

LEGISLATURE OF NEBRASKA

ONE HUNDRED FIRST LEGISLATURE

SECOND SESSION

LEGISLATIVE BILL 760

FINAL READING

Introduced by Wightman, 36.

Read first time January 06, 2010

Committee: Banking, Commerce and Insurance

A BILL

1 FOR AN ACT relating to the Uniform Principal and Income Act; to
2 amend section 30-3119.01, Reissue Revised Statutes of
3 Nebraska; to change provisions relating to total return
4 trusts; and to repeal the original section.
5 Be it enacted by the people of the State of Nebraska,

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

3 30-3119.01 (1) Unless expressly prohibited by a trust,
4 a trustee may release the power to adjust described in section
5 30-3119 and convert a trust to a total return trust as described in
6 this section if all of the following apply:

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

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

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

24 (d) No beneficiary has objected in writing to the
25 conversion to a total return trust and delivered such objection to

1 the trustee within sixty days after the notice was sent.

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

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

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

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

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

22 (b) A beneficiary may request the trustee to convert to
23 a total return trust or adjust the distribution percentage pursuant
24 to this subsection. If the trustee declines or fails to act within
25 six months after receiving a written request from a beneficiary

1 to do so, the beneficiary may petition the court to order the
2 conversion or adjustment.

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

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

16 (A) The trustee's support for or opposition to a
17 conversion to a total return trust, a reconversion from a total
18 return trust, or an adjustment of the distribution percentage
19 of a total return trust, including whether the trustee believes
20 conversion, reconversion, or adjustment of the distribution
21 percentage would enable the trustee to better carry out the
22 purposes of the trust; and

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

25 (ii) A trustee's actions undertaken in accordance with

1 this subsection shall not be deemed improper or inconsistent with
2 the trustee's duty of impartiality unless the court finds from all
3 the evidence that the trustee acted in bad faith.

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

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

13 (i) Pursuant to a subsequent court order; or

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

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

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

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

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

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

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

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

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

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

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

1 overpayment occurs.

2 (b) For purposes of this subsection:

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

8 (A) The three preceding years; or

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

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

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

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

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

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

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

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

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

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

10 (i) How frequently to value such an asset;

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

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

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

25 (B) If tangible personal property or real property is

1 possessed or occupied by a beneficiary, the trustee may not limit
2 or restrict any right of the beneficiary to use the property in
3 accordance with the governing instrument regardless of whether the
4 trustee treats the property as an excluded asset; and

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

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

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

24 (b) Unless otherwise provided by the governing
25 instrument, the distribution amount each year shall be deemed to

1 be paid from the following sources for that year in the following
2 order:

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

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

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

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

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

13 (vi) Other trust principal.

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

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

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

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

24 (iv) Direct the distribution of net income, determined
25 as if the trust were not a total return trust, in excess of

1 the distribution amount as to any or all trust assets if the
2 distribution is necessary to preserve a tax benefit; or

3 (v) Change or direct any administrative procedure as the
4 court determines is necessary or helpful for the proper functioning
5 of the total return trust.

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

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

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

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

19 (8)(a) In the case of a trust for which a marital
20 deduction has been taken for federal tax purposes under section
21 2056 or section 2523 of the Internal Revenue Code of 1986, as
22 amended, the spouse otherwise entitled to receive the net income
23 of the trust shall have the right, by written instrument delivered
24 to the trustee, to compel the reconversion during that spouse's
25 lifetime of the trust from a total return trust to an income trust,

1 notwithstanding anything in this section to the contrary.

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

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

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

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

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

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

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

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

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

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

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

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

23 (ii) Reconvert from a total return trust;

24 (iii) Change the distribution percentage; or

25 (iv) Order any administrative procedures the court

1 determines are necessary or helpful for the proper functioning of
2 the trust.

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

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

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

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

22 (i) The trust is a trust described in the Internal
23 Revenue Code of 1986, as amended, 26 U.S.C. section 170 (f) (2) (B),
24 664(d), 1361(d), 2702(a) (3), or 2702(b);

25 (ii) Conversion of a trust to a total return trust is

1 clearly contrary to the manifestation of the settlor's intent as
2 expressed in the trust instrument or as may be established by other
3 evidence that would be admissible in a judicial proceeding; or

4 (iii) The terms of a trust in existence on September 4,
5 2005, incorporate provisions that operate as a total return trust.
6 The trustee or a beneficiary of such a trust may proceed under
7 section 30-3121 to adopt provisions in this section that do not
8 contradict provisions in the governing instrument.

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