

2021 South Dakota Legislature

Senate Bill 78**AMENDMENT 78A FOR THE INTRODUCED BILL**

1 **An Act to modify certain ~~provisions~~ provisions related to trusts.**

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

3 **Section 1.** That § 55-3-24 be AMENDED.

4 **55-3-24. Modification or termination of trust--Notice to fiduciaries--**
5 **Distribution of property.**

6 An irrevocable trust may be modified or terminated ~~upon the consent of~~ by judicial
7 action or by written agreement entered into by all ~~of the~~ beneficiaries, if continuance of
8 the trust on its existing terms is not necessary to carry out a material purpose. Whether
9 or not continuance of the trust on its existing terms is necessary to carry out a material
10 purpose, an irrevocable trust may be modified or terminated ~~upon the consent of~~ by
11 judicial action or by written agreement by the trustor and all ~~of the~~ beneficiaries. Upon
12 termination of a trust under this section, the trustee shall distribute the trust property in
13 accordance with the trustor's probable intention or in any other manner as agreed by all
14 the beneficiaries. No person ~~may be~~ is required to seek court affirmation ~~of the trust's~~
15 ~~modification or termination of a nonjudicial settlement agreement~~ made pursuant to this
16 section. The provisions of chapter 55-18 apply to this section.

17 Thirty days prior to the effective date of a modification or termination of a trust under
18 this section, the trustor or beneficiaries shall provide notice in writing of the modification
19 or termination, including a copy of the modification or termination, to all fiduciaries as
20 defined in ~~§~~ subdivision 21-22-1(3) serving as of the date of the notice. The modification
21 or termination shall be effective no earlier than thirty days after the notice is given, unless
22 the notice is waived.

23 **Section 2.** That § 55-3-5 be AMENDED.

1 **55-3-5. Trustee to follow declaration of trust--Modifications.**

2 A trustee ~~must~~shall fulfill the purposes of the trust as declared at its creation, or
 3 as subsequently amended, and ~~must~~shall follow all the directions of the trustor given at
 4 that time, except as modified ~~by the consent of all parties interested, and upon approval~~
 5 ~~by the court~~. For purposes of modifications by consent of all parties interested and
 6 modifications upon approval by the court, the provisions of chapter 55-18 apply to such
 7 modifications.

8 **Section 3.** That § 55-18-1 be AMENDED.

9 **55-18-1. Definitions.**

10 Terms used in this chapter mean:

- 11 (1) "Bind" or "bound," to consent, receive notice or service of process, approve, agree,
 12 object, resist, waive, or demand for or as a person with the same binding and
 13 conclusive ~~effective~~effect as if the person represented had;
- 14 (2) "Conflict of interest," a situation in which a representative's interest in the trust
 15 causes a significant likelihood that a reasonable person would disregard a
 16 representative's duty to a represented beneficiary. A conflict of interest, however,
 17 excludes (i) any adversity, conflict or opposed interests substantially unrelated to
 18 the representative's interest in the trust; (ii) any past situation which is not likely
 19 to re-occur; and (iii) any conflict of interest which falls short of a material conflict
 20 of interest;
- 21 (3) "Co-representative," more than one simultaneously acting representative of the
 22 same class pursuant to § 55-18-9, as when co-guardians are acting;
- 23 (4) "Conservator," a person appointed pursuant to chapter 29A-5 or equivalent
 24 provisions of another jurisdiction's laws including a temporary conservator, a
 25 guardian ad litem, and a limited conservator;
- 26 (5) "Fiduciary," a person defined by subdivision 21-22-1(3), except as used in § 55-18-
 27 17;
- 28 (6) "Guardian," a person appointed pursuant to chapter 29A-5 or equivalent provisions
 29 of another jurisdiction's laws including a temporary guardian and a limited guardian;
- 30 (7) "Incapacitated" or "incapacity," lacking the capacity to meaningfully understand the
 31 matter in question because of a mental or physical impairment;
- 32 (8) "Interest," a beneficial interest as defined by subdivision 55-1-24(1) but including
 33 the holder of a power of appointment, and any power to remove or replace a
 34 fiduciary or a representative;

