



97TH GENERAL ASSEMBLY

State of Illinois

2011 and 2012

HB4664

by Rep. Emily McAsey

SYNOPSIS AS INTRODUCED:

760 ILCS 5/5.3
760 ILCS 5/16.1

Amends the Trust and Trustees Act. Defines terms. Provides that an "unascertainable beneficiary" may be represented by and bound by another beneficiary having a substantially similar (instead of a substantially identical) interest on a particular question or dispute. Provides that if a trust beneficiary is an unrepresented minor, disabled, or unborn person, a parent of the beneficiary may represent and bind the beneficiary, provided that there is no material conflict of interest between the minor or disabled person and either of that person's parents on that particular question or dispute. Further provides that this representative may on a particular question or dispute represent and bind an unborn beneficiary or an unascertainable beneficiary who has an interest that is substantially similar to the interest of the minor or disabled person, but only if there is no material conflict of interest between the minor or the disabled person and the unborn or the unascertainable person. Makes other corresponding changes. Provides that conversion of a trust to a total return trust may be made with a trustee and all primary beneficiaries (instead of with a trustee and all beneficiaries and presumptive remaindermen beneficiaries) in accordance with other provisions of the Act. Provides that changes made apply to all trusts in existence on the effective date and to all trusts created after that date.

LRB097 14224 AJ0 62152 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 Trusts and Trustees Act is amended by
5 changing Sections 5.3 and 16.1 as follows:

6 (760 ILCS 5/5.3)

7 Sec. 5.3. Total return trusts.

8 (a) Conversion by trustee. A trustee may convert a trust to
9 a 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 be
12 distributed to a beneficiary by referring to the trust's
13 income, and the trustee determines that conversion to a
14 total return trust will enable the trustee to better carry
15 out the purposes of the trust and the conversion is in the
16 best interests of the beneficiaries;

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

23 (3) the trustee sends a written notice of the trustee's

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

1 trust may be made by agreement between a trustee and ~~(i)~~ all
2 primary beneficiaries, acting either individually or by their
3 respective representatives in accordance with Section
4 ~~subsection 16.1(a)(2)~~ of this Act, ~~or (ii) all beneficiaries~~
5 ~~currently eligible to receive income or principal from the~~
6 ~~trust and all beneficiaries who are presumptive remaindermen,~~
7 ~~either individually or by their respective representatives in~~
8 ~~accordance with subsection 16.1(a)(3) of this Act.~~ The
9 agreement may include any actions a court could properly order
10 under subsection (g) of this Section; however, any distribution
11 percentage determined by the agreement may not be less than 3%
12 nor greater than 5%.

13 (c) Conversion or reconversion by court.

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

18 (A) a beneficiary timely objects to the conversion
19 to a total return trust;

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

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

24 (2) A beneficiary may request the trustee to convert to
25 a total return trust or adjust the distribution percentage.

26 If the trustee declines or fails to act within 6 months

1 after receiving a written request to do so, the beneficiary
2 may petition the court to order the conversion or
3 adjustment.

4 (3) The trustee may petition the court prospectively to
5 reconvert from a total return trust or adjust the
6 distribution percentage if the trustee determines that the
7 reconversion or adjustment will enable the trustee to
8 better carry out the purposes of the trust. A beneficiary
9 may request the trustee to petition the court prospectively
10 to reconvert from a total return trust or adjust the
11 distribution percentage. If the trustee declines or fails
12 to act within 6 months after receiving a written request to
13 do so, the beneficiary may petition the court to order the
14 reconversion or adjustment.

