22 transferor's possession and enjoyment of a
23 qualified annuity interest within the meaning of
24 such term as described in Treasury Regulation
25 Section 25.2702-5(c) (8) and any successor
26 provision;

1 (x) the transferor's potential or actual
2 receipt of income or principal to pay, in whole or
3 in part, income taxes due on income of the trust if
4 such potential or actual receipt of income or
5 principal is pursuant to a provision in the trust
6 instrument that expressly provides for the payment
7 of such taxes and if such potential or actual
8 receipt of trust property or income from trust
9 property would be the result of a qualified trustee
10 or qualified trustees acting:

11 (aa) in such qualified trustee's
12 discretion or pursuant to a mandatory
13 direction in the trust instrument; or

14 (bb) at the direction of an advisor who is
15 acting in accordance with authority granted
16 such advisor by the terms of the trust;

17 (xi) The ability, whether pursuant to
18 discretion, direction, or the grantor's exercise
19 of a testamentary power of appointment, of a
20 qualified trustee to pay, after the death of the
21 transferor, all or any part of the debts of the
22 transferor outstanding at the time of the
23 transferor's death, the expenses of administering
24 the transferor's estate, or any estate or
25 inheritance tax imposed on or with respect to the
26 transferor's estate; and

1 (C) Provides that the interest of the transferor or
2 other beneficiary in trust property and income from
3 trust property may not be transferred, assigned,
4 pledged, or mortgaged, whether voluntarily or
5 involuntarily, before the qualified trustee actually
6 distributes such trust property or income to the
7 beneficiary, or provides a comparable spendthrift
8 provision having substantially the same effect, and
9 such provision of the trust instrument shall be deemed
10 to be a restriction on the transfer of the transferor's
11 beneficial interest in the trust that is enforceable
12 under applicable nonbankruptcy law within the meaning
13 of Section 541(c) (2) of the Bankruptcy Code (11 U.S.C.
14 Section 541(c) (2)) or any successor provision.

15 (c) Retained interests of transferor. A qualified
16 disposition shall be subject to subsection (d) notwithstanding
17 a transferor's retention of any or all of the powers and rights
18 described in subdivision (b) (12) (B) or the transferor's
19 service as investment trust advisor in accordance with
20 subdivision (b) (9) (D). Except as permitted by subdivisions
21 (b) (9) (D) and (b) (12) (B), a transferor shall have no rights or
22 authority with respect to the property that is the subject of a
23 qualified disposition or income from such property, and any
24 agreement or understanding purporting to grant or permit the
25 retention of any greater rights or authority shall be void.

26 (d) Avoidance of qualified dispositions.

1 (1) The courts of this State have exclusive
2 jurisdiction over any action brought with respect to a
3 qualified disposition. Notwithstanding any other
4 applicable law of this State, no action of any kind,
5 including but not limited to an action to enforce a
6 judgment entered by a court or other body having
7 adjudicative authority, may be brought for an attachment or
8 other provisional remedy against property that is the
9 subject of a qualified disposition or for avoidance of a
10 qualified disposition unless (A) such action is brought
11 pursuant to the provisions of Section 5 or 6 of the Uniform
12 Fraudulent Transfer Act and (B) in the case of a creditor
13 whose claim arose after a qualified disposition, the
14 qualified disposition was made with intent to defraud such
15 creditor.

16 (2) In any action brought to avoid a qualified
17 disposition, the creditor's claim under subsection (c) is
18 extinguished unless:

19 (A) The creditor's claim arose before the
20 qualified disposition was made, and the action is
21 brought within the limitations of Section 10 of the
22 Uniform Fraudulent Transfer Act as in effect on the
23 later of the date of the qualified disposition or the
24 effective date of this amendatory Act of the 97th
25 General Assembly; and

26 (B) Notwithstanding the provisions of Section 10

1 of the Uniform Fraudulent Transfer Act, the creditor's
2 claim arose concurrent with or subsequent to the
3 qualified disposition and the action is brought within
4 4 years after the qualified disposition is made.

