CHAPTER 59-16.3
TOTAL RETURN UNITRUSTS

59-16.3-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Disinterested person" means a person who is not a related or subordinate party, as defined in section 672(c) of the Internal Revenue Code [26 U.S.C. 1, et seq.], with respect to the person then acting as trustee of the trust and excludes the settlor of the trust and any interested trustee.
2. "Income trust" means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions, or in amounts, or proportions determined by the trustee. However, a trust that otherwise is an income trust may not qualify if it is subject to taxation under section 2001 or section 2501 of the Internal Revenue Code, until the expiration of the period for filing the return therefor.
3. "Interested distributee" means a person to whom distributions of income or principal can currently be made who has the power to remove the existing trustee and designate as successor a person who may be a related or subordinate party, as defined in section 672(c) of the Internal Revenue Code, with respect to such distributee.
4. "Interested trustee" means:
   a. Any individual trustee to whom the net income or principal of the trust can currently be distributed or would be distributed if the trust were then to terminate and be distributed; and
   b. An individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust.
5. "Total return unitrust" means an income trust that has been converted under and meets the provisions of this chapter.
6. "Trustee" means all persons acting as trustee of the trust, except where expressly noted otherwise, whether acting in their discretion, or on the direction of one or more persons acting in a fiduciary capacity.
7. "Settlor" means an individual who created an inter vivos or a testamentary trust.
8. "Unitrust" means a trust, the terms of which require or permit distribution of a unitrust amount, without regard to whether the trust has been converted to a unitrust in accordance with this chapter, or whether the trust is established by express terms of the governing instrument.
9. "Unitrust amount" means an amount equal to a percentage of a unitrust's assets that may, or are required, to be distributed to one or more beneficiaries annually in accordance with the terms of the unitrust. The unitrust amount may be determined by reference to the net fair market value of the unitrust's assets as of a particular date each year, or as an average determined on a multiple year basis.
10. "Current valuation year" means the accounting period of the trust for which the unitrust amount is being determined.
11. "Prior valuation year" means each of the two accounting periods of the trust immediately preceding the current valuation year.

59-16.3-02. Trustee's authority to convert income trust - Conditions.

A trustee, other than an interested trustee, or if two or more persons are acting as trustee, a majority of the trustees who are not an interested trustee, and without the approval of a court, may convert an income trust to a total return unitrust, reconvert a total return unitrust to an income trust, or change the percentage used to calculate the unitrust amount and the method used to determine the fair market value of the trust if:

1. The trustee adopts a written policy for the trust providing:
   a. In the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income;

b. In the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts; or
c. That the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy.

2. The trustee sends written notice of its intention to take that action, along with copies of the written policy and this chapter, to:
   a. The settlor if living;
   b. All living individuals who are currently receiving, or eligible to receive, distributions of income of the trust;
   c. All living individuals who would receive principal of the trust if the trust were to terminate at the time of the giving of such notice, or if the trust does not provide for its termination, all living individuals who would receive, or be eligible to receive, distributions of income or principal of the trust if the persons identified in subdivision b were deceased; and
   d. All individuals acting as adviser or protector of the trust.
3. At least one person receiving notice under subdivision b and c of subsection 2, to the best information and belief of the trustee, is legally competent;
4. No individual receiving the notice objects, by written instrument delivered to the trustee, to the proposed action of the trustee within sixty days of receipt of notice.
5. In deciding whether, and to what extent, to exercise the power conferred under this chapter, a trustee may consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent relevant:
   a. The size, nature, purpose, and expected duration of the trust;
   b. The intent of the settlor;
   c. The identity and circumstances of the beneficiaries;
   d. The needs for liquidity, regularity of income, and preservation and appreciation of capital;
   e. The assets held in the trust:
      (1) The extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property;
      (2) The extent to which an asset is used by a beneficiary; and
      (3) Whether an asset was purchased by the trustee or received from the settlor;
   f. The net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;
   g. Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income, or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;
   h. The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and
   i. The anticipated tax consequences.

59-16.3-03. Interested trustee's authority over actions enumerated in chapter 59-16.3.

If there is not a trustee of the trust other than an interested trustee, the interested trustee, or if two or more persons are acting as trustee and are interested trustees, a majority of those interested trustees, without the approval of a court, may take such action as provided in so long as the trustee appoints a disinterested person who, in its sole discretion, but acting in a fiduciary capacity, determines for the trustee:

1. The percentage to be used to calculate the unitrust amount;
2. The method to be used in determining the fair market value of the trust;
3. Which assets, if any, are to be excluded in determining the unitrust amount; and
4. Complies with subsections 1 through 4 of section 59-16.3-02.

59-16.3-04. Trustee may petition court - Appointment of disinterested person.

If a trustee desires to convert an income trust to a total return unitrust, reconvert a total return unitrust to an income trust, or change the percentage used to calculate the unitrust amount and the method used to determine the fair market value of the trust, but does not have the ability to, or elects not to do it under sections 59-16.3-02 and 59-16.3-03, or if the trustee receives a written objection within the applicable period, the trustee may petition the court for such order as the trustee deems appropriate. If there is only one trustee of such trust and the trustee is an interested trustee, or if there are two or more trustees of such trust and a majority of them are interested trustees, the court, or on the petition of the trustee or trustees, or any person interested in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present the information to the court as is necessary to enable the court to make its determination.

59-16.3-05. Annual valuation of trust required.

The fair market value of the trust must be determined at least annually, using the valuation date, or dates, or averages of valuation dates as are deemed appropriate. Assets for which a fair market value cannot be readily ascertained must be valued using valuation methods that are deemed reasonable and appropriate. If all income received with respect to the assets is distributed to the extent distributable in accordance with the terms of the governing instrument, assets may be excluded from valuation.