15 (4) In a judicial proceeding under this subsection (c),
16 the trustee may, but need not, present the trustee's
17 opinions and reasons (A) for supporting or opposing
18 conversion to (or reconversion from or adjustment of the
19 distribution percentage of) a total return trust,
20 including whether the trustee believes conversion (or
21 reconversion or adjustment of the distribution percentage)
22 would enable the trustee to better carry out the purposes
23 of the trust, and (B) about any other matters relevant to
24 the proposed conversion (or reconversion or adjustment of
25 the distribution percentage). A trustee's actions in
26 accordance with this subsection (c) shall not be deemed

1 improper or inconsistent with the trustee's duty of
2 impartiality unless the court finds from all the evidence
3 that the trustee acted in bad faith.

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

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

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

22 (1) the trustee shall make income distributions in
23 accordance with the governing instrument subject to the
24 provisions of this Section;

25 (2) the term "income" in the governing instrument means
26 an annual amount (the "distribution amount") equal to a

1 percentage (the "distribution percentage") of the net fair
2 market value of the trust's assets, whether the assets are
3 considered income or principal under the Principal and
4 Income Act, averaged over the lesser of:

5 (i) the 3 preceding years; or

6 (ii) the period during which the trust has been in
7 existence;

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

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

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

1 total return of a total return trust.

2 (e) Administration. The trustee, in the trustee's
3 discretion, may determine any of the following matters in
4 administering a total return trust as the trustee from time to
5 time determines necessary or helpful for the proper functioning
6 of the trust:

7 (1) the effective date of a conversion to a total
8 return trust;

9 (2) the manner of prorating the distribution amount for
10 a short year in which a beneficiary's interest commences or
11 ceases;

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

13 (4) the manner of adjusting valuations and
14 calculations of the distribution amount to account for
15 other payments from or contributions to the trust;

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

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

20 (7) valuation decisions about any asset for which there
21 is no readily available market value, including:

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

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

25 (C) whether to exclude the value of such an asset
26 from the net fair market value of the trust's assets

1 under subdivision (d)(2) for purposes of determining
2 the distribution amount. Any such asset so excluded is
3 referred to as an "excluded asset" in this subsection
4 (e), and the trustee shall distribute any net income
5 received from the excluded asset as provided for in the
6 governing instrument, subject to the following
7 principles:

8 (i) unless the trustee determines there are
9 compelling reasons to the contrary considering all
10 relevant factors including the best interests of
11 the beneficiaries, the trustee shall treat each
12 asset for which there is no readily available
13 market value as an excluded asset;

14 (ii) if tangible personal property or real
15 property is possessed or occupied by a
16 beneficiary, the trustee shall not limit or
17 restrict any right of the beneficiary to use the
18 property in accordance with the governing
19 instrument whether or not the trustee treats the
20 property as an excluded asset;

21 (iii) examples of assets for which there is a
22 readily available market value include: cash and
23 cash equivalents; stocks, bonds, and other
24 securities and instruments for which there is an
25 established market on a stock exchange, in an
26 over-the-counter market, or otherwise; and any

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

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

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

14 (f) Allocations.

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

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

1 determined for federal income tax purposes, then from trust
2 principal comprised of assets for which there is a readily
3 available market value, and then from other trust
4 principal.

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

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

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

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

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

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

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

22 (h) Restrictions. Conversion to a total return trust does
23 not affect any provision in the governing instrument:

24 (1) directing or authorizing the trustee to distribute
25 principal;

26 (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

1 granted by this Section if the trustee reasonably believes the
2 release is in the best interests of the trust and its
3 beneficiaries. The release may be personal to the releasing
4 trustee or may apply generally to some or all subsequent
5 trustees, and the release may be for any specified period,
6 including a period measured by the life of an individual.

