



## 98TH GENERAL ASSEMBLY

### State of Illinois

2013 and 2014

HB4254

by Rep. Emily McAsey

#### SYNOPSIS AS INTRODUCED:

See Index

Amends the Trusts and Trustees Act. 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. Changes definitions and 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 if there is no conflict of interest between the beneficiary and either of that person's parents on that particular question or dispute. Further provides that this representative may represent and bind an unborn or 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 conflict of interest between the minor or the disabled person and the unborn or unascertainable person. Makes corresponding changes. In a subsection concerning nonjudicial settlement agreements, makes changes concerning the matters that may be resolved by a nonjudicial settlement agreement. Provides that if a charitable entity is a current beneficiary, is a presumptive remainder beneficiary, or has any vested interest in a trust, the parties to any proposed nonjudicial settlement agreement affecting the trust shall deliver to the Attorney General's Charitable Trust Bureau written notice of the proposed agreement at least 60 days prior to its effective date. Provides that if the Bureau objects in a writing delivered to one or more of the parties prior to the proposed effective date, the agreement shall not take effect unless the parties obtain court approval. Provides that the Section concerning virtual representation shall be construed as pertaining to the administration of any trust that is administered in this State or governed by Illinois law, unless certain conditions are met. Provides that changes made apply to all trusts in existence on the effective date and to all trusts created after that date.

LRB098 13317 HEP 47837 b

A BILL FOR

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 conflict of interest  
13           between the representative and the ~~person~~ represented  
14           beneficiary with respect to the particular question or  
15           dispute, a beneficiary who is a minor, or a disabled, or  
16           unborn beneficiary ~~person~~, or a beneficiary ~~person~~ whose  
17           identity or location is unknown and not reasonably  
18           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) 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 a person who, within the 365  
2           days immediately preceding that date, was examined by a  
3           licensed physician who determined that the person  
4           lacked the capacity to make prudent financial  
5           decisions, and the physician made a written record of  
6           the physician's determination and signed the written  
7           record within 90 days after the examination.

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

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

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

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

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

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

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

1       need not be considered and is not necessary if such  
2       beneficiary is otherwise represented in accordance with  
3       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 (b) 5.3(b) ~~of the total return trust provisions~~  
7       of 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. If a trust provides a  
19      beneficial interest or expectancy for one or more charities or  
20      charitable purposes that are not specifically named or  
21      otherwise represented (the "charitable interest"), the  
22      Illinois Attorney General may, in accordance with this Section,  
23      represent, bind, and act on behalf of the charitable interest  
24      with respect to any particular question or dispute, including  
25      without limitation representing the charitable interest in a  
26      nonjudicial settlement agreement or in an agreement to convert

1 a trust to a total return trust in accordance with subsection  
2 ~~(b) 5.3(b) of the total return trust provisions~~ of Section 5.3  
3 of this Act. A charity that is specifically named as  
4 beneficiary of a trust or that otherwise has an express  
5 beneficial interest in a trust may act for itself. ~~This~~  
6 ~~subsection (c) shall be construed as being declarative of~~  
7 ~~existing law and not as a new enactment.~~ Notwithstanding any  
8 other provision, nothing in this Section shall be construed to  
9 limit or affect the Illinois Attorney General's authority to  
10 file an action or take other steps as he or she deems advisable  
11 at any time to enforce or protect the general public interest  
12 as to a trust that provides a beneficial interest or expectancy  
13 for one or more charities or charitable purposes whether or not  
14 a specific charity is named in the trust. This subsection (c)  
15 shall be construed as being declarative of existing law and not  
16 as a new enactment.

17 (d) Nonjudicial settlement agreements.

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

1 holder, or committee of holders, of fiduciary or  
2 nonfiduciary powers, if the person then holds powers  
3 material to a particular question or dispute to be resolved  
4 or affected by a nonjudicial settlement agreement in  
5 accordance with this Section or by the court.

