



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

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

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

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

19 (5) no beneficiary objects to the conversion to a total  
20 return trust in a writing delivered to the trustee within  
21 60 days after the notice is sent; and

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

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

34 (c) Conversion or reconversion by court.

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

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

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

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

11           (2) A beneficiary may request the trustee to convert to  
12 a total return trust or adjust the distribution percentage.  
13 If the trustee declines or fails to act within 6 months  
14 after receiving a written request to do so, the beneficiary  
15 may petition the court to order the conversion or  
16 adjustment.

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

28           (4) In a judicial proceeding under this subsection (c),  
29 the trustee may, but need not, present the trustee's  
30 opinions and reasons (A) for supporting or opposing  
31 conversion to (or reconversion from or adjustment of the  
32 distribution percentage of) a total return trust,  
33 including whether the trustee believes conversion (or  
34 reconversion or adjustment of the distribution percentage)

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

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

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

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

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

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

1 Income Act, averaged over the lesser of:

2 (i) the 3 preceding years; or

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

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

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

16 (5) a change in the method of determining a reasonable  
17 current return by converting to a total return trust in  
18 accordance with this Section and substituting the  
19 distribution amount for net trust accounting income is a  
20 proper change in the definition of trust income  
21 notwithstanding any contrary provision of the Principal  
22 and Income Act, and the distribution amount shall be deemed  
23 a reasonable current return that fairly apportions the  
24 total return of a total return trust.

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

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

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

- 1           (3) whether distributions are made in cash or in kind;
- 2           (4) the manner of adjusting valuations and  
3 calculations of the distribution amount to account for  
4 other payments from or contributions to the trust;
- 5           (5) whether to value the trust's assets annually or  
6 more frequently;
- 7           (6) what valuation dates and how many valuation dates  
8 to use;
- 9           (7) valuation decisions about any asset for which there  
10 is no readily available market value, including:
- 11               (A) how frequently to value such an asset;
- 12               (B) whether and how often to engage a professional  
13 appraiser to value such an asset; and
- 14               (C) whether to exclude the value of such an asset  
15 from the net fair market value of the trust's assets  
16 under subdivision (d) (2) for purposes of determining  
17 the distribution amount. Any such asset so excluded is  
18 referred to as an "excluded asset" in this subsection  
19 (e), and the trustee shall distribute any net income  
20 received from the excluded asset as provided for in the  
21 governing instrument, subject to the following  
22 principles:
- 23               (i) unless the trustee determines there are  
24 compelling reasons to the contrary considering all  
25 relevant factors including the best interests of  
26 the beneficiaries, the trustee shall treat each  
27 asset for which there is no readily available  
28 market value as an excluded asset;
- 29               (ii) if tangible personal property or real  
30 property is possessed or occupied by a  
31 beneficiary, the trustee shall not limit or  
32 restrict any right of the beneficiary to use the  
33 property in accordance with the governing  
34 instrument whether or not the trustee treats the

1 property as an excluded asset;

2 (iii) examples of assets for which there is a  
3 readily available market value include: cash and  
4 cash equivalents; stocks, bonds, and other  
5 securities and instruments for which there is an  
6 established market on a stock exchange, in an  
7 over-the-counter market, or otherwise; and any  
8 other property that can reasonably be expected to  
9 be sold within one week of the decision to sell  
10 without extraordinary efforts by the seller;

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

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

21 (f) Allocations.

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

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

1 principal comprised of assets for which there is a readily  
2 available market value, and then from other trust  
3 principal.

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

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

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

10 (3) reconvert prospectively from or adjust the  
11 distribution percentage of a total return trust;

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

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

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

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

32 (1) directing or authorizing the trustee to distribute  
33 principal;

34 (2) directing or authorizing the trustee to distribute



1 a fixed annuity or a fixed fraction of the value of trust  
2 assets;

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

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

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

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

22 (2) if the trustee has one or more co-trustees to whom  
23 this subsection (i) does not apply, the co-trustee or  
24 co-trustees may convert the trust to a total return trust  
25 in accordance with this Section.

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

33 (k) Remedies. A trustee who reasonably and in good faith  
34 takes or omits to take any action under this Section is not

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

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

33 (1) the trust is a trust described in Internal Revenue  
34 Code Section 642(c)(5), ~~170(f)(2)(B)~~, 664(d), ~~1361(d)~~,

1 2702(a)(3), or 2702(b); or

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

10 (m) Application to express trusts.

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

14 (2) In this subsection (m):

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

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

29 (3) A unitrust changes the definition of income by  
30 substituting the unitrust amount for net trust accounting  
31 income as the method of determining current return and  
32 shall be given effect notwithstanding any contrary  
33 provision of the Principal and Income Act. By way of  
34 example and not limitation, a unitrust amount determined by

1 a percentage of not less than 3% nor greater than 5% is  
2 conclusively presumed a reasonable current return that  
3 fairly apportions the total return of a unitrust.

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

8 (Source: P.A. 92-838, eff. 8-22-02.)

9 (760 ILCS 5/5.5 new)

10 Sec. 5.5. Gift to a deceased beneficiary under an inter  
11 vivos trust. Unless the settlor expressly provides otherwise in  
12 his or her trust:

13 (1) if a gift of a present or future interest is to a  
14 descendant of the settlor who dies before or after the  
15 settlor, the descendants of the deceased beneficiary  
16 living when the gift is to take effect in possession or  
17 enjoyment take per stirpes the gift so bequeathed;

18 (2) if a gift of a present or future interest is to a  
19 class and any member of the class dies before or after the  
20 settlor, the members of the class living when the gift is  
21 to take effect in possession or enjoyment take the share or  
22 shares that the deceased member would have taken if he or  
23 she were then living, except that, if the deceased member  
24 of the class is a descendant of the settlor, the  
25 descendants of the deceased member then living shall take  
26 per stirpes the share or shares that the deceased member  
27 would have taken if he or she were then living; and

28 (3) except as above provided in items (1) and (2), if  
29 the gift is not to a descendant of the settlor or is not to  
30 a class as provided in items (1) and (2) and if the  
31 beneficiary dies either before or after the settlor and  
32 before the gift is to take effect in possession or  
33 enjoyment, then the gift shall lapse. If the gift lapses by

1       reason of the death of the beneficiary before the gift is  
2       to take possession or enjoyment, then the gift so given  
3       shall be included in and pass as part of the residue of the  
4       trust under the trust. If the gift is or becomes part of  
5       the residue, the gift so bequeathed shall pass to and be  
6       taken by the beneficiaries remaining, if any, of the  
7       residue in proportions and upon trusts corresponding to  
8       their respective interests in the residue of the trust.

9       The provisions of items (1) and (2) do not apply to a  
10      future interest that is or becomes indefeasibly vested at the  
11      settlor's death or at any time thereafter before it takes  
12      effect in possession or enjoyment.

13      The provisions of this Section apply on and after January  
14      1, 2005 for any gifts to a deceased beneficiary under an inter  
15      vivos trust where the deceased beneficiary dies after January  
16      1, 2005 and before the gift is to take effect in possession or  
17      enjoyment.

18           Section 10. The Uniform TOD Security Registration Act is  
19      amended by changing Section 1 as follows:".