2026 South Dakota Legislature

Senate Bill 100

ENROLLED

AN ACT

ENTITLED An Act to revise provisions related to trusts.

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

Section 1. That a NEW SECTION be added to chapter 55-1:

Unless the terms of the governing instrument expressly provide that a trustor may not be reimbursed by a trust for the trustor's personal income tax liability, if the trustor is treated under 26 U.S.C. §§ 671 to 678, inclusive (January 1, 2026), as the owner of all or part of the trust, the trustee, other than a trustee who is the trustor or a person who is a related or subordinate party with respect to the trustor within the meaning of 26 U.S.C. § 672(c) (January 1, 2026), may, in the trustee's sole discretion, or at the direction or with the consent of a trust advisor or trust protector, who, in either case, is not the trustor or a person who is a related or subordinate party with respect to the trustor, pay directly to any taxing authority, or reimburse the person liable for, any tax imposed by a taxing authority on the person by reason of the person being treated as the owner of all or any portion of the trust property pursuant to 26 U.S.C. §§ 671 to 678, inclusive (January 1, 2026).

If there is a policy of insurance on the trustor's life held in the trust, the cash value of the policy, or the proceeds of any loan secured by an interest in the policy may not be used to reimburse the trustor or to pay an appropriate taxing authority on the trustor's behalf.

The power to make payments to, or for the benefit of, the trustor under this section, or the trustee's, trust advisor's, or trust protector's decision to exercise or direct the exercise of the power in favor of the trustor, may not cause the trustor to be treated as a beneficiary of the trust for purposes of § 55-1-36.1 or any other law of this state.

The provisions of this section do not apply if the application of this section would disqualify a trust for, or reduce the amount of, a marital or charitable deduction otherwise available to any person for state or federal income, gift, or estate tax purposes.

A trustee, trust advisor, or trust protector is not liable to any person for the exercise of, or the direction or consent to exercise, the power to reimburse or not reimburse a trustor for tax payable by the trustor pursuant to this section. The exercise of, or the direction or consent to exercise, the power to reimburse or not reimburse a trustor for tax payable by the trustor pursuant to this section is not a breach of fiduciary duty to any person.

This section applies only to trusts created on or after July 1, 2026, and to any trust for which the principal place of administration is moved to this state on or after July 1, 2026.

For purposes of this section, the term "trustor" includes a trustor, settlor, trustmaker, or any person treated under 26 U.S.C. §§ 671 to 678, inclusive (January 1, 2026), as the owner of all or part of the trust.

Section 2. That § 55-2-15 be AMENDED:

55-2-15. Unless the terms of the governing instrument expressly provide otherwise, if a trustee has discretion under the terms of a governing instrument to make a distribution of income or principal to or for the benefit of one or more beneficiaries of a trust (the "first trust"), whether or not restricted by any standard, then the trustee, independently or with court approval, may exercise discretion by appointing part or all of the income or principal subject to the discretion in favor of a trustee of a second trust (the "second trust") under a governing instrument separate from the governing instrument of the first trust. Before exercising the discretion to appoint and distribute assets to the second trust, the trustee of the first trust shall determine whether the appointment is necessary or desirable after taking into account the purposes of the first trust, the terms and conditions of the second trust, and the consequences of the distribution.

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

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

(1) The second trust may only have as beneficiaries one or more of the beneficiaries of the first trust:

(a) To or for whom a discretionary distribution of income or principal may be made from the first trust;

(b) To or for whom a distribution of income or principal may be made in the future from the first trust at a time or upon the happening of an event specified under the first trust; or

(c) Both subsections (a) and (b);

(2) A restricted trustee of the first trust may not exercise authority over the first trust to the extent that doing so could have the effect of:

(a) Benefiting the restricted trustee as a beneficiary of the first trust, unless the exercise of authority is limited by an ascertainable standard based on or related to health, education, maintenance, or support; or

(b) Removing restrictions on discretionary distributions to a beneficiary imposed by the governing instrument under which the first trust was created, except that a provision in the second trust, which limits distributions by an ascertainable standard based on or related to the health, education, maintenance, or support of any beneficiary, is permitted, or to a trust pursuant to 42 U.S.C. § 1396p(d)(4) (January 1, 2025);

(3) A restricted trustee of the first trust may not exercise authority over the first trust to the extent that doing so would have the effect of increasing the distributions that can be made from the second trust to the restricted trustees of the first trust or to a beneficiary who may change the trustees of the first trust within the meaning of § 55-2-17 compared to the distributions that can be made to the trustee or beneficiary, as the case may be, under the first trust, unless the exercise of authority is limited by an ascertainable standard based on or related to health, education, maintenance, or support;