7 (k) Remedies. A trustee who reasonably and in good faith
8 takes or omits to take any action under this Section is not
9 liable to any person interested in the trust. If a trustee
10 reasonably and in good faith takes or omits to take any action
11 under this Section and a person interested in the trust opposes
12 the act or omission, the person's exclusive remedy is to obtain
13 an order of the court directing the trustee to convert the
14 trust to a total return trust, to reconvert from a total return
15 trust, to change the distribution percentage, or to order any
16 administrative procedures the court determines necessary or
17 helpful for the proper functioning of the trust. An act or
18 omission by a trustee under this Section is presumed taken or
19 omitted reasonably and in good faith unless it is determined by
20 the court to have been an abuse of discretion. Any claim by any
21 person interested in the trust that an act or omission by a
22 trustee under this Section was an abuse of discretion is barred
23 if not asserted in a proceeding commenced by or on behalf of
24 the person within 2 years after the trustee has sent to the
25 person or the person's personal representative a notice or
26 report in writing sufficiently disclosing facts fundamental to

1 the claim such that the person knew or reasonably should have
2 known of the claim. The preceding sentence shall not apply to a
3 person who was under a legal disability at the time the notice
4 or report was sent and who then had no personal representative.
5 For purposes of this subsection (k), a personal representative
6 refers to a court appointed guardian or conservator of the
7 estate of a person.

8 (l) Application. This Section is available to trusts in
9 existence on the effective date of this amendatory Act of the
10 92nd General Assembly or created after that date. This Section
11 shall be construed as pertaining to the administration of a
12 trust and shall be available to any trust that is administered
13 in Illinois ~~under Illinois law~~ or that is governed by Illinois
14 law with respect to the meaning and effect of its terms unless:

15 (1) the trust is a trust described in Internal Revenue
16 Code Section 642(c)(5), 664(d), 2702(a)(3), or 2702(b); or

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

25 (m) Application to express trusts.

26 (1) This subsection (m) does not apply to a charitable

1 remainder unitrust as defined by Section 664(d), Internal
2 Revenue Code of 1986 (26 U.S.C. Section 664), as amended.

3 (2) In this subsection (m):

4 (A) "Unitrust" means a trust the terms of which
5 require distribution of a unitrust amount, without
6 regard to whether the trust has been converted to a
7 total return trust in accordance with this Section or
8 whether the trust is established by express terms of
9 the governing instrument.

10 (B) "Unitrust amount" means an amount equal to a
11 percentage of a trust's assets that may or must be
12 distributed to one or more beneficiaries annually in
13 accordance with the terms of the trust. The unitrust
14 amount may be determined by reference to the net fair
15 market value of the trust's assets as of a particular
16 date or as an average determined on a multiple year
17 basis.

18 (3) A unitrust changes the definition of income by
19 substituting the unitrust amount for net trust accounting
20 income as the method of determining current return and
21 shall be given effect notwithstanding any contrary
22 provision of the Principal and Income Act. By way of
23 example and not limitation, a unitrust amount determined by
24 a percentage of not less than 3% nor greater than 5% is
25 conclusively presumed a reasonable current return that
26 fairly apportions the total return of a unitrust.

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

5 (Source: P.A. 96-479, eff. 1-1-10.)

6 (760 ILCS 5/16.1)

7 Sec. 16.1. Virtual representation.

8 (a) Representation by a beneficiary with a ~~person having~~
9 substantially similar ~~identical~~ interest, by the primary
10 beneficiaries and by others; ~~contingent remainder~~
11 beneficiaries.

12 (1) To the extent there is no material conflict of
13 interest between the representative and the ~~person~~
14 represented beneficiary with respect to the particular
15 question or dispute, a beneficiary who is a minor, ~~or a~~
16 ~~disabled,~~ ~~or unborn~~ beneficiary person, or a beneficiary
17 ~~person~~ whose identity or location is unknown and not
18 reasonably ascertainable (hereinafter referred to as an
19 "unascertainable beneficiary"), may for all purposes be
20 represented by and bound by another beneficiary ~~individual~~
21 having a substantially similar ~~identical~~ interest with
22 respect to the particular question or dispute; provided,
23 however, that the represented beneficiary ~~such person~~ is
24 not otherwise represented by a ~~court-appointed~~ guardian or
25 agent in accordance with subdivision (a) (4) or by a parent

