

1 **UTAH UNITRUST ACT**

2 2013 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Lyle W. Hillyard**

5 House Sponsor: V. Lowry Snow

7 **LONG TITLE**

8 **General Description:**

9 This bill creates the Utah Unitrust Act.

10 **Highlighted Provisions:**

11 This bill:

- 12 ▶ creates the Utah Unitrust Act;
- 13 ▶ sets out responsibilities for trustees;
- 14 ▶ provides for the creation or conversion of an income trust to a unitrust;
- 15 ▶ allows beneficiaries to object or consent to conversions; and
- 16 ▶ authorizes trustees to invest trust funds for current and future beneficiaries.

17 **Money Appropriated in this Bill:**

18 None

19 **Other Special Clauses:**

20 None

21 **Utah Code Sections Affected:**

22 ENACTS:

23 **22-7-101**, Utah Code Annotated 1953

24 **22-7-102**, Utah Code Annotated 1953

25 **22-7-103**, Utah Code Annotated 1953

26 **22-7-104**, Utah Code Annotated 1953

27 **22-7-105**, Utah Code Annotated 1953

28 **22-7-106**, Utah Code Annotated 1953

29 **22-7-107**, Utah Code Annotated 1953

58 trustee. Notwithstanding the foregoing, a trust that otherwise is an income trust may not
59 qualify under this chapter, if it may be subject to taxation under Sections 2001 or 2501, Internal
60 Revenue Code, until the expiration of the period for filing the return, including extensions.

61 (4) "Interested distributee" means a person to whom distributions of income or
62 principal can currently be made and who has the power to remove the existing trustee and
63 designate as successor a person who may be a related or subordinate party, as defined in
64 Section 672(c), Internal Revenue Code, with respect to the interested distributee.

65 (5) "Interested trustee" means:

66 (a) an individual trustee to whom the net income or principal of the trust can currently
67 be distributed or would be distributed if the trust were to terminate and be distributed;

68 (b) any trustee who may be removed and replaced by an interested distributee; or

69 (c) an individual trustee whose legal obligation to support a beneficiary may be
70 satisfied by distributions of income and principal of the trust.

71 (6) "Settlor" means a person as defined in Section 75-7-103.

72 (7) "Total return unitrust" means an income trust that has been created in or converted
73 under, meets the provisions of this chapter, and is invested and managed under the prudent
74 investor rule of Title 75, Chapter 7, Part 9, Utah Uniform Prudent Investor Act.

75 (8) "Trustee" means all persons acting as trustee of the trust, except where expressly
76 noted otherwise, whether acting within their discretion or on the direction of one or more
77 persons acting in a fiduciary capacity.

78 (9) "Unitrust amount" means an amount computed as a percentage of the net fair
79 market value of the trust.

80 (10) "Year" means a calendar year.

81 Section 3. Section **22-7-103** is enacted to read:

82 **22-7-103. Trustee powers to convert trusts -- Requirements to make unitrust**
83 **election.**

84 (1) A trustee, other than an interested trustee, or, when two or more persons are acting
85 as trustee, a majority of the trustees who are not interested trustees may, in the trustee's sole

86 discretion and without the approval of the district court:

87 (a) elect to release the power to adjust described in Section 22-3-104 and to convert an
88 income trust to a total return unitrust;

89 (b) reconvert a total return unitrust to an income trust and reinstate the power to adjust
90 described in Section 22-3-104; or

91 (c) change the percentage used to calculate the unitrust amount or the method used to
92 determine the fair market value of the trust if the trustee adopts a written policy for the trust
93 providing that:

94 (i) in the case of a trust administered as an income trust, future distributions from the
95 trust will be unitrust amounts rather than net income;

96 (ii) in the case of a trust administered as a total return unitrust, future distributions from
97 the trust will be net income rather than unitrust amounts; or

98 (iii) the percentage used to calculate the unitrust amount or the method used to
99 determine the fair market value of the trust will be changed as stated in the policy.

100 (2) The trustee shall mail notice of the proposed action to the settlor of the trust, if the
101 settlor is living, and to all adult qualified beneficiaries, as defined in Section 75-7-103, who, on
102 the date of the unitrust conversion, are current distributees or permissible distributees of trust
103 income or principal, or would be a distributee or permissible distributee of trust income or
104 principal if the trust terminated on that date, assuming nonexercise of all powers of
105 appointment.