(4) The provisions of subdivisions (2) and (3) only apply to restrict the authority of a trustee if either a trustee, or a beneficiary who may change the trustee, is a United States citizen or domiciliary under the Internal Revenue Code, or the trust owns property that would be subject to United States estate or gift taxes if owned directly by the person;

(5) In the case of any trust contributions that have been treated as gifts qualifying for the exclusion from gift tax described in 26 U.S.C. § 2503(b) (January 1, 2026), by reason of the application of 26 U.S.C. § 2503(c) (January 1, 2026), the governing instrument for the second trust must provide that the beneficiary's remainder interest vests no later than the date upon which the interest would have vested under the terms of the governing instrument for the first trust;

(6) The exercise of authority may not reduce any income interest of any income beneficiary of any of the following trusts:

(a) A trust for which a marital deduction has been taken for federal tax purposes under 26 U.S.C. § 2056 or 2523 (January 1, 2026) or for state tax purposes under any comparable provision of applicable state law;

(b) A charitable remainder trust under 26 U.S.C. § 664 (January 1, 2026); or

(c) A grantor retained annuity or unitrust trust under 26 U.S.C. § 2702 (January 1, 2026);

(7) The exercise of authority does not apply to trust property subject to a presently exercisable power of withdrawal held by a trust beneficiary to whom, or for the benefit of whom, the trustee has authority to make distributions, unless after the exercise of authority, the beneficiary's power of withdrawal is unchanged with respect to the trust property;

(8) The exercise of authority is not prohibited by a spendthrift clause or by a provision in the governing instrument, which prohibits amendment or revocation of the trust;

(9) Any appointment made by a trustee is considered a distribution by the trustee pursuant to the trustee's distribution powers and authority; and

(10) If the trustee's distribution discretion is not subject to a standard, or if the trustee's distribution discretion is subject to a standard that does not create a support interest, then the court may review the trustee's determination or any related appointment only pursuant to § 55-1-43. Any other court review of the trustee's determination or any related appointment may be made only pursuant to § 55-1-42.

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

A trustee’s power described in this section may be exercised by either an actual distribution of property to one or more second trusts or by modifying the terms of the first trust to create the second trust with or without an actual distribution. If the power is exercised by modifying the terms of the first trust, the trustee may treat the second trust created by the modification as a new trust, in which case property of the first trust would be transferred to the second trust, or treat the second trust as a continuation of the first

trust, for titling purposes, in which case property of the first trust would not need to be retitled.

In the case of an exercise of the power that is structured as a trustee's modification of the first trust, notwithstanding § 55-2-18, the trustee shall provide at least twenty days' advance written notice to the qualified beneficiaries, applying chapter 55-18, unless the trustee receives written waivers of the notice from the qualified beneficiaries.

The trustee's power, which is described in and constrained by this section, remains separate and distinct from trust reformation or termination under §§ 55-3-24 to 55-3-26, inclusive, 55-3-28, and other provisions of law allowing trust modifications.

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

Section 3. That a NEW SECTION be added to chapter 55-3:

Property given from a revocable trust during the trustor's lifetime to a trust beneficiary other than the trustor, whether the beneficiary holds a vested or contingent interest, is not treated as an advancement against the beneficiary's share, unless the trustor declared in a writing, or the beneficiary acknowledged in writing, that the gift is an advancement; or the trustor's writing or the beneficiary's written acknowledgment otherwise indicates that the gift is to be considered when computing the division and distribution of the trust estate following the death of the trustor.

A distribution from an irrevocable trust at the discretion of a trustee, or as directed by a distribution trust advisor, is not treated as an advancement against the beneficiary's share unless the trustee or distribution trust advisor declares in writing, or the beneficiary acknowledged in writing, that the distribution is an advancement; or the governing instrument indicates that discretionary distributions are equalized within or between classes of beneficiaries and are considered when computing the division or distributions from the trust.

Regardless of whether the recipient of the property survives the trust division or distribution, the property treated as an advancement herein is considered in computing the division and distribution of the trust estate, unless otherwise provided by the governing instrument or in writing by the trustee, distribution trust advisor or beneficiary, in accordance with this section.

For purposes of this section, property advanced is valued as of the time the beneficiary came into possession or enjoyment of the property.

Section 4. That § 55-4-33 be AMENDED:

55-4-33. If a trustee violates any of the provisions of this chapter, the trustee may be removed and denied compensation in whole or in part, and any beneficiary, cotrustee, or successor trustee may treat the violation as a breach of trust. Until the cessation of compensation is ordered by a court, a trustee is entitled to fees and expenses.

Section 5. That a NEW SECTION be added to chapter 55-4:

Unless expressly provided otherwise in a written agreement, the creation of an attorney-client relationship between an attorney and a person serving as a fiduciary does not impose upon the attorney any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary moneys may be used to compensate the attorney for legal services rendered to the fiduciary, or even if a beneficiary is entitled to accountings or other information regarding the estate, trust estate, or fiduciary property.

Section 6. That a NEW SECTION be added to chapter 55-4:

If an attorney-client relationship exists between an attorney and a fiduciary, communications between the attorney and the fiduciary are subject to the attorney-client privilege, unless waived by the fiduciary, even though fiduciary moneys may be used to compensate the attorney for legal services rendered to the fiduciary, or even if a beneficiary is entitled to accountings or other information regarding the estate, trust estate, or fiduciary property. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the attorney and the fiduciary.

Section 7. That § 55-16-10 be AMENDED:

55-16-10. A cause of action or claim for relief with respect to a fraudulent transfer of a settlor's assets under § 55-16-9 is extinguished unless the action under § 55-16-9 is brought by a creditor of the settlor who:

(1) Is a creditor of the settlor before the settlor's assets are transferred to the trust, and the action under § 55-16-9 is brought within the later of:

(a) Two years after the transfer is made; or

(b) Six months after the transfer is or reasonably could have been discovered by the creditor if the creditor:

(i) Can demonstrate that the creditor asserted a specific claim against the settlor before the transfer; or

(ii) Files another action, other than an action under § 55-16-9, against the settlor that asserts a claim based on an act or omission of the settlor that occurred before the transfer, and the action described in this sub-subsection is filed within two years after the transfer; or

(2) Becomes a creditor subsequent to the transfer into trust, and the action under § 55-16-9 is brought within two years after the transfer is made.

In any action described in § 55-16-9, the burden to prove the matter by clear and convincing evidence is upon the creditor.

A person is deemed to have discovered a transfer at the time a public record of the transfer is made, including the conveyance of an interest in real property, which is recorded in the appropriate public filing office where the property is located, the filing of a financing statement pursuant to chapter 57A-9, or the filing of a bill of sale or other transfer instrument regarding personal property.

The filing of a bill of sale or other transfer instrument that conveys personal property to a trust governed by this chapter must be filed in an applicable public filing office.

If the transferor is a natural person and is a resident of this state, the personal property transfer instrument must be recorded in the county in this state where the transferor maintains the transferor's principal residence.

In all other cases, the personal property transfer instrument must be recorded in the county in this state where the trustee of the trust maintains a principal residence or principal place of business.

This section, §§ 55-16-9, and 55-16-11 to 55-16-13, inclusive, are inseparably interwoven with substantive rights, and a deprivation of legal rights would result if another jurisdiction's contrary laws and regulations are applied to a claim or cause of action described therein.

Section 8. That § 55-17-5 be AMENDED:

55-17-5. For purposes of the application of 26 U.S.C. § 1014(b)(6) (January 1, 2026), a South Dakota special spousal trust is a trust established under the community property laws of this state, as set forth in this chapter.

For purposes of this chapter, "special spousal property" means community property. Community property that is classified by a jurisdiction other than this state and

transferred to a South Dakota special spousal trust retains its character as community property while in the trust. If the trust is revoked and property is transferred on revocation of the trust, the community property that is classified by a jurisdiction other than South Dakota retains its character as community property to the extent otherwise provided by the laws of this state.

An Act to revise provisions related to trusts.

I certify that the attached Act originated in the:

Senate as Bill No. 100

_____
Secretary of the Senate

_____
President of the Senate

Attest:

_____
Secretary of the Senate

_____
Speaker of the House

Attest:

_____
Chief Clerk of the House

Senate Bill No. 100
File No. _____
Chapter No. _____

Received at this Executive Office
this _____ day of _____,

2026 at _____M.

By _____
for the Governor

The attached Act is hereby
approved this _____ day of
_____, A.D., 2026

_____
Governor

STATE OF SOUTH DAKOTA,
ss.
Office of the Secretary of State

Filed _____, 2026
at _____ o'clock __M.

_____
Secretary of State

By _____
Asst. Secretary of State