- 1 (9) "Interested beneficiary," a person who, on the date the person's qualification is
2 determined:
- 3 (a) Is a current distributee or permissible distributee of trust income or principal;
4 (b) Would be a distributee or permissible distributee of trust income or principal
5 if the interests of the current distributees terminated on that date;
6 (c) Would be a distributee or permissible distributee of trust income or principal
7 if the trust terminated on that date;
8 (d) Holds a power of appointment; or
9 (e) Would hold a power of appointment if the interests of the current distributees
10 terminated on that date or the interests of the persons currently holding a
11 power of appointment under this subdivision terminated on that date;
- 12 (10) "Knows" or "knowingly," actual knowledge of the fact in question;
- 13 (11) "Minor," any person who has not attained the age of eighteen. The term includes a
14 minor with an incapacity;
- 15 (12) "Nonjudicial settlement," an agreement, release, or other action whether or not
16 approved by a court, which may include, without limitation:
- 17 (a) The interpretation or construction of the terms of a trust;
18 (b) The approval of any fiduciary's report or accounting;
19 (c) Direction to any fiduciary to refrain from performing a particular act or the
20 grant to a fiduciary of any necessary or desirable power;
21 (d) The resignation or appointment of any fiduciary;
22 (e) The determination of a fiduciary or a representative's compensation;
23 (f) The transfer of a trust's principal place of administration or situs;
24 (g) The liability of any fiduciary's action or omission relating to a trust;
25 (h) Partial or final settlement agreements regarding a trust or its administration;
26 or
27 (i) The modification, amendment, reformation, or termination of a trust;
- 28 (13) "Notice" or "notifies," notice provided personally, by mail, postage prepaid,
29 addressed to the person's last known post office address, or electronically in
30 accordance with § 15-6-5(d);
- 31 (14) "Notifier," a person who is undertaking notice or proposing consent with regard to
32 a matter concerning a trust;
- 33 (15) "Power of appointment," a power defined by § 55-1-12;
- 34 (16) "Proceeding," any judicial or nonjudicial trust proceeding, accounting, termination,
35 modification, reformation, decanting, settlement, nonjudicial settlement, and any

- 1 proceeding conducted pursuant to chapter 21-22 or title 29A which concerns a
2 trust;
- 3 (17) "Protected person," a person other than a minor for whom a guardian or conservator
4 is appointed;
- 5 (18) "Reasonably available," with respect to a person, that the person can be identified
6 and located with the exercise of reasonable diligence;
- 7 (19) "Representative," a person who may bind another person pursuant to § 55-18-9;
- 8 (20) "Trust," an express inter vivos or testamentary trust;
- 9 (21) "Uninterested beneficiary," a beneficiary other than an interested beneficiary.

10 **Section 4.** That § 55-2-15 be AMENDED.

11 **55-2-15. Trustee authorized to distribute income or principal from first trust**
12 **may appoint all or part in favor of trustee of second trust--Restrictions--Power**
13 **of appointment to beneficiary of second trust.**

14 Unless the terms of the governing instrument expressly provide otherwise, if a
15 trustee has discretion under the terms of a governing instrument to make a distribution
16 of income or principal to or for the benefit of one or more beneficiaries of a trust (the "first
17 trust"), whether or not restricted by any standard, then the trustee, independently or with
18 court approval, may exercise such discretion by appointing part or all of the income or
19 principal subject to the discretion in favor of a trustee of a second trust (the "second
20 trust") under a governing instrument separate from the governing instrument of the first
21 trust. Before exercising its discretion to appoint and distribute assets to a second trust,
22 the trustee of the first trust shall determine whether the appointment is necessary or
23 desirable after taking into account the purposes of the first trust, the terms and conditions
24 of the second trust, and the consequences of the distribution. For the purposes of this
25 section, a trustee of the first trust is a restricted trustee if either the trustee is a beneficiary
26 of the first trust or if a beneficiary of the first trust has a power to change the trustees
27 within the meaning of § 55-2-17. In addition, the following apply to all appointments made
28 under this section:

- 29 (1) The second trust may only have as beneficiaries one or more of the beneficiaries of
30 the first trust:
- 31 (a) To or for whom a discretionary distribution of income or principal may be
32 made from the first trust; or

