



## 97TH GENERAL ASSEMBLY

### State of Illinois

2011 and 2012

HB4663

by Rep. Emily McAsey

#### SYNOPSIS AS INTRODUCED:

760 ILCS 5/16.3 new  
760 ILCS 5/16.7 new

Amends the Trusts and Trustees Act. Adds provisions establishing a directed trust as a type of trust and establishes responsibilities among a distribution trust advisor, trust protector, and other parties to the trust. Provides that the changes to a trustee's powers in a directed trust apply to all trusts in existence on the effective date and all trusts created after that date. Provisions concerning the administration of a trust are available to any trust that is administered in Illinois or governed by Illinois law unless the trust instrument expressly prohibits the use of one or more those provisions by specific reference.

LRB097 14226 AJO 58935 b

1 AN ACT concerning civil law.

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

4 Section 5. The Trust and Trustees Act is amended by adding  
5 Sections 16.3 and 16.7 as follows:

6 (760 ILCS 5/16.3 new)

7 Sec. 16.3. Directed trusts.

8 (a) Definitions. In this Section:

9 (1) "Directing party" means any investment trust  
10 advisor, distribution trust advisor, or trust protector as  
11 provided in this Section.

12 (2) "Distribution trust advisor" means any one or more  
13 persons given authority by the governing instrument to  
14 direct, consent to, veto, or otherwise exercise all or any  
15 portion of the distribution powers and discretions of the  
16 trust, including but not limited to authority to make  
17 discretionary distribution of income or principal.

18 (3) "Excluded fiduciary" means any fiduciary that by  
19 the governing instrument is directed to act in accordance  
20 with the exercise of specified powers by a directing party,  
21 in which case such specified powers shall be deemed granted  
22 not to the fiduciary but to the directing party and such  
23 fiduciary shall be deemed excluded from exercising such

1 specified powers. If a governing instrument provides that a  
2 fiduciary as to one or more specified matters is to act,  
3 omit action, or make decisions only with the consent of a  
4 directing party, then such fiduciary is an excluded  
5 fiduciary with respect to such matters.

6 (4) "Fiduciary" means any person expressly given one or  
7 more fiduciary duties by the governing instrument,  
8 including but not limited to a trustee.

9 (5) "Governing instrument" refers to the instrument  
10 stating the terms of a trust, including but not limited to  
11 any court order or nonjudicial settlement agreement  
12 establishing, construing, or modifying the terms of the  
13 trust in accordance with Section 16.1, 16.4, or 16.6 or  
14 other applicable law.

15 (6) "Investment trust advisor" means any one or more  
16 persons given authority by the governing instrument to  
17 direct, consent to, veto, or otherwise exercise all or any  
18 portion of the investment powers of the trust.

19 (7) "Power" means authority to take or withhold an  
20 action or decision, including but not limited to an  
21 expressly specified power, the implied power necessary to  
22 exercise a specified power, and authority inherent in a  
23 general grant of discretion.

24 (8) "Trust protector" means any one or more persons  
25 given any one or more of the powers specified in subsection  
26 (d), whether or not designated with the title of trust

1 protector by the governing instrument.

2 (b) Powers of investment trust advisor. An investment trust  
3 advisor may be designated in the governing instrument of a  
4 trust. The powers of an investment trust advisor may be  
5 exercised or not exercised in the sole and absolute discretion  
6 of the investment trust advisor, and are binding on all other  
7 persons, including but not limited to each beneficiary,  
8 fiduciary, excluded fiduciary, and any other party having an  
9 interest in the trust. The governing instrument may use the  
10 title "investment trust advisor" or any similar name or  
11 description demonstrating the intent to provide for the office  
12 and function of an investment trust advisor. Unless the terms  
13 of the governing instrument provide otherwise, the investment  
14 trust advisor has the authority to:

15 (1) direct the trustee with respect to the retention,  
16 purchase, transfer, assignment, sale, or encumbrance of  
17 trust property and the investment and reinvestment of  
18 principal and income of the trust;

19 (2) direct the trustee with respect to all management,  
20 control, and voting powers related directly or indirectly  
21 to trust assets, including but not limited to voting  
22 proxies for securities held in trust;

23 (3) select and determine reasonable compensation of  
24 one or more advisors, managers, consultants, or  
25 counselors, including the trustee, and to delegate to them  
26 any of the powers of the investment trust advisor in

1 accordance with subsection (b) of Section 5.1; and

2 (4) determine the frequency and methodology for  
3 valuing any asset for which there is no readily available  
4 market value.