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

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

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

19 (A) Validity, interpretation, or construction of  
20 the terms of the trust.†

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

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

25 (D) The ~~the~~ grant to a trustee of any necessary or  
26 desirable administrative power, provided the grant



1 does not conflict with a clear material purpose of the  
2 trust.†

3 (E) Questions ~~questions~~ relating to property or an  
4 interest in property held by the trust, provided the  
5 resolution does not conflict with a clear material  
6 purpose of the trust.†

7 (F) Removal, appointment, or removal and  
8 appointment of a trustee, trust advisor, investment  
9 advisor, distribution advisor, trust protector or  
10 other holder, or committee of holders, of fiduciary or  
11 nonfiduciary powers, including without limitation  
12 designation of a plan of succession or procedure to  
13 determine successors to any such office. ~~resignation~~  
14 ~~or appointment of a trustee.~~

15 (G) Determination ~~determination~~ of a trustee's  
16 compensation.†

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

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

22 (J) Resolution of bona fide ~~resolution of~~ disputes  
23 ~~or issues~~ related to administration, investment,  
24 distribution or other matters.†

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

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

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

21          (4.5) If a charitable interest or a specifically named  
22          charity is a current beneficiary, is a presumptive  
23          remainder beneficiary, or has any vested interest in a  
24          trust, the parties to any proposed nonjudicial settlement  
25          agreement affecting the trust shall deliver to the Attorney  
26          General's Charitable Trust Bureau written notice of the

1 proposed agreement at least 60 days prior to its effective  
2 date. The Bureau need take no action, but if it objects in  
3 a writing delivered to one or more of the parties prior to  
4 the proposed effective date, the agreement shall not take  
5 effect unless the parties obtain court approval.

6 (5) Any beneficiary or other interested person may  
7 request the court to approve any part or all of a  
8 nonjudicial settlement agreement, including whether any  
9 representation is adequate and without conflict of  
10 interest, provided that the petition for such approval must  
11 be filed before or within 60 days after the effective date  
12 of the agreement.

13 (6) An agreement entered into in accordance with this  
14 Section shall be final and binding on the trustee, on and  
15 all beneficiaries of the trust, both current and future,  
16 and on all other interested persons as if ordered by a  
17 court with competent jurisdiction over the trust, the trust  
18 property, and all parties in interest.

19 (7) In the trustee's sole discretion, the trustee may,  
20 but is not required to, obtain and rely upon an opinion of  
21 counsel on any matter relevant to this Section, including  
22 without limitation: (i) where required by this Section,  
23 that the ~~any~~ agreement proposed to be made in accordance  
24 with this Section does not conflict with a clear material  
25 purpose of the trust or could be properly approved by the  
26 court under applicable law; (ii) in the case of a trust

1 termination, that continuance of the trust is not necessary  
2 to achieve any clear material purpose of the trust; (iii),  
3 ~~or~~ that there is no conflict of interest between a  
4 representative and the person represented with respect to  
5 the particular question or dispute; or (iv) that the  
6 representative and the person represented have  
7 substantially similar interests with respect to the ~~or~~  
8 ~~among those being represented with respect to a~~ particular  
9 question or dispute.

10 (e) Application. On and after its effective date, this  
11 Section applies to all existing and future trusts, judicial  
12 proceedings, or agreements entered into in accordance with this  
13 Section on or after the effective date.

14 (f) This Section shall be construed as pertaining to the  
15 administration of a trust and shall be available to any trust  
16 that is administered in this State or that is governed by  
17 Illinois law with respect to the meaning and effect of its  
18 terms, except to the extent the governing instrument expressly  
19 prohibits the use of this Section by specific reference to this  
20 Section. A provision in the governing instrument in the form:  
21 "Neither the provisions of Section 16.1 of the Illinois Trusts  
22 and Trustees Act nor any corresponding provision of future law  
23 may be used in the administration of this trust", or a similar  
24 provision demonstrating that intent, is sufficient to preclude  
25 the use of this Section.

26 (g) The changes made by this amendatory Act of the 98th

1 General Assembly apply to all trusts in existence on the  
2 effective date of this amendatory Act of the 98th General  
3 Assembly or created after that date, and are applicable to  
4 judicial proceedings and nonjudicial matters involving such  
5 trusts. For purposes of this Section:

6 (i) judicial proceedings include any proceeding before  
7 a court or administrative tribunal of this State and any  
8 arbitration or mediation proceedings; and

9 (ii) nonjudicial matters include, but are not limited  
10 to, nonjudicial settlement agreements entered into in  
11 accordance with this Section and the grant of any consent,  
12 release, ratification, or indemnification.

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

1 INDEX

2 Statutes amended in order of appearance

3 760 ILCS 5/5.3

4 760 ILCS 5/16.1