

AN ACT concerning civil law.

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

Section 5. The Trusts and Trustees Act is amended by changing Sections 5.3 and 16.1 as follows:

(760 ILCS 5/5.3)

Sec. 5.3. Total return trusts.

(a) Conversion by trustee. A trustee may convert a trust to a total return trust as described in this Section if all of the following apply:

(1) The trust describes the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines that conversion to a total return trust will enable the trustee to better carry out the purposes of the trust and the conversion is in the best interests of the beneficiaries;

(2) conversion to a total return trust means the trustee will invest and manage trust assets seeking a total return without regard to whether that return is from income or appreciation of principal, and will make distributions in accordance with this Section (such a trust is called a "total return trust" in this Section);

(3) the trustee sends a written notice of the trustee's

decision to convert the trust to a total return trust, specifying a prospective effective date for the conversion and including a copy of this Section, to the following beneficiaries, determined as of the date the notice is sent and assuming nonexercise of all powers of appointment:

(A) all of the legally competent beneficiaries who are currently receiving or eligible to receive income from the trust; and

(B) all of the legally competent beneficiaries who would receive or be eligible to receive a distribution of principal or income if the current interests of beneficiaries currently receiving or eligible to receive income ended;

(4) there are one or more legally competent income beneficiaries under subdivision (3)(A) of this subsection (a) and one or more legally competent remainder beneficiaries under subdivision (3)(B) of this subsection (a), determined as of the date of sending the notice;

(5) no beneficiary objects to the conversion to a total return trust in a writing delivered to the trustee within 60 days after the notice is sent; and

(6) the trustee has signed acknowledgments of receipt confirming that notice was received by each beneficiary required to be sent notice under subdivision (3) of this subsection (a).

(b) Conversion by agreement. Conversion to a total return

trust may be made by agreement between a trustee and (i) all primary beneficiaries, either individually or by their respective representatives in accordance with subsection 16.1(a)(2) of this Act, or (ii) all beneficiaries currently eligible to receive income or principal from the trust and all beneficiaries who are presumptive remaindermen, either individually or by their respective representatives in accordance with subsection 16.1(a)(3) of this Act ~~all the primary beneficiaries of the trust under the virtual representation provisions of Section 16.1 of this Act if those provisions otherwise apply.~~ The agreement may include any actions a court could properly order under subsection (g) of this Section; however, any distribution percentage determined by the agreement may not be less than 3% nor greater than 5%.

(c) Conversion or reconversion by court.

(1) The trustee may for any reason elect to petition the court to order conversion to a total return trust, including without limitation the reason that conversion under subsection (a) is unavailable because:

(A) a beneficiary timely objects to the conversion to a total return trust;

(B) there are no legally competent beneficiaries described in subdivision (3)(A) of subsection (a); or

(C) there are no legally competent beneficiaries described in subdivision (3)(B) of subsection (a).

(2) A beneficiary may request the trustee to convert to

a total return trust or adjust the distribution percentage. If the trustee declines or fails to act within 6 months after receiving a written request to do so, the beneficiary may petition the court to order the conversion or adjustment.

(3) The trustee may petition the court prospectively to reconvert from a total return trust or adjust the distribution percentage if the trustee determines that the reconversion or adjustment will enable the trustee to better carry out the purposes of the trust. A beneficiary may request the trustee to petition the court prospectively to reconvert from a total return trust or adjust the distribution percentage. If the trustee declines or fails to act within 6 months after receiving a written request to do so, the beneficiary may petition the court to order the reconversion or adjustment.

(4) In a judicial proceeding under this subsection (c), the trustee may, but need not, present the trustee's opinions and reasons (A) for supporting or opposing conversion to (or reconversion from or adjustment of the distribution percentage of) a total return trust, including whether the trustee believes conversion (or reconversion or adjustment of the distribution percentage) would enable the trustee to better carry out the purposes of the trust, and (B) about any other matters relevant to the proposed conversion (or reconversion or adjustment of

the distribution percentage). A trustee's actions in accordance with this subsection (c) shall not be deemed improper or inconsistent with the trustee's duty of impartiality unless the court finds from all the evidence that the trustee acted in bad faith.