106 (3) Notice of proposed action need not be given to any person who consents in writing
107 to the proposed action. The consent may be executed at any time before or after the proposed
108 action is taken.

109 (4) The trustee's written notice of the trustee's intention to take the proposed action
110 shall include:

111 (a) the name and mailing address of the trustee;

112 (b) the name and telephone number of a person who may be contacted for additional
113 information;

114 (c) a description of the action proposed to be taken and an explanation of the reasons
115 for the action;

116 (d) a copy of the trustee's written policy described in Subsection (1)(c);

117 (e) the time within which objections to the proposed action can be made, which shall
118 be at least 30 days from the mailing of the notice of proposed action; and

119 (f) the date on or after which the proposed action may be taken or is effective.

120 (5) A beneficiary may object to the proposed action by mailing a written objection to
121 the trustee stating the objection and the basis or reason for the objection at the address stated in
122 the notice of proposed action within the time period specified in the notice of proposed action.

123 (6) If the trustee receives a written objection stating the basis or reason for the
124 objection within the applicable time period, and within 60 days the objecting beneficiary does
125 not subsequently consent in writing, either the trustee or a beneficiary may petition the court to
126 have the proposed action taken as proposed, taken with modifications, or denied.

127 (7) A beneficiary who does not object is not estopped from opposing the proposed
128 action in the proceeding.

129 (8) If the trustee decides not to implement the proposed action, the trustee shall notify
130 the beneficiaries of the decision not to take the proposed action and the reasons for the
131 decision. The trustee's decision not to implement the proposed action may not give rise to
132 liability to any current or future beneficiary.

133 Section 4. Section **22-7-104** is enacted to read:

134 **22-7-104. Trustee powers to convert trusts where there is no trustee other than an**
135 **interested trustee -- Requirements to make unitrust election.**

136 (1) If there is no trustee of the trust other than an interested trustee, the interested
137 trustee, or when two or more persons are acting as trustees and are interested trustees, a
138 majority of the interested trustees, in the trustee's sole discretion and without the approval of
139 the district court, may:

140 (a) elect to release the power to adjust described in Section 22-3-104 and to convert an
141 income trust to a total return unitrust;

142 (b) reconvert a total return unitrust to an income trust and reinstate the power to adjust
143 described in Section 22-3-104; or

144 (c) change the percentage used to calculate the unitrust amount or the method used to
145 determine the fair market value of the trust if the requirements of Subsections 22-7-103(4)(a)
146 through (f) are completed and the trustee appoints a disinterested person who, in the person's
147 sole discretion but acting in a fiduciary capacity, determines for the trustee:

148 (i) the percentage to be used to calculate the unitrust amount;

149 (ii) the method to be used in determining the fair market value of the trust; and

150 (iii) which assets, if any, are to be excluded in determining the unitrust amount.

151 Section 5. Section **22-7-105** is enacted to read:

152 **22-7-105. Unitrust election by beneficiary -- Ability to request trustee action.**

153 (1) A trust beneficiary may:

154 (a) submit to the trustee a written request to convert an income trust to a total return
155 unitrust;

156 (b) reconvert a total return unitrust to an income trust; or

157 (c) change the percentage used to calculate the unitrust amount pursuant to Section
158 22-7-108.

159 (2) If the trustee declines or fails to act within six months of receipt of the written
160 request, the beneficiary may petition the district court having jurisdiction to order the
161 conversion, reconversion, or change in the unitrust rate, if the action would not alter any
162 amount in the trust that is permanently set aside for charitable purposes unless both income and
163 principal are set aside.

164 (3) If the court finds that the conversion, reconversion, or change in the unitrust rate
165 under this section will enable the trustee to better carry out the intent of the settlor, testator, or
166 testatrix and the purposes of the trust, the court shall approve the conversion, reconversion, or
167 change in the unitrust rate.

168 Section 6. Section **22-7-106** is enacted to read:

169 **22-7-106. Settlor created unitrust.**

170 A settlor may create a trust instrument with terms providing that the trust shall be
171 administered as a total return unitrust under this chapter. A settlor may also create a trust
172 instrument with terms providing that the trust may be administered as either an income trust or
173 as a total return unitrust under this chapter in the discretion of the trustee or a trust protector
174 appointed in the trust instrument.