- 1 (b) To or for whom a distribution of income or principal may be made in the
2 future from the first trust at a time or upon the happening of an event
3 specified under the first trust; or
- 4 (c) Both (a) and (b);
- 5 (2) No restricted trustee of the first trust may exercise such authority over the first
6 trust to the extent that doing so could have the effect of:
- 7 (a) Benefiting the restricted trustee as a beneficiary of the first trust, unless the
8 exercise of such authority is limited by an ascertainable standard based on
9 or related to health, education, maintenance, or support; or
- 10 (b) Removing restrictions on discretionary distributions to a beneficiary imposed
11 by the governing instrument under which the first trust was created, except
12 that a provision in the second trust which limits distributions by an
13 ascertainable standard based on or related to the health, education,
14 maintenance, or support of any such beneficiary is permitted, or to a trust
15 established pursuant to 42 U.S.C. § 1396(p)(d)(4);
- 16 (3) No restricted trustee of the first trust may exercise such authority over the first
17 trust to the extent that doing so would have the effect of increasing the distributions
18 that can be made from the second trust to the restricted trustees of the first trust
19 or to a beneficiary who may change the trustees of the first trust within the meaning
20 of § 55-2-17 compared to the distributions that can be made to such trustee or
21 beneficiary, as the case may be, under the first trust, unless the exercise of such
22 authority is limited by an ascertainable standard based on or related to health,
23 education, maintenance, or support;
- 24 (4) The provisions of subdivisions (2) and (3) only apply to restrict the authority of a
25 trustee if either a trustee, or a beneficiary who may change the trustee, is a United
26 States citizen or domiciliary under the Internal Revenue Code, or the trust owns
27 property that would be subject to United States estate or gift taxes if owned directly
28 by such a person;
- 29 (5) In the case of any trust contributions which have been treated as gifts qualifying
30 for the exclusion from gift tax described in § 2503(b) of the Internal Revenue Code
31 of 1986, by reason of the application of I.R.C. § 2503(c), the governing instrument
32 for the second trust shall provide that the beneficiary's remainder interest shall vest
33 no later than the date upon which such interest would have vested under the terms
34 of the governing instrument for the first trust;

- 1 (6) The exercise of such authority may not reduce any income interest of any income
2 beneficiary of any of the following trusts:
- 3 (a) A trust for which a marital deduction has been taken for federal tax purposes
4 under I.R.C. § 2056 or § 2523 or for state tax purposes under any
5 comparable provision of applicable state law;
- 6 (b) A charitable remainder trust under I.R.C. § 664; or
7 (c) A grantor retained annuity or unitrust trust under I.R.C. § 2702;
- 8 (7) The exercise of such authority does not apply to trust property subject to a presently
9 exercisable power of withdrawal held by a trust beneficiary to whom, or for the
10 benefit of whom, the trustee has authority to make distributions, unless after the
11 exercise of such authority, the beneficiary's power of withdrawal is unchanged with
12 respect to the trust property;
- 13 (8) The exercise of such authority is not prohibited by a spendthrift clause or by a
14 provision in the governing instrument that prohibits amendment or revocation of
15 the trust;
- 16 (9) Any appointment made by a trustee shall be considered a distribution by the trustee
17 pursuant to the trustee's distribution powers and authority; and
- 18 (10) If the trustee's distribution discretion is not subject to a standard, or if the trustee's
19 distribution discretion is subject to a standard that does not create a support
20 interest, then the court may review the trustee's determination or any related
21 appointment only pursuant to § 55-1-43. Any other court review of the trustee's
22 determination or any related appointment may be made only pursuant to § 55-1-
23 42.

24 Notwithstanding the foregoing provisions of this section, the governing instrument of
25 the second trust may grant a power of appointment to one or more of the beneficiaries of
26 the second trust who are beneficiaries of the first trust. The power of appointment may
27 include the power to appoint trust property to the holder of the power of appointment, the
28 holder's creditors, the holder's estate, the creditors of the holder's estate, or any other
29 person, whether or not that person is a trust beneficiary.

30 Furthermore, notwithstanding the provisions of this section or § 55-2-18 or 55-2-19,
31 a trustee may also exercise the power described in those sections by modifying the first
32 trust without an actual distribution of property, in which case the second trust is the
33 modified first trust. In exercising the power described by the preceding sentence of this
34 section, a trustee shall notify all beneficiaries of the trust, in writing applying chapter 55-
35 18, at least twenty days prior to the effective date of the trustee's exercise of the power.