(5) The court shall order conversion to (or reconversion prospectively from or adjustment of the distribution percentage of) a total return trust if the court determines that the conversion (or reconversion or adjustment of the distribution percentage) will enable the trustee to better carry out the purposes of the trust and the conversion (or reconversion or adjustment of the distribution percentage) is in the best interests of the beneficiaries.

(6) Notwithstanding any other provision of this Section, a trustee has no duty to inform beneficiaries about the availability of this Section and has no duty to review the trust to determine whether any action should be taken under this Section unless requested to do so in writing by a beneficiary described in subdivision (3) of subsection (a).

(d) Post conversion. While a trust is a total return trust, all of the following shall apply to the trust:

(1) the trustee shall make income distributions in accordance with the governing instrument subject to the provisions of this Section;

(2) the term "income" in the governing instrument means an annual amount (the "distribution amount") equal to a percentage (the "distribution percentage") of the net fair market value of the trust's assets, whether the assets are considered income or principal under the Principal and Income Act, averaged over the lesser of:

(i) the 3 preceding years; or

(ii) the period during which the trust has been in existence;

(3) the distribution percentage for any trust converted to a total return trust by a trustee in accordance with subsection (a) shall be 4%;

(4) the trustee shall pay to a beneficiary (in the case of an underpayment) and shall recover from a beneficiary (in the case of an overpayment) an amount equal to the difference between the amount properly payable and the amount actually paid, plus interest compounded annually at a rate per annum equal to the distribution percentage in the year or years while the underpayment or overpayment exists; and

(5) a change in the method of determining a reasonable current return by converting to a total return trust in accordance with this Section and substituting the distribution amount for net trust accounting income is a proper change in the definition of trust income notwithstanding any contrary provision of the Principal

and Income Act, and the distribution amount shall be deemed a reasonable current return that fairly apportions the total return of a total return trust.

(e) Administration. The trustee, in the trustee's discretion, may determine any of the following matters in administering a total return trust as the trustee from time to time determines necessary or helpful for the proper functioning of the trust:

(1) the effective date of a conversion to a total return trust;

(2) the manner of prorating the distribution amount for a short year in which a beneficiary's interest commences or ceases;

(3) whether distributions are made in cash or in kind;

(4) the manner of adjusting valuations and calculations of the distribution amount to account for other payments from or contributions to the trust;

(5) whether to value the trust's assets annually or more frequently;

(6) what valuation dates and how many valuation dates to use;

(7) valuation decisions about any asset for which there is no readily available market value, including:

(A) how frequently to value such an asset;

(B) whether and how often to engage a professional appraiser to value such an asset; and

(C) whether to exclude the value of such an asset from the net fair market value of the trust's assets under subdivision (d) (2) for purposes of determining the distribution amount. Any such asset so excluded is referred to as an "excluded asset" in this subsection (e), and the trustee shall distribute any net income received from the excluded asset as provided for in the governing instrument, subject to the following principles:

(i) unless the trustee determines there are compelling reasons to the contrary considering all relevant factors including the best interests of the beneficiaries, the trustee shall treat each asset for which there is no readily available market value as an excluded asset;

(ii) if tangible personal property or real property is possessed or occupied by a beneficiary, the trustee shall not limit or restrict any right of the beneficiary to use the property in accordance with the governing instrument whether or not the trustee treats the property as an excluded asset;

(iii) examples of assets for which there is a readily available market value include: cash and cash equivalents; stocks, bonds, and other securities and instruments for which there is an

established market on a stock exchange, in an over-the-counter market, or otherwise; and any other property that can reasonably be expected to be sold within one week of the decision to sell without extraordinary efforts by the seller;

(iv) examples of assets for which there is no readily available market value include: stocks, bonds, and other securities and instruments for which there is no established market on a stock exchange, in an over-the-counter market, or otherwise; real property; tangible personal property; and artwork and other collectibles; and

(8) any other administrative matters as the trustee determines necessary or helpful for the proper functioning of the total return trust.

(f) Allocations.

(1) Expenses, taxes, and other charges that would be deducted from income if the trust were not a total return trust shall not be deducted from the distribution amount.

(2) Unless otherwise provided by the governing instrument, the trustee shall fund the distribution amount each year from the following sources for that year in the order listed: first from net income (as the term would be determined if the trust were not a total return trust), then from other ordinary income as determined for federal income tax purposes, then from net realized short-term

capital gains as determined for federal income tax purposes, then from net realized long-term capital gains as determined for federal income tax purposes, then from trust principal comprised of assets for which there is a readily available market value, and then from other trust principal.