1 ~~in accordance with subdivision (a) (5) as provided in the~~
2 ~~next sentence. If a person is represented by a court~~
3 ~~appointed guardian of the estate or, if none, by a court~~
4 ~~appointed guardian of the person, the actions of such~~
5 ~~guardian shall represent and bind that person for purposes~~
6 ~~of this subsection (a) (1).~~

7 (2) If all primary beneficiaries of a trust either have
8 legal capacity ~~are adults and not disabled,~~ or have
9 representatives in accordance with this subsection (a) ~~(1)~~
10 who have legal capacity ~~are adults and not disabled,~~ the
11 actions of such primary beneficiaries, in each case either
12 by the beneficiary or by the beneficiary's representative
13 ~~or their respective representatives,~~ shall represent and
14 bind all other beneficiaries ~~persons~~ who have a successor,
15 contingent, future, or other interest in the trust ~~and who~~
16 ~~would become primary beneficiaries only by reason of~~
17 ~~surviving a primary beneficiary.~~

18 ~~For purposes of this Section, "primary beneficiary"~~
19 ~~means a beneficiary who is either: (i) currently eligible~~
20 ~~to receive income or principal from the trust or (ii)~~
21 ~~assuming nonexercise of all powers of appointment, will be~~
22 ~~eligible to receive a distribution of principal from the~~
23 ~~trust if the beneficiary survives to the final date of~~
24 ~~distribution with respect to the beneficiary's share.~~

25 (3) For purposes of this Act:

26 (A) "Primary beneficiary" means a beneficiary of a

1 trust who as of the date of determination is either:
2 (i) currently eligible to receive income or principal
3 from the trust or (ii) is a presumptive remainder
4 beneficiary. ~~If all presumptive remainder~~
5 ~~beneficiaries either are adults and not disabled, or~~
6 ~~have representatives in accordance with subsection~~
7 ~~(a) (1) who are adults and not disabled, the actions of~~
8 ~~such presumptive remainder beneficiaries, or their~~
9 ~~respective representatives, shall represent and bind~~
10 ~~all other beneficiaries who have a successor,~~
11 ~~contingent, or other future interest in the trust. For~~
12 ~~purposes of this Section, "presumptive remainder~~
13 ~~beneficiaries" means,~~

14 (B) "Presumptive remainder beneficiary" means a
15 beneficiary of a trust, as of the date of determination
16 and assuming nonexercise of all powers of appointment,
17 ~~all beneficiaries~~ who either (i) ~~(A)~~ would be eligible
18 to receive a distribution of income or principal if the
19 trust terminated on that date, or (ii) ~~(B)~~ would be
20 eligible to receive a distribution of income or
21 principal if the interests of all beneficiaries
22 currently eligible to receive income or principal from
23 the trust ended on that date without causing the trust
24 to terminate.

25 (C) "Disabled person" as of any date means either a
26 disabled person within the meaning of Section 11a-2 of

1 the Probate Act of 1975 or means a person who, within
2 the 365 days immediately preceding that date, (i) was
3 examined by a licensed physician who determined that
4 such person lacked the capacity to make prudent
5 financial decisions, and (ii) such physician made a
6 written record of the physician's determination and
7 signed the written record within 90 days after the
8 examination.

9 (D) A person has legal capacity unless the person
10 is a minor or a disabled person.