1 This section applies to any trust administered under the laws of this state, including a
2 trust whose governing jurisdiction is transferred to this state.

3 **Section 5.** That § 21-22-28 be AMENDED.

4 **21-22-28. Protection of privacy--Sealing and availability of documents.**

5 The privacy of those who have established a court trust or other trust shall be
6 protected in any court proceeding concerning the trust. Upon the filing of any petition, the
7 instrument on which the trust is based, briefs, and the entire court file including a trust's
8 inventory, statement filed by any fiduciary, annual verified report of a fiduciary, final
9 report of a fiduciary, and all petitions relevant to trust administration and all court orders
10 thereon shall be sealed upon filing and may not be made a part of the public record of the
11 proceeding, but are available to the court, to the trustor, to any fiduciary, to any enforcer,
12 to any beneficiary, ~~or the beneficiary's representative as provided in chapter 55-18,~~ to
13 their attorneys, and to such other interested persons as the court may order upon a
14 showing of the need.

15 **Section 6.** That a NEW SECTION be added:

16 **55-3-46.1. Effect of laws, rules, or orders of other states on a trust or**
17 **disposition of property.**

18 No trust governed by the laws of this state and no disposition of property to be
19 held upon the terms of such trust is void, voidable, liable to be set aside, or defective in
20 any manner by reason that the law or public policy of any other state does not recognize
21 or limits the validity of the trust or the validity or enforceability of any or all of the terms
22 of the trust, so long as such terms are valid and enforceable under the laws and public
23 policy of this state.

24 **Section 7.** That a NEW SECTION be added:

25 **55-3-49. Enforcement of foreign judgments.**

26 Notwithstanding any other provision of law, no judgment, decree, or order of a
27 court of the United States, a court of a state other than this state, or any other court, shall
28 be enforced against any trust governed by the laws of this state, or any disposition of
29 property to be held upon the terms of any such trust, unless a court in this state first
30 determines that the time, manner, and mechanism for enforcing the judgment is
31 consistent with the restrictions and limitations imposed under the terms of the trust and

1 by the laws of this state on the enforcement of the claims of any creditor, including the
2 restrictions and limitations imposed under this chapter, chapter 55-1, and chapter 55-16.

3 **Section 8.** That § 55-1A-41 be AMENDED.

4 **55-1A-41. Co-trustee appointment--Powers.**

5 Unless specifically restricted by the governing instrument, a trustee may appoint
6 an individual or a corporate fiduciary as a co-trustee. The appointed co-trustee may serve
7 only as long as the appointing trustee serves, or as long as the last to serve if more than
8 one trustee appointed the co-trustee. The appointed co-trustee may not become a
9 successor trustee upon the death, resignation, or incapacity of the appointing trustee,
10 unless appointed under the terms of the governing instrument or unless no other
11 successor trustee, or method for appointing a successor trustee, is provided in the
12 governing instrument.

13 The powers and the responsibilities of the appointed co-trustee may be limited by the
14 appointing trustee in a writing signed by the appointing trustee at the time of the
15 appointment. If the powers or responsibilities are so limited, the powers or responsibilities
16 of the co-trustee shall be limited as set forth in writing. Unless the powers or
17 responsibilities are so limited, the appointed co-trustee may exercise all the powers of the
18 appointing trustee. The combined powers of the appointed co-trustee and the appointing
19 trustee may not exceed the powers of the appointing trustee alone. The trustee appointing
20 a co-trustee may, in writing, revoke the appointment at any time, with or without cause.

21 Unless specifically restricted by the governing instrument, if the governing
22 instrument gives a fiduciary other than the trustee the power to remove and replace the
23 trustee, such power includes the power to appoint a co-trustee to serve with the current
24 trustee.

25 If an appointment under this section confers upon the appointed co-trustee, to the
26 exclusion of another co-trustee, the power to take certain actions, including the power to
27 direct or prevent certain actions of the trustees, the limitations on liability and the relief
28 from duties and obligations afforded an excluded fiduciary under § 55-1B-2 apply to a co-
29 trustee who does not hold such power.