5 (3) For the purposes of this Section, a qualified
6 disposition that is made by means of a disposition by a
7 transferor who is a trustee is deemed to have been made as
8 of the time (whether before, on, or after the effective
9 date of this amendatory Act of the 97th General Assembly)
10 the property that is the subject of the qualified
11 disposition was originally transferred to the transferor
12 (or any predecessor trustee) if the qualified disposition
13 is made in a form that otherwise meets the requirements of
14 subdivisions (b) (12) (B) and (C).

15 (4) Notwithstanding any applicable Illinois law to the
16 contrary, a creditor, including a creditor whose claim
17 arose before or after a qualified disposition, or any other
18 person may have only such rights with respect to a
19 qualified disposition as are provided in this Section, and
20 no such creditor nor any other person may have any claim or
21 cause of action against the trustee or any advisor of a
22 trust that is the subject of a qualified disposition, or
23 against any person involved in the counseling, drafting,
24 preparation, execution, or funding of a trust that is the
25 subject of a qualified disposition.

26 (5) Notwithstanding any other provision of applicable

1 law of this State, no action of any kind, including but not
2 limited to an action to enforce a judgment entered by a
3 court or other body having adjudicative authority, may be
4 brought at law or in equity against the trustee or any
5 advisor of a trust that is the subject of a qualified
6 disposition, if as of the date such action is brought an
7 action by a creditor with respect to such qualified
8 disposition would be barred in accordance with this
9 Section.

10 (6) In circumstances where more than one qualified
11 disposition is made by means of the same trust instrument,
12 then:

13 (A) the making of a subsequent qualified
14 disposition is disregarded in determining whether a
15 creditor's claim with respect to a prior qualified
16 disposition is extinguished as provided in this
17 Section; and

18 (B) any distribution to a beneficiary is deemed to
19 have been made from the latest such qualified
20 disposition.

21 (7) If, in any action brought against a corporate
22 trustee or a fiduciary of a trust that is the result of a
23 qualified disposition, a court takes any action by which
24 such court declines to apply the law of this State in
25 determining the validity, construction or administration
26 of such trust, or the effect of a spendthrift provision of

1 such trust, such trustee must immediately upon such court's
2 action and without the further order of any court, cease in
3 all respects to be trustee of such trust and a successor
4 trustee must immediately succeed as trustee in accordance
5 with the terms of the trust instrument or, if the trust
6 instrument does not provide for a successor trustee and the
7 trust would otherwise be without a trustee upon the
8 application by petition to a court of this State by any
9 beneficiary of such trust, the court shall appoint a
10 successor trustee upon such terms and conditions as it
11 determines to be consistent with the purposes of such trust
12 and this Section. Upon such trustee ceasing to be trustee,
13 such trustee shall have no power or authority other than to
14 convey the trust property to the successor trustee named in
15 the trust instrument or appointed by the court in
16 accordance with this Section.

17 (e) Limitations on qualified dispositions. With respect to
18 the limitations imposed by this Section on actions by creditors
19 of a transferor to avoid a qualified disposition, such
20 limitations do not apply to certain debts and claims as
21 follows: indebtedness, and only to the extent of such debt, to
22 any person on account of an agreement or order of court for the
23 payment of support, including but not limited to child support
24 or maintenance in favor of such transferor's spouse, former
25 spouse or children, or for a division or distribution of
26 property in favor of such transferor's spouse or former spouse,

1 but not including any claim for renunciation, spouse's award,
2 or child's award under the Probate Act of 1975.

3 (f) Effect of avoidance of qualified dispositions.

4 (1) A qualified disposition may be avoided only to the
5 extent necessary to satisfy the transferor's debt to the
6 creditor at whose instance the disposition had been
7 avoided, together with such costs, including attorney
8 fees, as the court may allow.

9 (2) In the event any qualified disposition is avoided
10 in accordance with this Section, then:

11 (A) if the court is satisfied that a trustee has
12 not acted in bad faith in accepting or administering
13 the property that is the subject of the qualified
14 disposition:

15 (i) such trustee has a first and paramount lien
16 against the property that is the subject of the
17 qualified disposition in an amount equal to the
18 entire cost, including attorney fees, incurred by
19 such trustee in the reasonable and necessary
20 defense of the action or proceedings to avoid the
21 qualified disposition; and

22 (ii) for purposes of subdivision (f) (2) (A) (i),
23 it is presumed that such trustee did not act in bad
24 faith merely by accepting such property.

