

LEGISLATIVE BILL 760

Approved by the Governor April 12, 2010

Introduced by Wightman, 36.

FOR AN ACT relating to the Uniform Principal and Income Act; to amend section 30-3119.01, Reissue Revised Statutes of Nebraska; to change provisions relating to total return trusts; and to repeal the original section.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 30-3119.01, Reissue Revised Statutes of Nebraska, is amended to read:

30-3119.01 (1) Unless expressly prohibited by a trust, a trustee may release the power to adjust described in section 30-3119 and convert a trust to a total return trust as described in this section if all of the following apply:

(a) The trustee determines that the conversion will enable the trustee to better carry out the intent of the settlor and the purpose of the trust;

(b) The trustee sends written notice of the trustee's decision to convert the trust to a total return trust specifying a prospective effective date for the conversion which shall not be sooner than sixty days after the notice is sent and which shall include a copy of this section of law and shall specifically recite the time period within which a timely objection may be made. Such notice shall be sent to the qualified beneficiaries determined as of the date the notice is sent and assuming nonexercise of all powers of appointment;

(c) There are one or more legally competent beneficiaries who are currently eligible to receive income from the trust and one or more legally competent beneficiaries who would receive a distribution of principal if the trust were to terminate immediately before the notice is given; and

(d) No beneficiary has objected in writing to the conversion to a total return trust and delivered such objection to the trustee within sixty days after the notice was sent.

(2) Conversion to a total return trust or reconversion to an income trust may be made by agreement between the trustee and all qualified beneficiaries of the trust. The trustee and all qualified beneficiaries of the trust may also agree to modify the distribution percentage, except that the trustee and the qualified beneficiaries may not agree to a distribution percentage of less than three percent or greater than five percent. The agreement may include any other actions a court could properly order pursuant to subsection (7) of this section.

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

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

(ii) There are no legally competent beneficiaries who are currently eligible to receive income from the trust; or

(iii) There are no legally competent beneficiaries who would receive a distribution of principal if the trust were to terminate immediately.

(b) A beneficiary may request the trustee to convert to a total return trust or adjust the distribution percentage pursuant to this subsection. If the trustee declines or fails to act within six months after receiving a written request from a beneficiary to do so, the beneficiary may petition the court to order the conversion or adjustment.

(c) The trustee may petition the court prospectively to reconvert from a total return trust or to adjust the distribution percentage if the trustee determines that the reconversion or adjustment will enable the trustee to better carry out the purposes of the trust. A beneficiary may request the trustee to petition the court prospectively to reconvert from a total return trust or adjust the distribution percentage. If the trustee declines or fails to act within six months after receiving a written request from a beneficiary to do so, the beneficiary may petition the court to order the reconversion or adjustment.

(d) (i) In a judicial proceeding instituted under this subsection, the trustee may present opinions and reasons concerning:

(A) The trustee's support for or opposition to a conversion to a total return trust, a reconversion from a total return trust, or an adjustment

of the distribution percentage of a total return trust, including whether the trustee believes conversion, reconversion, or adjustment of the distribution percentage would enable the trustee to better carry out the purposes of the trust; and

(B) Any other matter relevant to the proposed conversion, reconversion, or adjustment of the distribution percentage.

(ii) A trustee's actions undertaken in accordance with this subsection shall not be deemed improper or inconsistent with the trustee's duty of impartiality unless the court finds from all the evidence that the trustee acted in bad faith.

(e) The court shall order conversion to a total return trust, reconversion prospectively from a total return trust, or adjustment of the distribution percentage of a total return trust if the court determines that the conversion, reconversion, or adjustment of the distribution percentage will enable the trustee to better carry out the purposes of the trust.

(f) If a conversion to a total return trust is made pursuant to a court order, the trustee may reconvert the trust to an income trust only:

(i) Pursuant to a subsequent court order; or

(ii) By filing with the court an agreement made pursuant to subsection (2) of this section to reconvert to an income trust.

(g) Upon a reconversion the power to adjust, as described in section 30-3119 and as it existed before the conversion, shall be revived.

(h) An action may be taken under this subsection no more frequently than every two years, unless a court for good cause orders otherwise.

(4)(a) During the time that a trust is a total return trust, the trustee shall administer the trust in accordance with the provisions of this subsection as follows, unless otherwise expressly provided by the terms of the trust:

(i) The trustee shall invest the trust assets seeking a total return without regard to whether the return is from income or appreciation of principal;

(ii) The trustee shall make income distributions in accordance with the trust subject to the provisions of this section;

(iii) The distribution percentage for any trust converted to a total return trust by a trustee in accordance with subsection (1) of this section shall be four percent, unless a different percentage has been determined in an agreement made pursuant to subsection (2) of this section or ordered by the court pursuant to subsection (3) of this section; and

(iv)(A) The trustee shall pay to a beneficiary in the case of an underpayment within a reasonable time and shall recover from a beneficiary in the case of an overpayment either by repayment by the beneficiary or by withholding from future distributions to the beneficiary:

(I) An amount equal to the difference between the amount properly payable and the amount actually paid; and

(II) Interest compounded annually at a rate per annum equal to the distribution percentage in the year or years during which the underpayment or overpayment occurs.