5 (c) Powers of distribution trust advisor. A distribution  
6 trust advisor may be designated in the governing instrument of  
7 a trust. The powers of a distribution trust advisor may be  
8 exercised or not exercised in the sole and absolute discretion  
9 of the distribution trust advisor, and are binding on all other  
10 persons, including but not limited to each beneficiary,  
11 fiduciary, excluded fiduciary, and any other party having an  
12 interest in the trust. The governing instrument may use the  
13 title "distribution trust advisor" or any similar name or  
14 description demonstrating the intent to provide for the office  
15 and function of a distribution trust advisor. Unless the terms  
16 of the governing instrument provide otherwise, the  
17 distribution trust advisor has authority to direct the trustee  
18 with regard to all decisions relating directly or indirectly to  
19 discretionary distributions to or for one or more  
20 beneficiaries.

21 (d) Powers of trust protector. A trust protector may be  
22 designated in the governing instrument of a trust. The powers  
23 of a trust protector may be exercised or not exercised in the  
24 sole and absolute discretion of the trust protector, and are  
25 binding on all other persons, including but not limited to each  
26 beneficiary, investment trust advisor, distribution trust

1 advisor, fiduciary, excluded fiduciary, and any other party  
2 having an interest in the trust. The governing instrument may  
3 use the title "trust protector" or any similar name or  
4 description demonstrating the intent to provide for the office  
5 and function of a trust protector. The powers granted to a  
6 trust protector by the governing instrument may include but are  
7 not limited to authority to do any one or more of the  
8 following:

9 (1) modify or amend the trust instrument to achieve  
10 favorable tax status or respond to changes in the Internal  
11 Revenue Code, federal laws, State law, or the rulings and  
12 regulations under such laws;

13 (2) increase, decrease, or modify the interests of any  
14 beneficiary or beneficiaries of the trust;

15 (3) modify the terms of any power of appointment  
16 granted by the trust; provided, however, such modification  
17 or amendment may not grant a beneficial interest to any  
18 individual, class of individuals, or other parties not  
19 specifically provided for under the trust instrument;

20 (4) remove, appoint, or remove and appoint, a trustee,  
21 investment trust advisor, distribution trust advisor,  
22 another directing party, investment committee member, or  
23 distribution committee member, including designation of a  
24 plan of succession for future holders of any such office;

25 (5) terminate the trust, including determination of  
26 how the trustee shall distribute the trust property to be

1 consistent with the purposes of the trust;

2 (6) change the situs of the trust, the governing law of  
3 the trust, or both;

4 (7) appoint one or more successor trust protectors,  
5 including designation of a plan of succession for future  
6 trust protectors;

7 (8) interpret terms of the trust instrument at the  
8 request of the trustee;

9 (9) advise the trustee on matters concerning a  
10 beneficiary; or

11 (10) amend or modify the trust instrument to take  
12 advantage of laws governing restraints on alienation,  
13 distribution of trust property, or to improve the  
14 administration of the trust.

15 (e) Duty and liability of directing party. Each directing  
16 party is a fiduciary of the trust unless the governing  
17 instrument provides otherwise; provided, however, the  
18 governing instrument may not exonerate a directing party from  
19 the duty to act or withhold acting as the directing party in  
20 good faith reasonably believes is in the best interests of the  
21 trust. A directing party who the governing instrument specifies  
22 is a fiduciary is subject to the same duties and standards that  
23 are applicable to a trustee of a trust as provided by  
24 applicable law, except to the extent the governing instrument  
25 provides otherwise.

26 (f) Duty and liability of excluded fiduciary. The excluded

1 fiduciary shall act in accordance with the governing instrument  
2 and comply with the directing party's exercise of the powers  
3 granted to the directing party by the governing instrument.  
4 Unless otherwise provided in the governing instrument, an  
5 excluded fiduciary has no duty to monitor, review, inquire,  
6 investigate, recommend, evaluate, or warn with respect to a  
7 directing party's exercise or failure to exercise any power  
8 granted to the directing party by the governing instrument,  
9 including but not limited to any power related to the  
10 acquisition, disposition, retention, management, or valuation  
11 of any asset or investment. Except as otherwise provided in  
12 this Section or the governing instrument, an excluded fiduciary  
13 is not liable, either individually or as a fiduciary, for any  
14 action, inaction, consent, or failure to consent by a directing  
15 party, including but not limited to any of the following:

16 (1) if a governing instrument provides that an excluded  
17 fiduciary is to follow the direction of a directing party,  
18 and such excluded fiduciary acts in accordance with such a  
19 direction, then except in cases of willful misconduct on  
20 the part of the excluded fiduciary in complying with the  
21 direction of the directing party, the excluded fiduciary is  
22 not liable for any loss resulting directly or indirectly  
23 from following any such direction, including but not  
24 limited to compliance regarding the valuation of assets for  
25 which there is no readily available market value;

26 (2) if a governing instrument provides that an excluded



1 fiduciary is to act or omit to act only with the consent of  
2 a directing party, then except in cases of willful  
3 misconduct on the part of the excluded fiduciary, the  
4 excluded fiduciary is not liable for any loss resulting  
5 directly or indirectly from any act taken or omitted as a  
6 result of such directing party's failure to provide such  
7 consent after having been asked to do so by the excluded  
8 fiduciary; or

9 (3) if a governing instrument provides that, or for any  
10 other reason, an excluded fiduciary is required to assume  
11 the role or responsibilities of a directing party, then  
12 except in cases of willful misconduct, the excluded  
13 fiduciary is not liable for any loss resulting directly or  
14 indirectly from any act taken or omitted in complying with  
15 that requirement.

16 (g) Submission to court jurisdiction; effect on directing  
17 party. By accepting an appointment to serve as a directing  
18 party of a trust that is subject to the laws of this State, the  
19 directing party submits to the jurisdiction of the courts of  
20 this State even if investment advisory agreements or other  
21 related agreements provide otherwise, and the directing party  
22 may be made a party to any action or proceeding if issues  
23 relate to a decision or action of the directing party.

24 (h) Duty to inform excluded fiduciary. Each directing party  
25 shall keep the excluded fiduciary and any other directing party  
26 reasonably informed regarding the administration of the trust

1 with respect to any specific duty or function being performed  
2 by the directing party to the extent that the duty or function  
3 would normally be performed by the excluded fiduciary or to the  
4 extent that providing such information to the excluded  
5 fiduciary or other directing party is reasonably necessary for  
6 the excluded fiduciary or other directing party to perform its  
7 duties, and the directing party shall provide such information  
8 as reasonably requested by the excluded fiduciary or other  
9 directing party. Neither the performance nor the failure to  
10 perform of a directing party's duty to inform as provided in  
11 this subsection affects whatsoever the limitation on the  
12 liability of the excluded fiduciary as provided in this  
13 Section.

14 (i) Reliance on counsel. An excluded fiduciary may, but is  
15 not required to, obtain and rely upon an opinion of counsel on  
16 any matter relevant to this Section.

17 (j) Applicability. On and after its effective date, this  
18 Section applies to:

19 (1) all existing and future trusts that appoint or  
20 provide for a directing party, including but not limited to  
21 a party granted power or authority effectively comparable  
22 in substance to that of a directing party as provided in  
23 this Section; or

24 (2) any existing or future trust that:

25 (A) is modified in accordance with applicable law  
26 or the terms of the governing instrument to appoint or

1 provide for a directing party; or

2 (B) is modified to appoint or provide for a  
3 directing party, including but not limited to a party  
4 granted power or authority effectively comparable in  
5 substance to that of a directing party, in accordance  
6 with (i) a court order, or (ii) a nonjudicial  
7 settlement agreement made in accordance with Section  
8 16.1, whether or not such order or agreement specifies  
9 that this Section governs the responsibilities,  
10 actions, and liabilities of persons designated as a  
11 directing party or excluded fiduciary.

12 (760 ILCS 5/16.7 new)

13 Sec. 16.7. Application. Section 16.3 applies to all trusts  
14 in existence on the effective date of this amendatory Act of  
15 the 97th General Assembly or created after that date. Section  
16 16.3 shall be construed as pertaining to the administration of  
17 a trust and shall be available to any trust that is  
18 administered in Illinois under Illinois law or that is governed  
19 by Illinois law with respect to the meaning and effect of its  
20 terms, except to the extent the governing instrument expressly  
21 prohibits that Section by specific reference to that Section. A  
22 provision in the governing instrument in the form: "The  
23 provisions of Section 16.3 of the Trusts and Trustees Act and  
24 any corresponding provision of future law may not be used in  
25 the administration of this trust" or a similar provision

1 demonstrating that intent is sufficient to preclude the use of  
2 Section 16.3.