175 Section 7. Section **22-7-107** is enacted to read:

176 **22-7-107. Valuations.**

177 (1) The fair market value of a trust subject to this chapter shall be determined, at least
178 annually, using a valuation date or dates, or averages of valuation dates, that are considered
179 appropriate except that:

180 (a) the trustee may not include in the fair market value the value of any residential
181 property or any tangible personal property that the income beneficiary has the right to occupy
182 or use;

183 (b) the trustee may not limit or restrict any right of the beneficiary to use the excluded
184 property in accordance with the governing instrument; and

185 (c) where the terms of the trust do not provide contrary direction, the trustee shall
186 include in the fair market value the value of:

187 (i) the portion of any private or commercial annuity from which the trustee is receiving
188 distributions as a designated beneficiary; and

189 (ii) the portion of any individual retirement account and pension, profit-sharing, stock
190 bonus, or stock ownership plan retirement account from which the trustee is receiving
191 distributions as a designated beneficiary.

192 (2) Assets for which a fair market value cannot be readily ascertained shall be valued
193 using valuation methods that are considered reasonable and appropriate, as determined in the
194 sole discretion of the trustee. The assets may be excluded from valuation, in the sole discretion
195 of the trustee, provided all income received with respect to the assets is distributed to the extent
196 distributable in accordance with the terms of the governing instrument.

197 Section 8. Section **22-7-108** is enacted to read:

198 **22-7-108. Unitrust percentages.**

199 The percentage to be used in determining the unitrust amount shall be a reasonable
200 current return from the trust, which may not be less than 3% nor more than 5%, taking into
201 account:

202 (1) the intentions of the settlor of the trust as expressed in the governing instrument;

203 (2) the needs of the beneficiaries;

204 (3) general economic conditions;

205 (4) projected current earnings and appreciation for the trust; and

206 (5) projected inflation and its impact on the trust.

207 Section 9. Section **22-7-109** is enacted to read:

208 **22-7-109. Treatment and allocation of income.**

209 Following the conversion of an income trust to a total return unitrust or upon creation
210 of a total return unitrust by a settlor, the trustee:

211 (1) shall treat the unitrust amount as if it were net income of the trust for purposes of
212 determining the amount available, from time to time, for distribution from the trust; and

213 (2) may allocate to trust income for each taxable year of the trust, or portion of a
214 taxable year:

215 (a) net short-term capital gain described in Section 1222(5), Internal Revenue Code, for
216 the year, or portion of the year, but only to the extent that the amount allocated, together with
217 all other amounts allocated to trust income for the year, or portion of the year, does not exceed
218 the unitrust amount for the year, or portion of the year; and

219 (b) net long-term capital gain described in Section 1222(7), Internal Revenue Code, for
220 the year, or portion of the year, but only to the extent that the amount allocated, together with
221 all other amounts, including amounts described in Subsection (1), allocated to trust income for
222 the year, or portion of the year, does not exceed the unitrust amount for the year, or portion of
223 the year.

224 Section 10. Section **22-7-110** is enacted to read:

225 **22-7-110. Administration.**

226 In administering a total return unitrust, the trustee may, in the trustee's sole discretion,
227 but subject to the provisions of the governing instrument, determine:

228 (1) the effective date of the conversion;

229 (2) the timing of distributions, including provisions for prorating a distribution for a
230 short year in which a beneficiary's right to payments commences or ceases;

231 (3) whether distributions are to be made in cash, in kind, partly in cash, or partly in
232 kind;

233 (4) if the trust is reconverted to an income trust, the effective date of the reconversion;

234 and

235 (5) other administrative issues necessary or appropriate to carry out the purposes of this
236 chapter.

237 Section 11. Section **22-7-111** is enacted to read:

238 **22-7-111. Treatment of underpayments or overpayments.**

239 In the event of an underpayment to a beneficiary, the trustee shall pay to a beneficiary
240 within a reasonable time, and in the event of an overpayment to a beneficiary, the trustee shall
241 recover from the beneficiary either by repayment by the beneficiary or by withholding from
242 future distributions to the beneficiary, an amount equal to the difference between the amount
243 properly payable and the amount actually paid.