25 (B) If the court is satisfied that a beneficiary of
26 a trust has not acted in bad faith, the avoidance of

1 the qualified disposition is subject to the right of
2 such beneficiary to retain any distribution made prior
3 to the creditor's commencement of an action to avoid
4 the qualified disposition.

5 (C) A creditor has the burden of proving that a
6 trustee or beneficiary acted in bad faith by clear and
7 convincing evidence except that, in the case of a
8 beneficiary who is also the transferor, the burden on
9 the creditor is to prove that the
10 transferor-beneficiary acted in bad faith by a
11 preponderance of the evidence. The preceding sentence
12 provides a substantive and not a procedural right.

13 (3) Notwithstanding any other applicable law of this
14 State, a creditor has no right against the interest of a
15 beneficiary in a trust solely because such beneficiary has
16 the right to authorize or direct the trustee to pay all or
17 part of the trust property in satisfaction of estate or
18 inheritance taxes imposed upon or with respect to the
19 beneficiary's estate, or the debts of the beneficiary's
20 estate, unless such beneficiary actually directs the
21 payment of such taxes, debts, or expenses and then only to
22 the extent of such direction.

23 (g) Advisors.

24 (1) For purposes of this Section, the term "advisor"
25 includes a trust investment advisor, a trust distribution
26 advisor, a trust protector or any other person or persons

1 who, in addition to or to the exclusion of a qualified
2 trustee, holds one or more trust powers.

3 (2) Nothing in this Section shall preclude a transferor
4 from appointing one or more advisors, including but not
5 limited to:

6 (A) an advisor who has authority under the terms of
7 the trust instrument to remove and appoint qualified
8 trustees or trust advisors;

9 (B) an advisor who has authority under the terms of
10 the trust instrument to direct, consent to or
11 disapprove distributions from the trust; or

12 (C) an advisor who is a directing party as
13 described in Section 16.3.

14 (3) A person may serve as an investment trust advisor
15 described in Section 16.3 notwithstanding that such person
16 is the transferor of the qualified disposition, but such a
17 person may not otherwise serve as advisor of a trust that
18 is a qualified disposition except with respect to the
19 retention of one or more rights permitted by subdivision
20 (b) (12) (B) .

21 (h) Administration.

22 (1) In the event that a qualified trustee of a trust
23 ceases to meet the requirements to be a qualified trustee
24 in accordance with this Section, and there remains no
25 trustee that meets such requirements, such former
26 qualified trustee is deemed to have resigned as of the time

1 of such cessation, and the successor qualified trustee
2 provided for in the trust instrument then becomes the
3 qualified trustee of the trust, or in the absence of any
4 successor qualified trustee provided for in the trust
5 instrument, the court shall appoint a successor qualified
6 trustee, upon application of the settlor, a trustee, or a
7 beneficiary.

8 (2) In the case of a disposition to more than one
9 trustee, a disposition that is otherwise a qualified
10 disposition is not be treated as other than a qualified
11 disposition solely because not all of the trustees are
12 qualified trustees.

13 (3) For purposes of this Section, a qualified trustee
14 is presumed to have discretion with respect to the
15 distribution of principal unless such discretion is
16 expressly denied to such trustee by the terms of the trust
17 instrument.

18 (760 ILCS 5/16.6 new)

19 Sec. 16.6. Modification or termination of irrevocable
20 trust.

21 (a) By consent of trustee and beneficiaries.

22 (1) An irrevocable trust may be modified upon consent
23 of the trustee and all of the beneficiaries if the court
24 concludes that modification is not inconsistent with a
25 material purpose of the trust.

1 (2) An irrevocable trust may be terminated upon consent
2 of the trustee and all of the beneficiaries if the court
3 concludes that continuance of the trust is not necessary to
4 achieve any material purpose of the trust.

5 (3) The court may consider spendthrift provisions as a
6 factor in making a decision under this Section, but a
7 spendthrift provision is not necessarily a material
8 purpose of a trust, and the court is not precluded from
9 modifying or terminating a trust because the trust contains
10 spendthrift provisions.