11 (4) If a trust beneficiary is represented by a court
12 appointed guardian of the estate or, if none, guardian of
13 the person, such guardian shall represent and bind the
14 beneficiary. If a trust beneficiary is a disabled person,
15 an agent under a power of attorney for property who has
16 authority to act with respect to the particular question or
17 dispute and who does not have a material conflict of
18 interest with respect to the particular question or dispute
19 may represent and bind the principal. An agent is deemed to
20 have such authority if the power of attorney grants the
21 agent the power to settle claims and to exercise powers
22 with respect to trusts and estates even if such powers do
23 not include powers to make a will, to revoke or amend a
24 trust, or to require the trustee to pay income or
25 principal. Absent a court order pursuant to the Illinois
26 Power of Attorney Act directing a guardian to exercise

1 powers of the principal under an agency that survives
2 disability, an agent under a power of attorney for property
3 who in accordance with this subdivision has authority to
4 represent and bind a disabled principal takes precedence
5 over a court appointed guardian unless the court specifies
6 otherwise. This subdivision applies to all agencies,
7 whenever and wherever executed. ~~The consent of a person~~
8 ~~who may represent and bind another person in accordance~~
9 ~~with this Section is binding on the person represented, and~~
10 ~~notice to a person who may represent and bind another~~
11 ~~person in accordance with this Section has the same effect~~
12 ~~as if notice were given directly to the other person.~~

13 (5) If a trust beneficiary is a minor or a disabled or
14 unborn person and is not represented by a guardian or agent
15 in accordance with subdivision (a) (4), then a parent of the
16 beneficiary may represent and bind the beneficiary,
17 provided that there is no material conflict of interest
18 between the represented person and either of such person's
19 parents with respect to the particular question or dispute.
20 If a disagreement arises between parents who otherwise
21 qualify to represent a child in accordance with this
22 subsection (a) and who are seeking to represent the same
23 child, the parent who is a lineal descendant of the settlor
24 of the trust that is the subject of the representation is
25 entitled to represent the child; or if none, the parent who
26 is a beneficiary of such trust is entitled to represent the

1 child.

2 (6) A guardian, agent or parent who is the
3 representative for a beneficiary under subdivision (a)(4)
4 or (a)(5) may, for all purposes, represent and bind any
5 other beneficiary who is a minor or a disabled, unborn, or
6 unascertainable beneficiary who has an interest, with
7 respect to the particular question or dispute, that is
8 substantially similar to the interest of the beneficiary
9 represented by such representative, but only to the extent
10 that there is no material conflict of interest between the
11 beneficiary represented by the representative and the
12 other beneficiary with respect to the particular question
13 or dispute; provided, however, that the other beneficiary
14 is not otherwise represented by a guardian or agent in
15 accordance with subdivision (a)(4) or by a parent in
16 accordance with subdivision (a)(5).

17 (7) The action or consent of a representative who may
18 represent and bind a beneficiary in accordance with this
19 Section is binding on the beneficiary represented, and
20 notice or service of process to such representative has the
21 same effect as if such notice or service of process were
22 given directly to the beneficiary represented.

23 (8) Nothing in this Section limits the discretionary
24 power of a court in a judicial proceeding to appoint a
25 guardian ad litem for any minor, disabled, unborn, or
26 unascertainable beneficiary with respect to a particular

1 question or dispute, but such appointment need not be
2 considered and is not necessary if such beneficiary is
3 otherwise represented in accordance with this Section.

4 (b) Total return trusts. This Section shall apply to enable
5 conversion to a total return trust by agreement in accordance
6 with subsection 5.3(b) of the total return trust provisions of
7 Section 5.3 of this Act, by ~~whether such agreement is made~~
8 ~~between the trustee and (A) all primary beneficiaries of the~~
9 ~~trust, in each case either by the beneficiary or by the~~
10 ~~beneficiary's representative in accordance with this Section,~~
11 ~~either individually or by their respective representatives in~~
12 ~~accordance with subsection (a)(1), or (B) all beneficiaries~~
13 ~~currently eligible to receive income or principal from the~~
14 ~~trust and all beneficiaries who are presumptive remaindermen of~~
15 ~~the trust, in each case either individually or by their~~
16 ~~respective representatives in accordance with subsection~~
17 ~~(a)(1).~~