244 Section 12. Section **22-7-112** is enacted to read:

245 **22-7-112. Effect of conversion or reconversion on governing instrument.**

246 Conversion to a total return unitrust under the provisions of this chapter may not affect
247 any other provision of the governing instrument, if any, regarding distributions of principal. If
248 a total return unitrust is reconverted to an income trust, the trustee's release of the trustee's
249 power under Section 22-7-104, if it was given at the time the trust was converted to a total
250 return unitrust, is void when the trust is reconverted.

251 Section 13. Section **22-7-113** is enacted to read:

252 **22-7-113. Situs.**

253 This chapter shall be construed as pertaining to the administration of a trust and shall be

254 available to any trust that is administered in Utah under Utah law unless:

255 (1) the governing instrument reflects an intention that the beneficiary or beneficiaries
256 are to receive an amount other than a reasonable current return from the trust;

257 (2) the trust is a trust described in Section 170(f)(2)(B), 664(d), 2702(a)(3), or 2702(b),
258 Internal Revenue Code; or

259 (3) the governing instrument expressly prohibits use of this chapter by specific
260 reference to this chapter.

261 Section 14. Section **22-7-114** is enacted to read:

262 **22-7-114. Trustee's liability.**

263 Any trustee or disinterested person who in good faith takes or fails to take any action
264 under this chapter may not be liable to any beneficiary or other person affected by the action or
265 inaction, regardless of whether the beneficiary or person received written notice as provided in
266 this chapter and regardless of whether the beneficiary or person was under a legal disability at
267 the time of the delivery of the notice. The beneficiary's or any other person's exclusive remedy
268 shall be to obtain an order of the district court directing the trustee to convert an income trust to
269 a total return unitrust, to reconvert from a total return unitrust to an income trust, or to change
270 the percentage used to calculate the unitrust amount.

271 Section 15. Section **22-7-115** is enacted to read:

272 **22-7-115. Judicial control of discretionary powers.**

273 (1) A court may not change a trustee's decision to exercise or not to exercise a
274 discretionary power conferred by this chapter unless the court determines that the decision was
275 an abuse of the trustee's discretion. A court may not determine that a trustee abused the
276 trustee's discretion merely because the court would have exercised the discretion in a different
277 manner or would not have exercised the discretion.

278 (2) Where a beneficiary elects to challenge an action or nonaction by a trustee or a
279 disinterested party under the powers and authority granted to the party under this chapter, the
280 beneficiary has the burden of establishing, by a preponderance of the evidence, that the actions
281 or nonactions by a trustee or a disinterested party abused the trustee's or the party's discretion.

282 A beneficiary who fails to state a basis or reason for an objection or fails to prove by a
283 preponderance of the evidence the proposed action should be taken or should not be taken shall
284 be liable to the trust or all other beneficiaries for damages and costs associated with the
285 objection.

286 Section 16. Section **22-7-116** is enacted to read:

287 **22-7-116. Limitation of election.**

288 An action may not be taken under Section 22-7-103, 22-7-104, or 22-7-105 more
289 frequently than every two years, unless the district court orders otherwise.

290 Section 17. Section **22-7-117** is enacted to read:

291 **22-7-117. Application.**

292 This chapter applies to every trust or decedent's estate existing on July 1, 2013, or
293 created afterward, except as otherwise expressly provided in the will or terms of the trust or in
294 this chapter.

295 Section 18. Section **22-7-118** is enacted to read:

296 **22-7-118. Trusts for which a marital deduction under the tax code has been taken**
297 **-- Trusts for which the generation-skipping transfer tax does not apply.**

298 (1) This section applies to the following trusts:

299 (a) a trust for which a marital deduction has been taken for federal tax purposes during
300 the lifetime of the spouse for whom the trust was created under Section 2056 or 2523 of the
301 Internal Revenue Code; and

302 (b) a trust to which the generation-skipping transfer tax due under Section 2601 of the
303 Internal Revenue Code does not apply by reason of any effective date or transition rule.

304 (2) To the extent necessary to satisfy a tax law requirement or to preserve a tax benefit,
305 the unitrust amount may not be less than the net income of the trust. Net income of the trust
306 shall be determined as if the trust were not a unitrust.