

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. 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

1 trustee's decision to convert the trust into a total  
2 return trust as of a specified effective date, along with  
3 a copy of this Section, to:

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

7 (B) all of the legally competent beneficiaries  
8 who would receive or be eligible to receive,  
9 assuming nonexercise of all powers of appointment, a  
10 distribution of principal if the trust were to  
11 terminate immediately before the sending of the  
12 notice;

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

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

21 (b) Judicially approved conversion.

22 (1) The trustee may petition the court to order the  
23 conversion to a total return trust if any of the  
24 following apply:

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

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

30 (C) there are no legally competent  
31 beneficiaries described in subdivision (3)(B) of  
32 subsection (a); or

33 (D) the trustee elects for any reason to  
34 petition the court to approve conversion to a total

1           return trust.

2           (2) A beneficiary may request a trustee to convert  
3 to a total return trust. If the trustee declines or fails  
4 to act within a reasonable time after receiving a written  
5 request to do so, the beneficiary may petition the court  
6 to order the conversion.

7           (3) The court shall order conversion to a total  
8 return trust if the court determines that the conversion  
9 will enable the trustee to better carry out the purposes  
10 of the trust.

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

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

26           (6) Conversion to a total return trust may be made  
27 by agreement between a trustee and all the primary  
28 beneficiaries of the trust under the virtual  
29 representation provisions of Section 16.1 of this Act if  
30 those provisions apply. The agreement may include any  
31 actions a court could properly order under subsection  
32 (f); however, any distribution percentage determined by  
33 the agreement may not be less than 3% nor greater than  
34 5%.

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

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

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

12                   (i) the 3 preceding years; or

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

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

18           (4) the trustee shall pay to a beneficiary (in the  
19 case of an underpayment) and shall recover from a  
20 beneficiary (in the case of an overpayment) an amount  
21 equal to the difference between the amount properly  
22 payable and the amount actually paid.

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

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

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

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

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

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

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

8           (7) how frequently to value any asset for which  
9 there is no readily available market value, whether and  
10 how often to engage a professional appraiser to value  
11 such an asset, and whether to decide both to exclude such  
12 an asset from valuation and to distribute any net income  
13 received from such an asset in accordance with the  
14 governing instrument;

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

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

20 (e) Allocation.

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

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

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

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

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

8           (3) reconvert from a total return trust;

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

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

17       (g) Restrictions. The distribution amount may not be  
18 less than the net income of the trust, determined without  
19 regard to the provisions of this Section, for either a trust  
20 for which an estate tax or a gift tax marital deduction was  
21 or may be claimed in whole or in part (but only during the  
22 lifetime of the spouse for whom the trust was created), or a  
23 trust that is exempt from generation-skipping transfer tax by  
24 reason of any effective date or transition rule. Conversion  
25 to a total return trust does not affect any provision in the  
26 governing 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 (h) 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 (b)(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 (i) Remedies. A trustee who reasonably and in good faith  
22 takes or omits to take any action under this Section is not  
23 liable to any person interested in the trust, regardless of  
24 whether the person received written notice as provided in  
25 this Section and regardless of whether the person was under a  
26 legal disability at the time of the action or inaction. If a  
27 trustee reasonably and in good faith takes or omits to take  
28 any action under this Section and a person interested in the  
29 trust opposes the act or omission, the person's exclusive  
30 remedy is to obtain an order of the court directing the  
31 trustee to convert the trust to a total return trust, to  
32 reconvert from a total return trust, to change the  
33 distribution percentage, or to order any administrative  
34 procedures the court determines necessary or helpful for the

1 proper functioning of the trust. An act or omission by a  
2 trustee under this Section is presumed taken or omitted  
3 reasonably and in good faith unless it is proven by clear and  
4 convincing evidence to have been an abuse of discretion. Any  
5 claim by any person interested in the trust that an act or  
6 omission by a trustee under this Section was an abuse of  
7 discretion is barred if not asserted in a proceeding  
8 commenced by or on behalf of the person within 2 years after  
9 the trustee has sent to the person an accounting or report in  
10 writing sufficiently disclosing facts fundamental to the  
11 claim such that the person knew or reasonably should have  
12 known of the claim.

13 (j) Application. This Section is available to trusts in  
14 existence on the effective date of this amendatory Act of the  
15 92nd General Assembly or created after that date. This  
16 Section shall be construed as pertaining to the  
17 administration of a trust and shall be available to any trust  
18 administered in Illinois under Illinois law or for which the  
19 meaning and effect of its terms are governed by Illinois law  
20 unless:

21 (1) the trust is a trust described in Internal  
22 Revenue Code Section 170(f)(2)(B), 664(d), 1361(d),  
23 2702(a)(3) or 2702(b); or

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

32 Section 99. Effective date. This Act takes effect upon  
33 becoming law."