11 (4) If not all of the beneficiaries consent to a
12 proposed modification or termination of the trust in
13 accordance with this Section, the court may approve the
14 modification or termination if the court is satisfied that:

15 (A) if all of the beneficiaries had consented, the
16 trust could have been modified or terminated under this
17 Section; and

18 (B) the interests of a beneficiary who does not
19 consent receives equitable treatment consistent with
20 the purposes of the trust.

21 (b) Unanticipated circumstances.

22 (1) The court may modify the administrative or
23 dispositive terms of a trust or terminate the trust if,
24 because of circumstances not anticipated by the settlor,
25 modification or termination will further the purposes of
26 the trust. To the extent practicable, the modification must

1 be made in accordance with the settlor's probable
2 intention.

3 (2) The court may modify the administrative terms of a
4 trust if the modification furthers the purposes of the
5 trust or if continuation of the trust on its existing terms
6 would be impracticable, wasteful, or impair the trust's
7 administration.

8 (3) The court may modify or terminate a trust or remove
9 the trustee and appoint a different trustee if such change
10 furtheres the purposes of the trust, including but not
11 limited to a finding by the court that the value of the
12 trust property is insufficient to justify the cost of
13 administration.

14 (c) Reformation to correct mistakes. The court may reform
15 the terms of a trust, even if unambiguous, to conform the terms
16 to the settlor's intention if it is proved by clear and
17 convincing evidence that both the settlor's intent and the
18 terms of the trust instrument were affected by a mistake of
19 fact or law, whether in expression or inducement.

20 (d) Modification to achieve settlor's tax objectives. To
21 achieve the settlor's tax objectives, the court may modify the
22 terms of a trust in a manner that is not contrary to the
23 settlor's probable intention. The court may provide that the
24 modification has retroactive effect.

25 (e) Distribution on termination. Upon termination of a
26 trust, or modification of trust provisions regarding

1 termination, in accordance with this Section, the court may
2 order the trust property distributed as agreed by the parties
3 to the agreement or otherwise as the court determines equitable
4 consistent with the purposes of the trust.

5 (f) Charitable trusts. This Section does not apply to a
6 charitable trust until the termination of all charitable
7 interests in the trust. For this purpose, "charitable trust"
8 means a trust that holds funds part or all of which are to be
9 applied for the benefit of an indefinite number of people to
10 provide them with education; religion; relief from poverty,
11 sickness, or disease; a means of establishing themselves in
12 life; public building or recreational facilities; or services
13 that lessen the burden of government, including but not limited
14 to a trust for which a charitable deduction was or is allowed
15 or allowable under the Internal Revenue Code.

16 (g) Modification or termination by agreement. Any
17 modification or termination of a trust that could be approved
18 by a court as provided in this Section alternatively may be
19 completed by a nonjudicial settlement agreement entered into by
20 all interested persons, or their respective representatives,
21 in accordance with Section 16.1 without court action, except
22 that in the case of an agreement to terminate a trust court
23 approval is required in accordance with subparagraph (d) (4) (L)
24 of Section 16.1.

1 Sec. 16.7. Application. Sections 16.3 through 16.6 of this
2 Act apply to all trusts in existence on the effective date of
3 this amendatory Act of the 97th General Assembly or created
4 after that date. Sections 16.3 through 16.6 shall be construed
5 as pertaining to administration of a trust and shall be
6 available to any trust that is administered in Illinois under
7 Illinois law or that is governed by Illinois law with respect
8 to the meaning and effect of its terms, except to the extent
9 the governing instrument expressly prohibits use of one or more
10 such Sections by specific reference to such one or more
11 Sections. A provision in the governing instrument in the form:
12 "Neither the provisions of Sections 16.3 through 16.6 of the
13 Trusts and Trustees Act nor any corresponding provision of
14 future law may be used in the administration of this trust" or
15 a similar provision demonstrating that intent is sufficient to
16 preclude the use of Sections 16.3 through 16.6.

17 Section 99. Effective date. This Act takes effect upon
18 becoming law.