(g) Court orders. The court may order any of the following actions in a proceeding brought by a trustee or a beneficiary in accordance with subdivision (c) (1), (c) (2), or (c) (3):

- (1) select a distribution percentage other than 4%;
- (2) average the valuation of the trust's net assets over a period other than 3 years;
- (3) reconvert prospectively from or adjust the distribution percentage of a total return trust;
- (4) direct the distribution of net income (determined as if the trust were not a total return trust) in excess of the distribution amount as to any or all trust assets if the distribution is necessary to preserve a tax benefit; or
- (5) change or direct any administrative procedure as the court determines necessary or helpful for the proper functioning of the total return trust.

Nothing in this subsection (g) limits the equitable powers of the court to grant other relief.

(h) Restrictions. Conversion to a total return trust does not affect any provision in the governing instrument:

- (1) directing or authorizing the trustee to distribute

principal;

(2) directing or authorizing the trustee to distribute a fixed annuity or a fixed fraction of the value of trust assets;

(3) authorizing a beneficiary to withdraw a portion or all of the principal; or

(4) in any manner that would diminish an amount permanently set aside for charitable purposes under the governing instrument unless both income and principal are so set aside.

(i) Tax limitations. If a particular trustee is a beneficiary of the trust and conversion or failure to convert would enhance or diminish the beneficial interest of the trustee, or if possession or exercise of the conversion power by a particular trustee would alone cause any individual to be treated as owner of a part of the trust for income tax purposes or cause a part of the trust to be included in the gross estate of any individual for estate tax purposes, then that particular trustee may not participate as a trustee in the exercise of the conversion power; however:

(1) the trustee may petition the court under subdivision (c)(1) to order conversion in accordance with this Section; and

(2) if the trustee has one or more co-trustees to whom this subsection (i) does not apply, the co-trustee or co-trustees may convert the trust to a total return trust

in accordance with this Section.

(j) Releases. A trustee may irrevocably release the power granted by this Section if the trustee reasonably believes the release is in the best interests of the trust and its beneficiaries. The release may be personal to the releasing trustee or may apply generally to some or all subsequent trustees, and the release may be for any specified period, including a period measured by the life of an individual.

(k) Remedies. A trustee who reasonably and in good faith takes or omits to take any action under this Section is not liable to any person interested in the trust. If a trustee reasonably and in good faith takes or omits to take any action under this Section and a person interested in the trust opposes the act or omission, the person's exclusive remedy is to obtain an order of the court directing the trustee to convert the trust to a total return trust, to reconvert from a total return trust, to change the distribution percentage, or to order any administrative procedures the court determines necessary or helpful for the proper functioning of the trust. An act or omission by a trustee under this Section is presumed taken or omitted reasonably and in good faith unless it is determined by the court to have been an abuse of discretion. Any claim by any person interested in the trust that an act or omission by a trustee under this Section was an abuse of discretion is barred if not asserted in a proceeding commenced by or on behalf of the person within 2 years after the trustee has sent to the

person or the person's personal representative a notice or report in writing sufficiently disclosing facts fundamental to the claim such that the person knew or reasonably should have known of the claim. The preceding sentence shall not apply to a person who was under a legal disability at the time the notice or report was sent and who then had no personal representative. For purposes of this subsection (k), a personal representative refers to a court appointed guardian or conservator of the estate of a person.

(1) Application. This Section is available to trusts in existence on the effective date of this amendatory Act of the 92nd General Assembly or created after that date. This Section shall be construed as pertaining to the administration of a trust and shall be available to any trust that is administered in Illinois under Illinois law or that is governed by Illinois law with respect to the meaning and effect of its terms unless:

(1) the trust is a trust described in Internal Revenue Code Section 642(c)(5), 664(d), 2702(a)(3), or 2702(b); or

(2) the governing instrument expressly prohibits use of this Section by specific reference to this Section. A provision in the governing instrument in the form: "Neither the provisions of Section 5.3 of the Trusts and Trustees Act nor any corresponding provision of future law may be used in the administration of this trust" or a similar provision demonstrating that intent is sufficient to preclude the use of this Section.

(m) Application to express trusts.