30 If the governing instrument is silent concerning the trustee's power to appoint a co-
31 trustee, the trustee shall notify in writing, the trustor, if living, and all current income and
32 principal beneficiaries at least thirty days prior to the effective date of the trustee's
33 exercise of the power granted under this section. The notice, which shall include a copy
34 of the proposed action, shall advise the trustor and current beneficiaries that if they object

1 to the trustee's appointment they need to file a written objection with the trustee prior to
2 the effective date set out in the notice of the proposed action. If an objection is received
3 by the trustee, prior to the effective date of the appointment, the trustee may not appoint
4 a co-trustee. However, this section does not limit the power of the trustee under law to
5 petition the court for approval of the appointment. If no objection has been timely made,
6 the proposed appointment shall go into effect on the later of the date set out in the notice
7 or thirty days after notice has been given. The notice shall be ~~mailed,~~ sent by any means
8 allowed under the terms of the trust instrument, by mail with postage prepaid, to the last
9 known address of the trustor or current beneficiary, or by means otherwise allowed by
10 law.

11 The provisions of this section are effective for trusts created before, on, or after July
12 1, 2017, except as otherwise directed by the trustor, trust protector, trust advisor, or
13 other fiduciary designated by the terms of the trust.

14 **Section 9.** That § 55-1B-4 be AMENDED.

15 **55-1B-4. Trust advisor as fiduciary.**

16 If one or more trust advisors are given authority by the terms of a governing
17 instrument to direct, consent to, or disapprove a fiduciary's investment or distribution
18 decisions, or proposed investment or distribution decisions, such trust advisors shall be
19 considered to be fiduciaries when exercising such authority. ~~So~~ For investment decisions,
20 so long as there is at least one fiduciary exercising the authority of the investment advisor
21 pursuant to § 55-1B-10 for the investment, except in the cases of willful misconduct or
22 gross negligence by the fiduciary investment advisor in the selection or monitoring of the
23 nonfiduciary trust advisors, the governing instrument may provide that such other trust
24 advisors acting pursuant to this section are not acting in a fiduciary capacity. Similarly,
25 for distribution decisions, so long as there is at least one fiduciary exercising the authority
26 of the distribution advisor pursuant to § 55-1B-11 for the distribution, except in the case
27 of willful misconduct or gross negligence by the fiduciary distribution advisor in the
28 selection or monitoring of the nonfiduciary trust advisors, the governing instrument may
29 provide that such other trust advisors acting pursuant to this section are not acting in a
30 fiduciary capacity.

31 **Section 10.** That § 55-2-12 be AMENDED.

1 **55-2-12. Liability of successor trustee for agreements, contracts or actions**
2 **of predecessor fiduciary.**

3 Unless otherwise provided in the trust agreement, a successor trustee ~~is:~~

- 4 (1) Is not individually liable for actions or inactions of a predecessor fiduciary, including
5 agreements, contracts or actions, accountings, records, distributions, investments,
6 modifications, reformations, or other acts entered into by its predecessor fiduciary;
7 and
8 (2) Does not have a duty to:
9 (a) Confirm or validate such predecessor fiduciary's actions or inactions;
10 (b) Confirm the validity of the trust agreement; or
11 (c) Prosecute or seek redress for any action or inaction by the predecessor
12 fiduciary.

13 **Section 11.** That § 55-1A-32 be AMENDED.

14 **55-1A-32. Prosecution or defense of actions and proceedings.**

15 A trustee may prosecute or defend actions, claims or proceedings for the protection
16 of trust assets or of the trustee in the performance of the trustee's duties. However, a
17 trustee has no duty to prosecute, or to defend or continue to defend the trust or its assets
18 in any action, through exercise of judicial process or otherwise, to reach the assets of the
19 trust in satisfaction of a claim against the trust, a beneficiary or the settlor of a trust
20 unless:

- 21 (1) The trustee is reasonably satisfied that the readily marketable assets of the trust
22 are sufficient to fully indemnify the trustee for all the liabilities and expenses,
23 including professional fees and expense of counsel, accountants, and expert
24 witnesses, that the trustee may incur in so prosecuting or defending the trust or its
25 assets; or
26 (2) If the trustee is not satisfied that the settlor or the beneficiaries have provided the
27 trustee with indemnity, supported with such security as may be satisfactory to the
28 trustee in its sole discretion, as is then and will be sufficient to fully indemnify the
29 trustee.