18 (c) Representation of charity. A charity that is
19 specifically named as beneficiary of a trust or that otherwise
20 has an express beneficial interest in a trust shall act for
21 itself. If a trust provides a beneficial interest or expectancy
22 for one or more charities or charitable purposes that are not
23 specifically named or otherwise represented (the "charitable
24 interest"), the Illinois Attorney General may, in accordance
25 with this Section, represent, bind, and act on behalf of the
26 charitable interest with respect to any particular question or

1 dispute, including without limitation representing the
2 charitable interest in a nonjudicial settlement agreement or in
3 an agreement to convert a trust to a total return trust in
4 accordance with subsection 5.3(b) of the total return trust
5 provisions of Section 5.3 of this Act. This subsection (c)
6 shall be construed as being declarative of existing law and not
7 as a new enactment. Notwithstanding any other provision,
8 nothing in this Section shall be construed to limit or affect
9 the Illinois Attorney General's authority to file an action or
10 take other steps as he or she deems advisable at any time to
11 enforce or protect the general public interest as to a trust
12 that provides a beneficial interest or expectancy for one or
13 more charities or charitable purposes whether or not a specific
14 charity is named in the trust.

15 (d) Nonjudicial settlement agreements.

16 (1) For purposes of this Section, "interested persons"
17 means the trustee and all beneficiaries, or their
18 respective representatives determined after giving effect
19 to the preceding provisions of this Section, other persons
20 and parties in interest whose consent or joinder would be
21 required in order to achieve a binding settlement were the
22 settlement to be approved by the court. "Interested
23 persons" also includes a trust advisor, investment
24 advisor, distribution advisor, trust protector or other
25 holder, or committee of holders, of fiduciary or
26 nonfiduciary powers, if such person then holds powers

1 material to a particular question or dispute to be resolved
2 or affected by a nonjudicial settlement agreement in
3 accordance with this Section or by the court.

4 (2) Interested ~~Except as otherwise provided in~~
5 ~~subsection (d) (3), interested~~ persons, or their respective
6 representatives determined after giving effect to the
7 preceding provisions of this Section, may enter into a
8 binding nonjudicial settlement agreement with respect to
9 any matter involving a trust as provided in this Section.

10 (3) (Blank). ~~A nonjudicial settlement agreement is~~
11 ~~valid only to the extent its terms and conditions could be~~
12 ~~properly approved under applicable law by a court of~~
13 ~~competent jurisdiction.~~

14 (4) The following matters ~~Matters that~~ may be resolved
15 by a nonjudicial settlement agreement ~~include but are not~~
16 ~~limited to:~~

17 (A) Validity, interpretation, or construction of
18 the terms of the trust.†

19 (B) Approval ~~approval~~ of a trustee's report or
20 accounting.†

21 (C) Exercise ~~exercise~~ or nonexercise of any power
22 by a trustee.†

23 (D) The ~~the~~ grant to a trustee of any necessary or
24 desirable administrative power if such grant does not
25 conflict with a clear material purpose of the trust.†

26 (E) Questions ~~questions~~ relating to property or an

1 interest in property held by the trust if such
2 resolution does not conflict with a clear material
3 purpose of the trust.†

4 (F) Remove, appoint, or remove and appoint, a
5 trustee, trust advisor, investment advisor,
6 distribution advisor, trust protector or other holder,
7 or committee of holders, of fiduciary or nonfiduciary
8 powers, including without limitation designation of a
9 plan of succession or procedure to determine
10 successors to any such office. ~~resignation or~~
11 ~~appointment of a trustee;~~

12 (G) Determination ~~determination~~ of a trustee's
13 compensation.†

14 (H) Transfer ~~transfer~~ of a trust's principal place
15 of administration, including without limitation to
16 change the law governing administration of the trust.†

17 (I) Liability ~~liability~~ or indemnification of a
18 trustee for an action relating to the trust.†

19 (J) Resolution of bona fide ~~resolution of~~ disputes
20 ~~or issues~~ related to administration, investment,
21 distribution or other matters.†