(1) This subsection (m) does not apply to a charitable remainder unitrust as defined by Section 664(d), Internal Revenue Code of 1986 (26 U.S.C. Section 664), as amended.

(2) In this subsection (m):

(A) "Unitrust" means a trust the terms of which require distribution of a unitrust amount, without regard to whether the trust has been converted to a total return trust in accordance with this Section or whether the trust is established by express terms of the governing instrument.

(B) "Unitrust amount" means an amount equal to a percentage of a trust's assets that may or must be distributed to one or more beneficiaries annually in accordance with the terms of the trust. The unitrust amount may be determined by reference to the net fair market value of the trust's assets as of a particular date or as an average determined on a multiple year basis.

(3) A unitrust changes the definition of income by substituting the unitrust amount for net trust accounting income as the method of determining current return and shall be given effect notwithstanding any contrary provision of the Principal and Income Act. By way of example and not limitation, a unitrust amount determined by a percentage of not less than 3% nor greater than 5% is

conclusively presumed a reasonable current return that fairly apportions the total return of a unitrust.

(4) The allocations provision of subdivision (2) of subsection (f) of Section 5.3 applies to a unitrust except to the extent its governing instrument expressly provides otherwise.

(Source: P.A. 92-838, eff. 8-22-02; 93-991, eff. 8-23-04.)

(760 ILCS 5/16.1)

Sec. 16.1. Virtual representation.

(a) Representation by person having substantially identical interest; contingent remainder beneficiaries.

(1) To the extent there is no conflict of interest between the representative and the person represented, a minor, disabled, or unborn person, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another individual having a substantially identical interest with respect to the particular question or dispute; provided, however, that such person is not otherwise represented by a court appointed guardian as provided in the next sentence. If a person is represented by a court appointed guardian of the estate or, if none, by a court appointed guardian of the person, the actions of such guardian shall represent and bind that person for purposes of this subsection (a)(1).

(2) If all primary beneficiaries of a trust either are adults and not disabled, or have representatives in accordance with subsection (a)(1) who are adults and not disabled, the actions of such primary beneficiaries, or their respective representatives, shall represent and bind all other persons who have a successor, contingent, future, or other interest in the trust and who would become primary beneficiaries only by reason of surviving a primary beneficiary.

For purposes of this Section, "primary beneficiary" means a beneficiary who is either: (i) currently eligible to receive income or principal from the trust or (ii) assuming nonexercise of all powers of appointment, will be eligible to receive a distribution of principal from the trust if the beneficiary survives to the final date of distribution with respect to the beneficiary's share.

(3) If all presumptive remainder beneficiaries either are adults and not disabled, or have representatives in accordance with subsection (a)(1) who are adults and not disabled, the actions of such presumptive remainder beneficiaries, or their respective representatives, shall represent and bind all other beneficiaries who have a successor, contingent, or other future interest in the trust. For purposes of this Section, "presumptive remainder beneficiaries" means, as of the date of determination and assuming nonexercise of all powers of

appointment, all beneficiaries who either (A) would be eligible to receive a distribution of income or principal if the trust terminated on that date, or (B) would be eligible to receive a distribution of income or principal if the interests of all beneficiaries currently eligible to receive income or principal from the trust ended without causing the trust to terminate.

(4) The consent of a person who may represent and bind another person in accordance with this Section is binding on the person represented, and notice to a person who may represent and bind another person in accordance with this Section has the same effect as if notice were given directly to the other person.

(b) Total return trusts. This Section shall apply to enable conversion to a total return trust by agreement in accordance with subsection 5.3(b) of the total return trust provisions of Section 5.3 of this Act, whether such agreement is made between the trustee and (A) all primary beneficiaries, either individually or by their respective representatives in accordance with subsection (a)(1), or (B) all beneficiaries currently eligible to receive income or principal from the trust and all beneficiaries who are presumptive remaindermen of the trust, in each case either individually or by their respective representatives in accordance with subsection (a)(1).

