

1 AN ACT in relation to trusts.

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
5 adding Section 5.3 as follows:

6 (760 ILCS 5/5.3 new)

7 Sec. 5.3. Total return trusts.

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

11 (1) the trust describes the amount that may or must
12 be distributed to a beneficiary by referring to the
13 trust's income, and the trustee determines that
14 conversion to a total return trust will enable the
15 trustee to better carry out the purposes of the trust;

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

22 (3) the trustee sends written notice of the
23 trustee's decision to convert the trust into a total
24 return trust as of a specified effective date, along with
25 a copy of this Section, to:

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

29 (B) all of the legally competent beneficiaries
30 who would receive or be eligible to receive,
31 assuming nonexercise of all powers of appointment, a

1 distribution of principal if the trust were to
2 terminate immediately before the sending of the
3 notice;

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

9 (5) no such beneficiary objects to the conversion
10 to a total return trust in a writing delivered to the
11 trustee within 60 days after the notice is sent.

12 (b) Judicially approved conversion.

13 (1) The trustee may petition the court to order the
14 conversion to a total return trust if any of the
15 following apply:

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

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

21 (C) there are no legally competent
22 beneficiaries described in subdivision (3)(B) of
23 subsection (a); or

24 (D) the trustee elects for any reason to
25 petition the court to approve conversion to a total
26 return trust.

27 (2) A beneficiary may request a trustee to convert
28 to a total return trust. If the trustee declines or fails
29 to act within a reasonable time after receiving a written
30 request to do so, the beneficiary may petition the court
31 to order the conversion.

32 (3) The court shall order conversion to a total
33 return trust if the court determines that the conversion
34 will enable the trustee to better carry out the purposes

1 of the trust.

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

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

17 (6) Conversion to a total return trust may be made
18 by agreement between a trustee and all the primary
19 beneficiaries of the trust under the virtual
20 representation provisions of Section 16.1 of this Act if
21 those provisions apply. The agreement may include any
22 actions a court could properly order under subsection
23 (f); however, any distribution percentage determined by
24 the agreement may not be less than 3% nor greater than
25 5%.

26 (c) Post conversion. After a trust is converted to a
27 total return trust, all of the following apply:

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

31 (2) the term "income" in the governing instrument
32 means an annual amount (the "distribution amount") equal
33 to a percentage (the "distribution percentage") of the
34 net fair market value of the trust's assets, whether the

1 assets are considered income or principal under the
2 Principal and Income Act, averaged over the lesser of:

3 (i) the 3 preceding years; or

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

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

9 (4) the trustee shall pay to a beneficiary (in the
10 case of an underpayment) and shall recover from a
11 beneficiary (in the case of an overpayment) an amount
12 equal to the difference between the amount properly
13 payable and the amount actually paid.

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

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

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

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

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

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

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

33 (7) how frequently to value any asset for which
34 there is no readily available market value, whether and

1 how often to engage a professional appraiser to value
 2 such an asset, and whether to decide both to exclude such
 3 an asset from valuation and to distribute any net income
 4 received from such an asset in accordance with the
 5 governing instrument;

6 (8) whether to omit from valuation any tangible or
 7 real property occupied or possessed by a beneficiary; and

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

11 (e) Allocation.

12 (1) Expenses and charges that would be deducted
 13 from income if the trust were not a total return trust
 14 may not be deducted from the distribution amount.

15 (2) Unless otherwise provided by the governing
 16 instrument, the trustee shall fund the distribution
 17 amount each year from the following sources for that year
 18 in the order listed: first from net income (as the term
 19 would be determined if the trust were not a total return
 20 trust), then from other ordinary income as determined for
 21 federal income tax purposes, then from net realized
 22 short-term capital gains as determined for federal income
 23 tax purposes, then from net realized long-term capital
 24 gains as determined for federal income tax purposes, and
 25 then from trust principal.

26 (f) Court orders. The court may order any of the
 27 following actions in a proceeding brought by a trustee in
 28 accordance with subdivision (b)(1) or by a beneficiary in
 29 accordance with subdivision (b)(2):

30 (1) select a distribution percentage other than 4%;

31 (2) average the valuation of the trust's net assets
 32 over a period other than 3 years;

33 (3) reconvert from a total return trust;

34 (4) direct the distribution of net income

1 (determined as if the trust were not a total return
2 trust) in excess of the distribution amount as to any or
3 all trust assets if the distribution is necessary to
4 preserve a tax benefit; or

5 (5) change or direct any administrative procedure
6 as the court determines necessary or helpful for the
7 proper functioning of the total return trust.

8 (g) Restrictions. The distribution amount may not be
9 less than the net income of the trust, determined without
10 regard to the provisions of this Section, for either a trust
11 for which an estate tax or a gift tax marital deduction was
12 or may be claimed in whole or in part (but only during the
13 lifetime of the spouse for whom the trust was created), or a
14 trust that is exempt from generation-skipping transfer tax by
15 reason of any effective date or transition rule. Conversion
16 to a total return trust does not affect any provision in the
17 governing instrument:

18 (1) directing or authorizing the trustee to
19 distribute principal;

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

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

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

29 (h) Tax limitations. If a particular trustee is a
30 beneficiary of the trust and conversion or failure to convert
31 would enhance or diminish the beneficial interest of the
32 trustee, or if possession or exercise of the conversion power
33 by a particular trustee would alone cause any individual to
34 be treated as owner of a part of the trust for income tax

1 purposes or cause a part of the trust to be included in the
2 gross estate of any individual for estate tax purposes, then
3 that particular trustee may not participate as a trustee in
4 the exercise of the conversion power; however:

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

8 (2) if the trustee has one or more co-trustees to
9 whom this subsection (h) does not apply, the co-trustee
10 or co-trustees may convert the trust to a total return
11 trust in accordance with this Section.

12 (i) Remedies. A trustee who reasonably and in good faith
13 takes or omits to take any action under this Section is not
14 liable to any person interested in the trust, regardless of
15 whether the person received written notice as provided in
16 this Section and regardless of whether the person was under a
17 legal disability at the time of the action or inaction. If a
18 trustee reasonably and in good faith takes or omits to take
19 any action under this Section and a person interested in the
20 trust opposes the act or omission, the person's exclusive
21 remedy is to obtain an order of the court directing the
22 trustee to convert the trust to a total return trust, to
23 reconvert from a total return trust, to change the
24 distribution percentage, or to order any administrative
25 procedures the court determines necessary or helpful for the
26 proper functioning of the trust. An act or omission by a
27 trustee under this Section is presumed taken or omitted
28 reasonably and in good faith unless it is proven by clear and
29 convincing evidence to have been an abuse of discretion. Any
30 claim by any person interested in the trust that an act or
31 omission by a trustee under this Section was an abuse of
32 discretion is barred if not asserted in a proceeding
33 commenced by or on behalf of the person within 2 years after
34 the trustee has sent to the person an accounting or report in

1 writing sufficiently disclosing facts fundamental to the
2 claim such that the person knew or reasonably should have
3 known of the claim.

4 (j) Application. This Section is available to trusts in
5 existence on the effective date of this amendatory Act of the
6 92nd General Assembly or created after that date. This
7 Section shall be construed as pertaining to the
8 administration of a trust and shall be available to any trust
9 administered in Illinois under Illinois law or for which the
10 meaning and effect of its terms are governed by Illinois law
11 unless:

12 (1) the trust is a trust described in Internal
13 Revenue Code Section 170(f)(2)(B), 664(d), 1361(d),
14 2702(a)(3) or 2702(b); or

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

23 Section 99. Effective date. This Act takes effect upon
24 becoming law.