(B) For purposes of subdivision (4)(a)(iv) of this section, accrual of interest may not commence until the beginning of the trust year following the year in which the underpayment or overpayment occurs.

(b) For purposes of this subsection:

(i) Distribution amount means an annual amount equal to the distribution percentage multiplied by the average net fair market value of the trust's assets. The average net fair market value of the trust's assets shall be the net fair market value of the trust's assets averaged over the lesser of:

(A) The three preceding years; or

(B) The period during which the trust has been in existence; and

(ii) Income, as that term appears in the governing instrument, means the distribution amount.

(5) The trustee may determine any of the following matters in administering a total return trust as the trustee deems necessary or helpful for the proper functioning of the trust:

(a) The effective date of a conversion to a total return trust pursuant to subsection (1) of this section;

(b) The manner of prorating the distribution amount for a short year in which a beneficiary's interest commences or ceases, or, if the trust is a total return trust for only part of the year or the trustee may elect to treat the trust year as two separate years, the first of which ends at the close of the day on which the conversion or reconversion occurs, and the second of which ends at the close of the trust year;

(c) Whether distributions are made in cash or in kind;

(d) The manner of adjusting valuations and calculations of the distribution amount to account for other payments from, or contributions to, the trust;

(e) Whether to value the trust's assets annually or more frequently;

(f) Which valuation dates to use and how many valuation dates to use;

(g) Valuation decisions concerning any asset for which there is no readily available market value, including:

(i) How frequently to value such an asset;

(ii) Whether and how often to engage a professional appraiser to value such an asset; and

(iii) Whether to exclude the value of such an asset from the net fair market value of the trust's assets for purposes of determining the distribution amount. For purposes of this section, any such asset so excluded shall be referred to as an excluded asset and the trustee shall distribute any net income received from the excluded asset as provided for in the governing instrument, subject to the following principles:

(A) The trustee shall treat each asset for which there is no readily available market value as an excluded asset unless the trustee determines that there are compelling reasons not to do so and the trustee considers all relevant factors including the best interests of the beneficiaries;

(B) If tangible personal property or real property is possessed or occupied by a beneficiary, the trustee may not limit or restrict any right of the beneficiary to use the property in accordance with the governing instrument regardless of whether the trustee treats the property as an excluded asset; and

(C) By way of example and not by way of limitation, assets for which there is a readily available market value include cash and cash equivalents; stocks, bonds, and other securities and instruments for which there is an established market on a stock exchange, in an over-the-counter market, or otherwise; and any other property that can reasonably be expected to be sold within one week of the decision to sell without extraordinary efforts by the seller. By way of example and not by way of limitation, assets for which there is no readily available market value include stocks, bonds, and other securities and instruments for which there is no established market on a stock exchange, in an over-the-counter market, or otherwise; real property; tangible personal property; and artwork and other collectibles; and

(h) Any other administrative matter that the trustee determines is necessary or helpful for the proper functioning of the total return trust.

(6)(a) Expenses, taxes, and other charges that would otherwise be deducted from income if the trust was not a total return trust may not be deducted from the distribution amount.

(b) Unless otherwise provided by the governing instrument, the distribution amount each year shall be deemed to be paid from the following sources for that year in the following order:

(i) Net income determined as if the trust was not a total return trust;

(ii) Other ordinary income as determined for federal income tax purposes;

(iii) Net realized short-term capital gains as determined for federal income tax purposes;

(iv) Net realized long-term capital gains as determined for federal income tax purposes;

(v) Trust principal comprising assets for which there is a readily available market value; and

(vi) Other trust principal.

(7)(a) The court may order any of the following actions in a proceeding brought by a trustee or a beneficiary pursuant to subdivision (a), (b), or (c) of subsection (3) of this section:

(i) Select a distribution percentage other than four percent, except that the court may not order a distribution percentage of less than three percent or greater than five percent;

(ii) Average the valuation of the trust's net assets over a period other than three years;

(iii) Reconvert prospectively from a total return trust or adjust the distribution percentage of a total return trust;

(iv) Direct the distribution of net income, determined as if the trust were not a total return trust, in excess of the distribution amount as to any or all trust assets if the distribution is necessary to preserve a tax benefit; or

(v) Change or direct any administrative procedure as the court determines is necessary or helpful for the proper functioning of the total

return trust.