30 Unless otherwise provided in the trust agreement, a trustee who is no longer
31 serving due to resignation or removal, whether by judicial process or pursuant to the trust
32 agreement, or as a result of the trust terminating, does not have a duty to defend or
33 continue to prosecute or defend the trust or its assets in any action, whether the trust is
34 in existence or not at the time of such action.

1 **Section 12.** That § 55-1-12 be AMENDED.

2 **55-1-12. Trustor, trustee, beneficiary, power of appointment, and person**
3 **defined.**

4 The person whose confidence creates a trust is called the trustor; the person in
5 whom the confidence is reposed is called the trustee; and the person for whose benefit
6 the trust is created is called the beneficiary. As used in this title, except as specifically
7 provided in chapters 55-13 and 55-13A, the term, beneficiary, means a person that has
8 a present or future beneficial interest in a trust, vested or contingent. A person is not a
9 beneficiary solely by reason of holding a power of appointment or by reason of the
10 existence or exercise of a discretionary power described in § 55-1-36.1 with respect to
11 the person. As used in this title, except as provided in § 55-1-26, the term, power of
12 appointment, means a power, including a withdrawal power as defined in § 55-1-24.2, to
13 direct the disposition of trust property, but does not include the authority of a trustee to
14 make a distribution to a beneficiary. A power of appointment is held by the person to
15 whom the power has been given and once granted to a person, is not capable of
16 appropriation or of manual delivery. A power of appointment is a general power of
17 appointment if it is exercisable in favor of the person holding the power, the person's
18 estate, the person's creditors, or the creditors of the person's estate, whether or not the
19 power is also exercisable in favor of others. A power of appointment is a nongeneral power
20 of appointment if it is not a general power of appointment. A holder of a general or
21 nongeneral power of appointment may not be deemed a fiduciary unless otherwise
22 provided for in the trust instrument. As used in this chapter, the term, person, has the
23 meaning set forth in § 55-4-1.

24 **Section 13.** That § 55-5-9 be AMENDED.

25 **55-5-9. Review of assets upon acceptance of trusteeship--Basis for**
26 **disposition or retention of assets--Interest in closely held entity.**

27 The trustee shall, within a reasonable time after the acceptance of the trusteeship,
28 review trust assets and make and implement decisions concerning the retention and
29 disposition of original pre-existing investments in order to conform to the provisions of
30 this section. The trustee's decision to retain or dispose of an asset may properly be
31 influenced by the asset's special relationship or value to the purposes of the trust or to
32 some or all of the beneficiaries, consistent with the trustee's duty of impartiality.

1 If a trust owns an interest in a closely held entity, and the trust agreement, or other
2 document signed by the settlor, trust protector, or signed by a majority of the current
3 income or principal beneficiaries, if the settlor is deceased, provides that the trustee has
4 no duty to inquire or review the activities of the closely held entity, no trustee is liable to
5 a beneficiary to the extent that the trustee acted in reliance on the provisions of the trust
6 or court order.

7 For purposes of this section, the term, closely held entity, means any entity in which
8 the following persons in aggregate own at least twenty percent of the entity:

- 9 (1) The settlor;
- 10 (2) The settlor's grandparents or their descendants;
- 11 (3) The settlor's spouse; or
- 12 (4) Any trust created by anyone of the aforementioned persons.

13 If a trust was in existence on or before July 1, 2012, and a collateral document relieved
14 the trustee of the duty to inquire or review the activities of a closely held entity as provided
15 in this section, then the trustee may elect to have this section apply upon providing sixty
16 days written notice of the election to the settlor or to the current income or principal
17 beneficiaries if the settlor is deceased.

18 **Section 14.** That § 55-5-16 be AMENDED.

19 **55-5-16. Delegation of responsibilities to others.**

20 A trustee has a duty to personally perform the responsibilities of the trusteeship
21 except as a prudent person might delegate those responsibilities to others. In deciding
22 whether, to whom, and in what manner to delegate fiduciary authority in the
23 administration of a trust, and thereafter in monitoring agents, the trustee may seek the
24 prior approval for the delegation from the settlor, a trust protector, or if the settlor is
25 deceased, the majority of the current income or principal beneficiaries, or from the court.
26 If such approval is given in writing by either the settlor, a trust protector, or if the settlor
27 is deceased, the majority of the current income or principal beneficiaries, or by the court,
28 the trustee is not liable for the acts of the person to whom the authority is delegated
29 except in the cases of willful misconduct or gross negligence by the delegating trustee in
30 the selection or monitoring of the agent.