(c) Representation of charity. If a trust provides a

beneficial interest or expectancy for one or more charities or charitable purposes that are not specifically named or otherwise represented (the "charitable interest"), the Illinois Attorney General may, in accordance with this Section, represent, bind, and act on behalf of the charitable interest with respect to any particular question or dispute, including without limitation representing the charitable interest in a nonjudicial settlement agreement or in an agreement to convert a trust to a total return trust in accordance with subsection 5.3(b) of the total return trust provisions of Section 5.3 of this Act. This subsection (c) shall be construed as being declarative of existing law and not as a new enactment. Notwithstanding any other provision, nothing in this Section shall be construed to limit or affect the Illinois Attorney General's authority to file an action or take other steps as he or she deems advisable at any time to enforce or protect the general public interest as to a trust that provides a beneficial interest or expectancy for one or more charities or charitable purposes whether or not a specific charity is named in the trust.

(d) Nonjudicial settlement agreements.

(1) For purposes of this Section, "interested persons" means the trustee and all other persons and parties in interest whose consent or joinder would be required in order to achieve a binding settlement were the settlement to be approved by the court.

(2) Except as otherwise provided in subsection (d)(3), interested persons, or their respective representatives determined after giving effect to the preceding provisions of this Section, may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(3) A nonjudicial settlement agreement is valid only to the extent its terms and conditions could be properly approved under applicable law by a court of competent jurisdiction.

(4) Matters that may be resolved by a nonjudicial settlement agreement include but are not limited to:

(A) interpretation or construction of the terms of the trust;

(B) approval of a trustee's report or accounting;

(C) exercise or nonexercise of any power by a trustee;

(D) the grant to a trustee of any necessary or desirable administrative power;

(E) questions relating to property or an interest in property held by the trust;

(F) resignation or appointment of a trustee;

(G) determination of a trustee's compensation;

(H) transfer of a trust's principal place of administration;

(I) liability or indemnification of a trustee for

an action relating to the trust;

(J) resolution of disputes or issues related to administration, investment, distribution or other matters;

(K) modification of terms of the trust pertaining to administration of the trust; and

(L) termination of the trust, provided that court approval of such termination must be obtained in accordance with subsection (d)(5), and the court must conclude continuance of the trust is not necessary to achieve any material purpose of the trust; upon such termination the court may order the trust property distributed as agreed by the parties to the agreement or otherwise as the court determines equitable consistent with the purposes of the trust.

(5) Any interested person may request the court to approve any part or all of a nonjudicial settlement agreement, including whether any representation is adequate and without conflict of interest, provided that the petition for such approval must be filed before or within 60 days after the effective date of the agreement.

(6) An agreement entered into in accordance with this Section shall be final and binding on the trustee and all beneficiaries of the trust, both current and future, as if ordered by a court with competent jurisdiction over all parties in interest.

(7) In the trustee's sole discretion, the trustee may, but is not required to, obtain and rely upon opinion of counsel on any matter relevant to this Section, including that any agreement proposed to be made in accordance with this Section could be properly approved by the court under applicable law, or that there is no conflict of interest between a representative and the person represented or among those being represented with respect to a particular question or dispute.

(e) Application. On and after its effective date, this Section applies to all existing and future trusts, judicial proceedings, or agreements entered into in accordance with this Section on or after the effective date.

~~(a) If all primary beneficiaries of a trust are adults and not incapacitated, except as provided in subsection (c), any written agreement, including, without limitation, an agreement construing any provision of the trust or an agreement regarding any duty, power, responsibility, or action of the trustee, between a trustee and all of the primary beneficiaries of a trust shall be final and binding on the trustee and all beneficiaries of the trust, both current and future, as if ordered by a court with competent jurisdiction over all parties in interest, if all other persons who have a contingent, future, or other interest in the trust would become primary beneficiaries only by reason of surviving a primary beneficiary.~~

~~(b) For purposes of this Section, "primary beneficiary" means a beneficiary who is either: (1) currently entitled or eligible to receive any portion of the trust income or principal, or (2) assuming nonexercise of all powers of appointment, will receive, or be entitled to withdraw, all or a portion of the principal of the trust, if the beneficiary survives to the final date of distribution with respect to the beneficiary's share.~~

~~(c) This Section shall not apply to an agreement that accelerates the termination of a trust, in whole or in part.~~

~~(d) In the trustee's sole discretion, the trustee may obtain opinion of counsel that any agreement proposed to be made under this Section is not clearly contrary to the express terms of the trust instrument. The trustee may, but is not required to, enter into an agreement under this Section. On and after its effective date, this Section applies to all existing and future trusts, but only as to agreements entered into on or after the effective date.~~

(Source: P.A. 88-367.)