(b) Nothing in this subsection shall be construed to limit the equitable jurisdiction of the court to grant other relief as the court deems proper.

~~(8)(a) The distribution amount may not be less than the net income of the trust, determined without regard to the provisions of this section, either:~~

~~(i) For a trust for which an estate tax or a gift tax marital deduction was claimed or may be claimed, in whole or in part, but only during the lifetime of the spouse for whom the trust was created; or~~

~~(ii) For a trust that was exempt, in whole or in part, from generation-skipping transfer tax on September 4, 2005, by reason of any effective date or transition rule.~~

(8)(a) In the case of a trust for which a marital deduction has been taken for federal tax purposes under section 2056 or section 2523 of the Internal Revenue Code of 1986, as amended, the spouse otherwise entitled to receive the net income of the trust shall have the right, by written instrument delivered to the trustee, to compel the reconversion during that spouse's lifetime of the trust from a total return trust to an income trust, notwithstanding anything in this section to the contrary.

(b) Conversion to a total return trust shall not affect any provision in the governing instrument:

(i) That directs or authorizes the trustee to distribute principal;

(ii) That directs or authorizes the trustee to distribute a fixed annuity or a fixed fraction of the value of trust assets;

(iii) That authorizes a beneficiary to withdraw a portion or all of the principal; or

(iv) That in any manner diminishes an amount permanently set aside for charitable purposes under the governing instrument unless both income and principal are set aside.

(9) If a particular trustee is also a beneficiary of the trust and conversion or failure to convert would enhance or diminish the beneficial interest of that trustee or, if possession or exercise of the conversion power by a particular trustee alone would cause any individual to be treated as owner of a part of the trust for federal income tax purposes or cause a part of the trust to be included in the gross estate of any individual for federal estate tax purposes, then that particular trustee may not participate as a trustee in the exercise of the conversion power, except that:

(a) The trustee may petition the court under subdivision (a) of subsection (3) of this section to order conversion in accordance with this section; and

(b) A cotrustee or cotrustees to whom this subsection does not apply may convert the trust to a total return trust in accordance with subsection (1) or (2) of this section.

(10) A trustee may irrevocably release the power granted by this section if the trustee reasonably believes the release is in the best interests of the trust and its beneficiaries. The release may be personal to the releasing trustee or it may apply generally to some or all subsequent trustees. The release may be for any specified period, including a period measured by the life of an individual.

(11)(a) A trustee who reasonably and in good faith takes any action or omits to take any action under this section is not liable to any person interested in the trust. A discretionary act or omission by a trustee under this section shall be presumed to be reasonable and undertaken in good faith unless the act or omission is determined by a court to have been an abuse of discretion.

(b) If a trustee reasonably and in good faith takes or omits to take any action under this section and a person interested in the trust opposes the act or omission, the person's exclusive remedy shall be to seek an order of the court directing the trustee to:

(i) Convert the trust to a total return trust;

(ii) Reconvert from a total return trust;

(iii) Change the distribution percentage; or

(iv) Order any administrative procedures the court determines are necessary or helpful for the proper functioning of the trust.

(c) A claim for relief under this subsection that is not barred by adjudication, consent, or limitation is nevertheless barred as to any beneficiary who has received a statement fully disclosing the matter unless a proceeding to assert the claim is commenced within six months after receipt of the statement. A beneficiary is deemed to have received a statement if it is received by the beneficiary or the beneficiary's representative in a manner described in section 30-2222 or 30-3121.

(12) A trustee has no duty to inform a beneficiary about the availability and provisions of this section. A trustee has no duty to review the trust to determine whether any action should be taken under this section unless the trustee is requested in writing by a qualified beneficiary to do so.

(13) (a) This section applies to trusts in existence on September 4, 2005, and to trusts created on or after such date.

(b) This section shall be construed to apply to the administration of a trust that is administered in Nebraska under Nebraska law or that is governed by Nebraska law with respect to the meaning and effect of its terms unless:

(i) The trust is a trust described in the Internal Revenue Code of 1986, as amended, 26 U.S.C. section 170 (f)(2)(B), 664(d), 1361(d), 2702(a)(3), or 2702(b);

(ii) Conversion of a trust to a total return trust is clearly contrary to the manifestation of the settlor's intent as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding; or

(iii) The terms of a trust in existence on September 4, 2005, incorporate provisions that operate as a total return trust. The trustee or a beneficiary of such a trust may proceed under section 30-3121 to adopt provisions in this section that do not contradict provisions in the governing instrument.

Sec. 2. Original section 30-3119.01, Reissue Revised Statutes of Nebraska, is repealed.