22 (K) Modification ~~modification~~ of terms of the
23 trust pertaining to administration of the trust.† ~~and~~

24 (L) Termination ~~termination~~ of the trust, provided
25 that court approval of such termination must be
26 obtained in accordance with subdivision ~~subsection~~

1 (d) (5) of this Section, and the court must conclude
2 continuance of the trust is not necessary to achieve
3 any clear material purpose of the trust.~~;~~ upon The
4 court may consider spendthrift provisions as a factor
5 in making a decision under this subdivision but a
6 spendthrift provision is not necessarily a clear
7 material purpose of a trust, and the court is not
8 precluded from modifying or terminating a trust
9 because the trust instrument contains a spendthrift
10 provisions. Upon such termination the court may order
11 the trust property distributed as agreed by the parties
12 to the agreement or otherwise as the court determines
13 equitable consistent with the purposes of the trust.

14 (M) Any other matter involving a trust to the
15 extent the terms and conditions of the nonjudicial
16 settlement agreement could be properly approved under
17 applicable law by a court of competent jurisdiction.

18 (5) Any beneficiary or other interested person may
19 request the court to approve any part or all of a
20 nonjudicial settlement agreement, including whether any
21 representation is adequate and without conflict of
22 interest, provided that the petition for such approval must
23 be filed before or within 60 days after the effective date
24 of the agreement.

25 (6) An agreement entered into in accordance with this
26 Section shall be final and binding on the trustee, on and

1 all beneficiaries of the trust, both current and future,
2 and on all other interested persons as if ordered by a
3 court with competent jurisdiction over the trust, the trust
4 property, and all parties in interest.

5 (7) In the trustee's sole discretion, the trustee may,
6 but is not required to, obtain and rely upon an opinion of
7 counsel on any matter relevant to this Section, including
8 without limitation: (i) where required by this Section,
9 that the any agreement proposed to be made in accordance
10 with this Section does not conflict with a clear material
11 purpose of the trust or could be properly approved by the
12 court under applicable law, (ii) in the case of a trust
13 termination, that continuance of the trust is not necessary
14 to achieve any clear material purpose of the trust, (iii)
15 ~~or~~ that there is no material conflict of interest between a
16 representative and the person represented with respect to
17 the particular question or dispute, or (iv) that the
18 representative and the person represented have
19 substantially similar interests with respect to the ~~or~~
20 ~~among those being represented with respect to a particular~~
21 question or dispute.

22 (e) Application. ~~This On and after its effective date, this~~
23 Section applies to all trusts in existence on the effective
24 date of this amendatory Act of the 97th General Assembly or
25 created after that date ~~existing and future trusts, and is~~
26 applicable to judicial proceedings and nonjudicial matters

1 involving such trusts. For purposes of this Section, (i)
2 judicial proceedings include any proceeding before a court or
3 administrative tribunal of this State, and any arbitration or
4 mediation proceedings; (ii) nonjudicial matters include, but
5 are not limited to, nonjudicial settlement, ~~or~~ agreements
6 entered into in accordance with this Section, and the grant of
7 any consent, release, ratification, or indemnification ~~on or~~
8 ~~after the effective date.~~ This Section shall be construed as
9 pertaining to the administration of a trust and shall be
10 available to any trust that is administered in Illinois or that
11 is governed by Illinois law with respect to the meaning and
12 effect of its terms, except to the extent the governing
13 instrument expressly prohibits use of this Section by specific
14 reference to this Section. A provision in the governing
15 instrument in the form: "Neither the provisions of Section 16.1
16 of the Illinois Trusts and Trustees Act nor any corresponding
17 provision of future law may be used in the administration of
18 this trust" or a similar provision demonstrating that intent is
19 sufficient to preclude the use of this Section.

20 (Source: P.A. 96-479, eff. 1-1-10.)