

# State of South Dakota

NINETY-FOURTH SESSION  
LEGISLATIVE ASSEMBLY, 2019

297B0187

## SENATE ENGROSSED NO. **SB 51** - 1/25/2019

Introduced by: Senators Partridge, Cronin, Curd, Greenfield (Brock), Langer, Maher, Monroe, Otten (Ernie), Rusch, Schoenbeck, Solano, White, Wiik, and Youngberg and Representatives Hansen, Bartels, Diedrich, Gosch, