

## 2025 South Dakota Legislature

# Senate Bill 69

### AMENDMENT 69A FOR THE INTRODUCED BILL

1 **An Act to revise provisions related to trusts.**

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

3 **Section 1. That § 55-1B-1 be AMENDED:**

4 **55-1B-1.** Terms used in this chapter mean:

- 5 (1) "Instrument," any revocable or irrevocable trust document created inter vivos or  
6 testamentary or any custodial account agreement, whether such document or  
7 agreement was created prior to, on, or after July 1, 1997;
- 8 (2) "Trust protector," any person whose appointment as protector is provided for in  
9 the instrument. Such person may not be considered to be acting in a fiduciary  
10 capacity except to the extent the governing instrument provides otherwise.  
11 However, a protector shall be considered acting in a fiduciary capacity to the extent  
12 that the person exercises the authority of an investment trust advisor~~, or,~~ a  
13 distribution trust advisor, or a tax trust advisor;
- 14 (3) "Trust advisor," ~~either an investment trust advisor~~, or,~~ a distribution trust advisor,~~  
15 a tax trust advisor, or, in the case of a custodial account, a custodial account owner  
16 or the owner's designee, except that a tax trust advisor is not considered a trust  
17 advisor for purposes of § 55-2-13;
- 18 (4) "Fiduciary," a trustee or custodian under any instrument, an executor,  
19 administrator, or personal representative of a decedent's estate, or any other  
20 party, including a trust advisor, a trust protector, or a trust committee, who is  
21 acting in a fiduciary capacity for any person, trust, or estate;
- 22 (5) "Excluded fiduciary," any fiduciary excluded from exercising certain powers under  
23 the instrument, which powers may be exercised by the grantor, custodial account  
24 owner, trust advisor, trust protector, trust committee, or other persons designated  
25 in the instrument;

- 1 (6) "Investment trust advisor," a fiduciary, given authority by the instrument to  
 2 exercise all or any portions of the powers and discretions set forth in § 55-1B-10;
- 3 (7) "Distribution trust advisor," a fiduciary, given authority by the instrument to  
 4 exercise all or any portions of the powers and discretions set forth in § 55-1B-11;
- 5 (8) "Tax trust advisor," a fiduciary, given authority by the instrument to exercise any  
 6 tax power, including all or any powers and discretions set forth in § 55-1B-13;
- 7 (9) "Custodial account," an account, established by a party with a bank as defined in  
 8 26 U.S.C. § 408(n), as of (January 1, 2006), or with another person approved by  
 9 the Internal Revenue Service as satisfying the requirements to be a nonbank  
 10 trustee or a nonbank passive trustee set forth in U.S. Treasury Regulations  
 11 promulgated under 26 U.S.C. § 408, that is governed by an instrument concerning  
 12 the establishment or maintenance, or both, of an individual retirement account,  
 13 qualified retirement plan, Archer medical savings account, health savings account,  
 14 Coverdell education savings account, or any similar retirement or savings vehicle  
 15 permitted under the Internal Revenue Code of 1986, ~~as of (January 1, 2006);~~
- 16 (9) "Custodial account owner," any party who ~~establishes:~~  
 17 (a) Establishes a custodial account; ~~or has~~  
 18 (b) Has the power to designate the beneficiaries or appoint the custodian of the  
 19 custodial account; ~~or otherwise is~~  
 20 (c) Is the party who possesses the power to direct the investment, disposition,  
 21 or retention of any assets in the custodial account or name an authorized  
 22 designee to ~~effect~~ affect the same;
- 23 (10) "Family advisor," any person ~~whose:~~  
 24 (a) Whose appointment is provided for in the governing instrument or by court  
 25 order ~~who;~~  
 26 (b) Who is authorized to consult with or advise a fiduciary ~~with regard to~~  
 27 regarding fiduciary or nonfiduciary matters and actions, ~~and who; and~~  
 28 (c) Who may also be authorized by the governing instrument or court order to  
 29 otherwise act in a nonfiduciary capacity.

30 **Section 2. That § 55-1B-2 be AMENDED:**

- 31 **55-1B-2.** An excluded fiduciary is not liable, either individually or as a fiduciary,  
 32 for any of the following:

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

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

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

30 Absent contrary provisions in the governing instrument, the actions of the excluded  
31 fiduciary (such as any communications with the trust advisor and others and carrying out,  
32 recording, and reporting actions taken at the trust advisor's direction) pertaining to  
33 matters within the scope of authority of the trust advisor or trust protector constitute  
34 administrative actions taken by the excluded fiduciary solely to allow the excluded  
35 fiduciary to perform those duties assigned to the excluded fiduciary under the governing

1 instrument, and such administrative actions do not constitute an undertaking by the  
2 excluded fiduciary to monitor, participate, or otherwise take any fiduciary responsibility  
3 for actions within the scope of authority of the trust advisor or trust protector.

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

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

9 **Section 3. That § 55-1B-4 be AMENDED:**

10 **55-1B-4.** If one or more trust advisors and tax trust advisors are given authority  
11 by the terms of a governing instrument to direct, consent to, or disapprove a fiduciary's  
12 investment-~~or~~, distribution, or tax decisions, or proposed investment-~~or~~, distribution, or  
13 tax decisions, such trust advisors ~~shall be considered to be~~ and tax trust advisors are  
14 considered to be fiduciaries when exercising such authority.

15 For investment decisions, so long as there is at least one fiduciary exercising the  
16 authority of the investment advisor pursuant to § 55-1B-10 for the investment, except in  
17 the ~~cases~~ case of willful misconduct or gross negligence by the fiduciary investment  
18 advisor in the selection or monitoring of the nonfiduciary trust advisors, the governing  
19 instrument may provide that such other trust advisors acting pursuant to this section are  
20 not acting in a fiduciary capacity. ~~Similarly, for~~

21 For distribution decisions, so long as there is at least one fiduciary exercising the  
22 authority of the distribution advisor pursuant to § 55-1B-11 for the distribution, except in  
23 the case of willful misconduct or gross negligence by the fiduciary distribution advisor in  
24 the selection or monitoring of the nonfiduciary trust advisors, the governing instrument  
25 may provide that ~~such~~ the other trust advisors acting pursuant to this section are not  
26 acting in a fiduciary capacity.

27 For tax decisions, so long as there is at least one fiduciary exercising the authority  
28 of the tax trust advisor pursuant to § 55-1B-13 for the tax decision, except in the case of  
29 willful misconduct or gross negligence by the fiduciary tax trust advisor in the selection or  
30 monitoring of the nonfiduciary tax trust advisors, the governing instrument may provide  
31 that such other tax trust advisors acting pursuant to this section are not acting in a  
32 fiduciary capacity.

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

1           **55-1B-9.** A trust instrument governed by the laws of ~~South Dakota~~ this state may  
 2 provide for a person to act as an investment trust advisor ~~or~~, a distribution trust advisor,  
 3 ~~or a tax trust~~ adviser advisor, respectively, with regard to investment decisions ~~or~~  
 4 ~~discretionary distributions, distribution decisions, or tax decisions, respectively.~~ Unless  
 5 otherwise provided or restricted by the terms of the governing instrument, any person  
 6 may simultaneously serve as a trust advisor and a trust protector.

7           **Section 5. That a NEW SECTION be added to chapter 55-1B:**

8           The powers and discretions of a tax trust advisor must be as provided in the  
 9 governing instrument and may be exercised or not exercised, in the best interests of the  
 10 trust, in the sole and absolute discretion of the tax trust advisor and are binding on any  
 11 other person and any other interested party, fiduciary, and excluded fiduciary. In addition  
 12 to the powers and discretions granted to the tax trust advisor in the governing instrument,  
 13 the tax trust advisor may also exercise any of the following powers and discretions to the  
 14 extent the exercise is not prohibited under the terms of the governing instrument:

- 15           (1) Direct the trustee with respect to tax matters related to the trust, including tax  
 16 elections, tax returns to be filed, positions to be taken on tax returns, tax payments  
 17 to be made, and the anticipated tax impact to the trust or a beneficiary of any  
 18 transaction involving the trust, including:  
 19           (a) The retention, purchase, sale, exchange, or tender of any asset of the trust;  
 20           (b) Any contribution to or distribution from the trust: or  
 21           (c) Any contribution to or distribution from an entity owned by the trust;  
 22           (2) Direct the trustee to rely on any tax information received pursuant to § 55-2-23;  
 23           (3) Select one or more tax advisors to prepare tax returns or other related filings;  
 24           (4) Direct the trustee to sign and file tax returns;  
 25           (5) Direct the trustee with respect to any additional powers and discretions over tax-  
 26 related matters provided in the governing instrument; and  
 27           (6) Direct the trustee as to any tax-related powers referenced in chapter § 55-1A.

28           **Section 6. That § 55-2-15 be AMENDED:**

29           **55-2-15.** Unless the terms of the governing instrument expressly provide  
 30 otherwise, if a trustee has discretion under the terms of a governing instrument to make  
 31 a distribution of income or principal to or for the benefit of one or more beneficiaries of a  
 32 trust (the "first trust"), whether or not restricted by any standard, then the trustee,  
 33 independently or with court approval, may exercise such discretion by appointing part or

1 all of the income or principal subject to the discretion in favor of a trustee of a second  
 2 trust (the "second trust") under a governing instrument separate from the governing  
 3 instrument of the first trust. Before exercising ~~its~~ the discretion to appoint and distribute  
 4 assets to a second trust, the trustee of the first trust shall determine whether the  
 5 appointment is necessary or desirable after taking into account the purposes of the first  
 6 trust, the terms and conditions of the second trust, and the consequences of the  
 7 distribution.

8 For the purposes of this section, a trustee of the first trust is a restricted trustee if  
 9 either the trustee is a beneficiary of the first trust or if a beneficiary of the first trust has  
 10 a power to change the trustees within the meaning of § 55-2-17.

11 In addition, the following apply to all appointments made under this section:

- 12 (1) The second trust may only have as beneficiaries one or more of the beneficiaries  
 13 of the first trust:
- 14 (a) To or for whom a discretionary distribution of income or principal may be  
 15 made from the first trust; ~~or~~
  - 16 (b) To or for whom a distribution of income or principal may be made in the  
 17 future from the first trust at a time or upon the happening of an event  
 18 specified under the first trust; or
  - 19 (c) Both subsections (a) and (b);
- 20 (2) No restricted trustee of the first trust may exercise such authority over the first  
 21 trust to the extent that doing so could have the effect of:
- 22 (a) Benefiting the restricted trustee as a beneficiary of the first trust, unless  
 23 the exercise of such authority is limited by an ascertainable standard based  
 24 on or related to health, education, maintenance, or support; or
  - 25 (b) Removing restrictions on discretionary distributions to a beneficiary  
 26 imposed by the governing instrument under which the first trust was  
 27 created, except that a provision in the second trust, which limits  
 28 distributions by an ascertainable standard based on or related to the health,  
 29 education, maintenance, or support of any such beneficiary, is permitted,  
 30 or to a trust established pursuant to ~~42 U.S.C. § 1396(p)(d)(4)~~ 42 U.S.C. §  
 31 1396p(d)(4) (January 1, 2025);
- 32 (3) No restricted trustee of the first trust may exercise such authority over the first  
 33 trust to the extent that doing so would have the effect of increasing the  
 34 distributions that can be made from the second trust to the restricted trustees of  
 35 the first trust or to a beneficiary who may change the trustees of the first trust

- 1 within the meaning of § 55-2-17 compared to the distributions that can be made  
2 to such trustee or beneficiary, as the case may be, under the first trust, unless the  
3 exercise of such authority is limited by an ascertainable standard based on or  
4 related to health, education, maintenance, or support;
- 5 (4) The provisions of subdivisions (2) and (3) only apply to restrict the authority of a  
6 trustee if either a trustee, or a beneficiary who may change the trustee, is a United  
7 States citizen or domiciliary under the Internal Revenue Code, or the trust owns  
8 property that would be subject to United States estate or gift taxes if owned directly  
9 by such a person;
- 10 (5) In the case of any trust contributions ~~which~~ that have been treated as gifts  
11 qualifying for the exclusion from gift tax described in § 2503(b) of the Internal  
12 Revenue Code of 1986, by reason of the application of I.R.C. § 2503(c), the  
13 governing instrument for the second trust ~~shall~~ must provide that the beneficiary's  
14 remainder interest shall vest no later than the date upon which such interest would  
15 have vested under the terms of the governing instrument for the first trust;
- 16 (6) The exercise of such authority may not reduce any income interest of any income  
17 beneficiary of any of the following trusts:
- 18 (a) A trust for which a marital deduction has been taken for federal tax purposes  
19 under I.R.C. § 2056 or § 2523 or for state tax purposes under any  
20 comparable provision of applicable state law;
- 21 (b) A charitable remainder trust under I.R.C. § 664; or
- 22 (c) A grantor retained annuity or unitrust trust under I.R.C. § 2702;
- 23 (7) The exercise of such authority does not apply to trust property subject to a  
24 presently exercisable power of withdrawal held by a trust beneficiary to whom, or  
25 for the benefit of whom, the trustee has authority to make distributions, unless  
26 after the exercise of such authority, the beneficiary's power of withdrawal is  
27 unchanged with respect to the trust property;
- 28 (8) The exercise of such authority is not prohibited by a spendthrift clause or by a  
29 provision in the governing instrument that prohibits amendment or revocation of  
30 the trust;
- 31 (9) Any appointment made by a trustee ~~shall be~~ is considered a distribution by the  
32 trustee pursuant to the trustee's distribution powers and authority; and
- 33 (10) If the trustee's distribution discretion is not subject to a standard, or if the trustee's  
34 distribution discretion is subject to a standard that does not create a support  
35 interest, then the court may review the trustee's determination or any related

1 appointment only pursuant to § 55-1-43. Any other court review of the trustee's  
2 determination or any related appointment may be made only pursuant to § 55-1-  
3 42.

4 Notwithstanding the foregoing provisions of this section, the governing instrument  
5 of the second trust may grant a power of appointment to one or more of the beneficiaries  
6 of the second trust who are beneficiaries of the first trust. The power of appointment may  
7 include the power to appoint trust property to the holder of the power of appointment, the  
8 holder's creditors, the holder's estate, the creditors of the holder's estate, or any other  
9 person, whether or not ~~that~~ the person is a trust beneficiary.

10 ~~Furthermore, notwithstanding the provisions of this section or § 55-2-18 or 55-2-~~  
11 ~~19, a trustee may also exercise the power described in those sections by modifying the~~  
12 ~~first trust without an actual distribution of property, in which case the second trust is the~~  
13 ~~modified first trust. In exercising the power described by the preceding sentence of this~~  
14 ~~section, a trustee shall notify all beneficiaries of the trust, in writing applying chapter 55-~~  
15 ~~18, at least twenty days prior to the effective date of the trustee's exercise of the power.~~

16 A trustee's power described in this section may be exercised by either an actual  
17 distribution of property to one or more second trusts or by modifying the terms of the first  
18 trust to create the second trust with or without an actual distribution. If the power is  
19 exercised by modifying the terms of the first trust, the trustee may:

- 20 (1) Treat the second trust created by such modification as a new trust, in which case  
21 property of the first trust would be transferred to the second trust; or  
22 (2) Treat the second trust as a continuation of the first trust with respect for titling  
23 purposes, in which case property of the first trust would not need to be retitled.