31 **Section 15.** That § 55-1B-2 be AMENDED.

1 **55-1B-2. Liability limits of excluded fiduciary--Relief from obligations for**
2 **excluded fiduciary--Burden of proof in action against excluded fiduciary.**

3 An excluded fiduciary is not liable, either individually or as a fiduciary, for any of
4 the following:

- 5 (1) Any loss that results from compliance with a direction of the trust advisor, including
6 any loss from the trust advisor breaching fiduciary responsibilities or acting beyond
7 the trust advisor's scope of authority;
- 8 (2) Any loss that results from a failure to take any action proposed by an excluded
9 fiduciary that requires a prior authorization of the trust advisor if that excluded
10 fiduciary timely sought but failed to obtain that authorization;
- 11 (3) Any loss that results from any action or inaction, except for gross negligence or
12 willful misconduct, when an excluded fiduciary is required, pursuant to the trust
13 agreement or any other reason, to assume the role of trust advisor or trust
14 protector;~~or~~
- 15 (4) Any loss that results from relying upon any trust advisor for valuation of trust
16 assets; or
- 17 (5) Any loss that results from any tax filing made or tax position taken based on the
18 recommendations or instructions received from a tax preparer or professional used
19 by the excluded fiduciary at the direction of the grantor or of another trust fiduciary.

20 Any excluded fiduciary is also relieved from any obligation to independently value trust
21 assets, to review or evaluate any direction from a distribution trust advisor, or to perform
22 investment or suitability reviews, inquiries, or investigations or to make recommendations
23 or evaluations with respect to any investments to the extent the trust advisor had
24 authority to direct the acquisition, disposition, or retention of the investment. If the
25 excluded fiduciary offers such communication to the trust advisor, trust protector, or any
26 investment person selected by the investment trust advisor, such action ~~may not be~~
27 ~~deemed to~~ does not constitute an undertaking by the excluded fiduciary to monitor or
28 otherwise participate in actions within the scope of the advisor's authority or to constitute
29 any duty to do so.

30 Any excluded fiduciary is also relieved of any duty to communicate with or warn or
31 apprise any beneficiary or third party concerning instances in which the excluded fiduciary
32 would or might have exercised the excluded fiduciary's own discretion in a manner
33 different from the manner directed by the trust advisor or trust protector.

34 Absent contrary provisions in the governing instrument, the actions of the excluded
35 fiduciary (such as any communications with the trust advisor and others and carrying out,

1 recording, and reporting actions taken at the trust advisor's direction) pertaining to
2 matters within the scope of authority of the trust advisor or trust protector ~~shall be~~
3 ~~deemed to be~~ constitute administrative actions taken by the excluded fiduciary solely to
4 allow the excluded fiduciary to perform those duties assigned to the excluded fiduciary
5 under the governing instrument, and such administrative actions ~~may do not be deemed~~
6 ~~to constitute~~ an undertaking by the excluded fiduciary to monitor, participate, or otherwise
7 take any fiduciary responsibility for actions within the scope of authority of the trust
8 advisor or trust protector.

9 Nothing in subdivision (2) imposes an obligation or liability with respect to a custodian
10 of a custodial account.

11 In an action against an excluded fiduciary pursuant to the provisions of this section,
12 the burden to prove the matter by clear and convincing evidence is on the person seeking
13 to hold the excluded fiduciary liable.

14 **Section 16.** That § 55-16-2 be AMENDED.

