

1 AMENDMENT TO SENATE BILL 1697

2 AMENDMENT NO. _____. Amend Senate Bill 1697 by replacing
3 everything after the enacting clause with the following:

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 by trustee. A trustee may convert a trust
9 to a total return trust as described in this Section if all
10 of the 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 and
16 the conversion is in the best interests of the
17 beneficiaries;

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

1 trust is called a "total return trust" in this Section);

2 (3) the trustee sends a written notice of the
3 trustee's decision to convert the trust to a total return
4 trust, specifying a prospective effective date for the
5 conversion and including a copy of this Section, to the
6 following beneficiaries, determined as of the date the
7 notice is sent and assuming nonexercise of all powers of
8 appointment:

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

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

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

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

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

29 (b) Conversion by agreement. Conversion to a total
30 return trust may be made by agreement between a trustee and
31 all the primary beneficiaries of the trust under the virtual
32 representation provisions of Section 16.1 of this Act if
33 those provisions otherwise apply. The agreement may include
34 any actions a court could properly order under subsection (g)

1 of this Section; however, any distribution percentage
2 determined by the agreement may not be less than 3% nor
3 greater than 5%.

4 (c) Conversion or reconversion by court.

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

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

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

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

17 (2) A beneficiary may request the trustee to
18 convert to a total return trust. If the trustee declines
19 or fails to act within 6 months after receiving a written
20 request to do so, the beneficiary may petition the court
21 to order the conversion.

22 (3) The trustee may petition the court
23 prospectively to reconvert from a total return trust if
24 the trustee determines that the reconversion will enable
25 the trustee to better carry out the purposes of the
26 trust. A beneficiary may request the trustee to petition
27 the court prospectively to reconvert from a total return
28 trust. If the trustee declines or fails to act within 6
29 months after receiving a written request to do so, the
30 beneficiary may petition the court to order the
31 reconversion.

32 (4) In a judicial proceeding under this subsection
33 (c), the trustee may, but need not, present the trustee's
34 opinions and reasons (A) for supporting or opposing

1 conversion to (or reconversion from) a total return
2 trust, including whether the trustee believes conversion
3 (or reconversion) would enable the trustee to better
4 carry out the purposes of the trust, and (B) about any
5 other matters relevant to the proposed conversion (or
6 reconversion). A trustee's actions in accordance with
7 this subsection (c) shall not be deemed improper or
8 inconsistent with the trustee's duty of impartiality
9 unless the court finds from all the evidence that the
10 trustee acted in bad faith.

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

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

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

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

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

1 (i) the 3 preceding years; or

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

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

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

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

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

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

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

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

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

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

34 (7) valuation decisions about any asset for which

1 there is no readily available market value, including:

2 (A) how frequently to value such an asset;

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

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

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

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

28 (iii) examples of assets for which there
29 is a readily available market value include:
30 cash and cash equivalents; stocks, bonds, and
31 other securities and instruments for which
32 there is an established market on a stock
33 exchange, in an over-the-counter market, or
34 otherwise; and any other property that can

1 reasonably be expected to be sold within one
2 week of the decision to sell without
3 extraordinary efforts by the seller;

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

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

15 (f) Allocations.

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

20 (2) Unless otherwise provided by the governing
21 instrument, the trustee shall fund the distribution
22 amount each year from the following sources for that year
23 in the order listed: first from net income (as the term
24 would be determined if the trust were not a total return
25 trust), then from other ordinary income as determined for
26 federal income tax purposes, then from net realized
27 short-term capital gains as determined for federal income
28 tax purposes, then from net realized long-term capital
29 gains as determined for federal income tax purposes, then
30 from trust principal comprised of assets for which there
31 is a readily available market value, and then from other
32 trust principal.

33 (g) Court orders. The court may order any of the
34 following actions in a proceeding brought by a trustee in

1 accordance with subdivision (c)(1), (c)(2), or (c)(3):

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

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

5 (3) reconvert prospectively from a total return
6 trust;

7 (4) direct the distribution of net income
8 (determined as if the trust were not a total return
9 trust) in excess of the distribution amount as to any or
10 all trust assets if the distribution is necessary to
11 preserve a tax benefit; or

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

15 (h) Restrictions. The distribution amount may not be
16 less than the net income of the trust, determined without
17 regard to the provisions of this Section, for either a trust
18 for which an estate tax or a gift tax marital deduction was
19 or may be claimed in whole or in part (but only during the
20 lifetime of the spouse for whom the trust was created), or a
21 trust that was exempt in whole or in part from
22 generation-skipping transfer tax on the effective date of
23 this amendatory Act of the 92nd General Assembly by reason of
24 any effective date or transition rule. Conversion to a total
25 return trust does not affect any provision in the governing
26 instrument:

27 (1) directing or authorizing the trustee to
28 distribute principal;

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

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

34 (4) in any manner that would diminish an amount

1 permanently set aside for charitable purposes under the
2 governing instrument unless both income and principal are
3 so set aside.

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

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

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

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

29 (k) Remedies. A trustee who reasonably and in good faith
30 takes or omits to take any action under this Section is not
31 liable to any person interested in the trust. If a trustee
32 reasonably and in good faith takes or omits to take any
33 action under this Section and a person interested in the
34 trust opposes the act or omission, the person's exclusive

1 remedy is to obtain an order of the court directing the
2 trustee to convert the trust to a total return trust, to
3 reconvert from a total return trust, to change the
4 distribution percentage, or to order any administrative
5 procedures the court determines necessary or helpful for the
6 proper functioning of the trust. An act or omission by a
7 trustee under this Section is presumed taken or omitted
8 reasonably and in good faith unless it is determined by the
9 court to have been an abuse of discretion. Any claim by any
10 person interested in the trust that an act or omission by a
11 trustee under this Section was an abuse of discretion is
12 barred if not asserted in a proceeding commenced by or on
13 behalf of the person within 2 years after the trustee has
14 sent to the person or the person's personal representative a
15 notice or report in writing sufficiently disclosing facts
16 fundamental to the claim such that the person knew or
17 reasonably should have known of the claim. The preceding
18 sentence shall not apply to a person who was under a legal
19 disability at the time the notice or report was sent and who
20 then had no personal representative. For purposes of this
21 subsection (k), a personal representative refers to a court
22 appointed guardian or conservator of the estate of a person.

23 (1) Application. This Section is available to trusts in
24 existence on the effective date of this amendatory Act of the
25 92nd General Assembly or created after that date. This
26 Section shall be construed as pertaining to the
27 administration of a trust and shall be available to any trust
28 that is administered in Illinois under Illinois law or that
29 is governed by Illinois law with respect to the meaning and
30 effect of its terms unless:

31 (1) the trust is a trust described in Internal
32 Revenue Code Section 170(f)(2)(B), 664(d), 1361(d),
33 2702(a)(3), or 2702(b); or

34 (2) the governing instrument expressly prohibits

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

8 Section 99. Effective date. This Act takes effect upon
9 becoming law."