24 In the case of an exercise of the power that is structured as a trustee's modification  
25 of the first trust, however, notwithstanding § 55-2-18, the trustee shall provide not less  
26 than twenty days advance written notice to the qualified beneficiaries, applying chapter  
27 55-18, unless the trustee receives written waivers of the notice from the qualified  
28 beneficiaries.

29 The trustee's power, which is described in and constrained by this section, remains  
30 separate and distinct from trust reformation under §§ 55-3-24 to 55-3-26, inclusive, or  
31 other provisions of law allowing trust modifications.

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

34 **Section 7. That § 55-2-23 be AMENDED:**



1           **55-2-23.** An excluded fiduciary, as defined in § 55-1B-1, who receives tax  
 2 information regarding an asset or entity owned by the trust, any trustee of a trust that  
 3 holds an asset or entity owned by the trust but who does not manage the asset or entity,  
 4 and any trustee who receives tax information from the settlor, the settlor's agents, a tax  
 5 trust advisor, or other individuals regarding matters that have tax implications to the trust  
 6 or trust beneficiaries, may rely, without liability, on tax information it receives in any of  
 7 the above situations. By way of example, if a trustee holds in trust a limited liability  
 8 company interest but does not manage the limited liability company, the trustee may rely,  
 9 without limitation, on any tax information received from the manager of the limited liability  
 10 company or its accountant or agents.

11           The tax information that a trustee may rely on in the above situations may include  
 12 the following:

- 13       (1) The accuracy of any information reported on a tax return;
- 14       (2) A copy of a tax return provided by the tax return preparer or the taxpayer filing  
 15 the return;
- 16       (3) The representation of another fiduciary or tax advisor who filed or prepared a tax  
 17 return as to the amount of any item reported on that return;
- 18       (4) The settlor's representation regarding whether ~~or not~~ a gift or generation skipping  
 19 transfer tax form has ever been filed, as well as how much of the respective  
 20 exemptions have been utilized; or
- 21       (5) The direction from the grantor's or settlor's tax advisors based upon any  
 22 contribution or distribution, or both, for the appropriate tax filings.

23           An entity, for purposes of this section, ~~shall be~~ is defined as set out in subdivisions  
 24 ~~47-34A-101(6), 47-34A-101(7) and 47-34A-101(13).~~

25           This section applies to any trust in existence on or created on or after July 1, 2012.

26   **Section 8. That § 55-3-24 be AMENDED:**

27           **55-3-24.** An irrevocable trust may be modified or terminated by judicial action or  
 28 by the ~~written agreement entered into by consent of~~ all beneficiaries, if continuance of the  
 29 trust on its existing terms is not necessary to carry out a material purpose. Whether or  
 30 not continuance of the trust on its existing terms is necessary to carry out a material  
 31 purpose, an irrevocable trust may be modified or terminated ~~by judicial action or by the~~  
 32 ~~written agreement by~~ consent of the trustor and all beneficiaries. Upon termination of a  
 33 trust under this section, the trustee shall distribute the trust property in accordance with  
 34 the trustor's probable intention or in any other manner as agreed by all the beneficiaries.

1 No person is required to seek court affirmation of a nonjudicial settlement agreement  
2 made pursuant to this section. The provisions of chapter 55-18 apply to this section.

3 Thirty days prior to the effective date of a modification or termination of a trust  
4 under this section, the trustor or beneficiaries shall provide notice in writing of the  
5 modification or termination, including a copy of the modification or termination<sup>7</sup> to all  
6 fiduciaries<sub>2</sub> as defined in subdivision 21-22-1(3) serving as of the date of the notice. The  
7 modification or termination~~shall be~~is effective no earlier than thirty days after the notice  
8 is given, unless the notice is waived.