15 **55-16-2. Trust instrument defined.**

16 For the purposes of this chapter, a trust instrument, is an instrument appointing a
17 qualified person or qualified persons for the property that is the subject of a disposition,
18 which instrument:

- 19 (1) Expressly incorporates the law of this state to govern the validity, construction, and
20 administration of the trust;
- 21 (2) Is irrevocable, but a trust instrument may not be deemed revocable on account of
22 its inclusion of one or more of the following:
- 23 (a) A transferor's power to veto a distribution from the trust;
- 24 (b) An inter vivos power of appointment, other than an inter vivos power
25 exercisable solely by the transferor in favor of the transferor, the transferor's
26 creditors, the transferor's estate, or the creditors of the transferor's estate;
- 27 (c) A testamentary power of appointment;
- 28 (d) The transferor's potential or actual receipt of income, including rights to such
29 income retained in the trust instrument;
- 30 (e) The transferor's potential or actual receipt of income or principal from a
31 charitable remainder unitrust or charitable remainder annuity trust as such
32 terms are defined in § 664 of the Internal Revenue Code of 1986, 26 U.S.C.
33 § 664, as of January 1, 2009;

- 1 (f) The transferor's receipt each year of a percentage of the value as determined
2 from time to time pursuant to the trust instrument, but not exceeding the
3 amount that may be defined as income under § 643(b) of the Internal
4 Revenue Code of 1986, 26 U.S.C. § 643(b), as of January 1, 2009;
- 5 (g) The transferor's potential or actual receipt or use of principal if the potential
6 or actual receipt or use of principal would be the result of a qualified person,
7 including a qualified person acting at the direction of a trust advisor described
8 in this section, acting either in the qualified person's sole discretion or
9 pursuant to an ascertainable standard contained in the trust instrument;
- 10 (h) The transferor's right to remove a trustee, protector, or trust advisor and to
11 appoint a new trustee, protector, or trust advisor, other than a trustee who
12 is a related or subordinate party with respect to the transferor within the
13 meaning of § 672(c) of the Internal Revenue Code of 1986, 26 U.S.C.
14 § 672(c), as of January 1, 2009;
- 15 (i) The transferor's potential or actual use of real property held under a qualified
16 personal residence trust within the meaning of such term as described in the
17 regulations promulgated under § 2702(c) of the Internal Revenue Code of
18 1986, 26 U.S.C. § 2702(c), as of January 1, 2009;
- 19 (j) A pour back provision that pours back to the transferor's will or revocable
20 trust all or part of the trust assets;
- 21 (k) The transferor's potential or actual receipt of income or principal to pay, in
22 whole or in part, income taxes due on income of the trust if the potential or
23 actual receipt of income or principal is pursuant to a provision in the trust
24 instrument that expressly provides for the payment of the taxes and if the
25 potential or actual receipt of income or principal would be the result of a
26 qualified person's acting in the qualified person's discretion or pursuant to a
27 mandatory direction in the trust instrument or acting at the direction of an
28 advisor described in § 55-16-4;
- 29 (l) The ability, whether pursuant to discretion, direction, or the grantor's
30 exercise of a testamentary power of appointment, of a qualified person to
31 pay, after the death of the transferor, all or any part of the debts of the
32 transferor outstanding at the time of the transferor's death, the expenses of
33 administering the transferor's estate, or any estate or inheritance tax
34 imposed on or with respect to the transferor's estate; ~~or~~

- 1 (m) A transferor's service as a noncontrolling member of a distribution committee
2 that functions as a distribution trust advisor, as defined in subdivision 55-1B-
3 1(7); or
- 4 (n) A transferor's enjoyment of a power to reacquire the trust corpus by
5 substituting other property of an equivalent value within the meaning of §
6 675(4)(C) of the Internal Revenue Code of 1986, 26 U.S.C. § 675(4)(C), as
7 of January 1, 2021; and
- 8 (3) Provides that the interest of the transferor or other beneficiary in the trust property
9 or the income from the trust property may not be transferred, assigned, pledged,
10 or mortgaged, whether voluntarily or involuntarily, before the qualified person
11 ~~actually~~-distributes the property or income from the property to the beneficiary, and
12 such provision of the trust instrument ~~shall be deemed to be~~ constitutes a restriction
13 on the transfer of the transferor's beneficial interest in the trust that is enforceable
14 under applicable nonbankruptcy law within the meaning of § 541(c)(2) of the
15 Bankruptcy Code, 11 U.S.C. § 541(c)(2), as of January 1, 2009.

16 A disposition by a trustee that is not a qualified person to a trustee that is a qualified
17 person may not be treated as other than a qualified disposition solely because the trust
18 instrument fails to meet the requirements of subdivision (1) of this section.