59-16.3-06. Calculation of unitrust amount.

The unitrust amount is determined as follows:

1. For the first three accounting periods of the trust, the unitrust amount for a current valuation year of the trust may not be less than three percent, or more than five percent, by the election of the trustee, the disinterested person, or the court, of the net fair market value of the assets held in the trust on the valuation date of the current valuation year;
2. Beginning with the fourth accounting period of the trust, the unitrust amount for a current valuation year of the trust may not be less than three percent, or more than five percent, by the election of the trustee, the disinterested person, or the court, of the average of the net fair market value of the assets held in the trust on the valuation date of the current valuation year and the net fair market value of the assets held in the trust on the valuation date of each prior valuation year;
3. The percentage that may be elected by the trustee, the disinterested person, or the court in determining the unitrust amount must be a reasonable current return from the trust, taking into account the intentions of the settlor as expressed in the governing instrument. However, the election by the trustee, the disinterested person, or the court in determining the unitrust amount may not be less than three percent, or more than five percent;
4. The unitrust amount for the current valuation year must be proportionately reduced for any distribution, in whole or in part, other than distributions of the unitrust amount, and for any payments of expenses, including debts, disbursements, and taxes, from the trust within a current valuation year which the trustee determines to be material and substantial, and must be proportionately increased for the receipt, other than a receipt that represents a return on investment, of any additional property into the trust within a current valuation year;
5. In the case of a short accounting period, the trustee shall prorate the unitrust amount on a daily basis;
6. If the net fair market value of an asset held in the trust has been incorrectly determined either in a current valuation year or in a prior valuation year, the unitrust amount must be increased in the case of an undervaluation, or be decreased in the case of an overvaluation, by an amount equal to the difference between the unitrust amount determined based on the correct valuation of the asset and the unitrust amount originally determined;

7. In determining the net fair market value of the assets held in trust, the determination may not include the value of residential property or tangible personal property that, as of the first business day of the current valuation year, one or more income beneficiaries of the trust have or had the right to occupy, or have or had the right to possess or control, other than in a capacity as trustee, and instead the right of occupancy or the right of possession or control must be deemed to be the unitrust amount with respect to the residential property or the tangible personal property; or any asset to be distributed outright to a beneficiary during the valuation period under the terms of the trust and the return on investment on that asset, which return on investment must be distributed to the beneficiary.

59-16.3-07. Unitrust amount as net income.

Following the conversion of an income trust to a total return unitrust, the trustee:

1. Shall treat the unitrust amount as net income of the trust for purposes of determining the amount available, from time to time, for distributions from the trust;
2. May allocate to trust income for each taxable year of the trust:
   a. Net short-term capital gain described in section 1222(5) of the Internal Revenue Code for that year, but only to the extent the amounts so allocated together with all other amounts allocate to trust income for that year does not exceed the unitrust amount for that year; and
   b. Net long-term capital gain described in section 1222(7) of the Internal Revenue Code for that year, but only to the extent the amount so allocated together with all other amounts, including amounts described in subdivision a, allocated to trust income for that year does not exceed the unitrust amount for that year.

59-16.3-08. Administration of total return unitrust authority - Authority of trustee.

The trustee, in administering a total return unitrust, may determine:

1. The effective date of the conversion;
2. The timing of distributions;
3. Whether distributions are to be made in cash, in kind, or partly in cash and partly in kind;
4. Which assets are to be excluded in determining the unitrust amount;
5. If the trust is reconverted to an income trust, the effective date of the reconversion; and
6. Any other administrative issues as may be necessary or appropriate to carry out the purposes of this chapter.

59-16.3-09. Distributions of principal not affected by conversion.

Conversion to a total return unitrust under this chapter does not affect any other provisions of the governing instrument, if any, regarding distributions of principal.

59-16.3-10. Spouse may compel reconversion to income trust for certain trusts - Written instrument required.

In the case of a trust for which a marital deduction has been taken for federal tax purpose under sections 2056 and 2523 of the Internal Revenue Code, the spouse otherwise entitled to receive the net income of the trust, by written instrument delivered to the trustee, may compel the reconversion during the spouse's lifetime of the trust from a total return unitrust to an income trust, notwithstanding contrary provisions in this chapter.

59-16.3-11. Applicability of chapter.

This chapter must be construed as pertaining to the administration of a trust and must be available to a trust that is administered in the state under state law unless:

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

2. One or more persons to whom the trustee could distribute income have a power of withdrawal over the trust which is not subject to an ascertainable standard under sections 2041 and 2514 of the Internal Revenue Code, or which can be exercised to discharge a duty of support the person possesses; or
3. The governing instrument expressly prohibits use of this chapter by specific reference to the chapter. A provision in the governing instrument that "the provisions of this chapter, or any corresponding provision of future law, may not be used in the administration of this trust" are sufficient to preclude use of this chapter.

59-16.3-12. Trustee acting in good faith not liable - Remedy.

A trustee or disinterested person who in good faith takes or fails to take any action under this chapter is not liable to any person affected by that action or inaction, regardless of whether the person received written notice as provided in this chapter and regardless of whether the person was under a legal disability at the time of the delivery of the notice. The person's exclusive remedy is to obtain an order of the court directing the trustee to convert an income trust to a total return unitrust, to reconvert from a total return unitrust to an income trust, or to change the percentage used to calculate the unitrust amount.

59-16.3-13. No duty to act created.

This chapter does not create a duty to take action under this chapter, and a trustee is not liable for not considering whether to take action or for choosing not to take action.

59-16.3-14. Chapter not applicable to charitable remainder unitrust.

This chapter does not apply to a charitable remainder unitrust as defined by section 664(d) of the Internal Revenue Code.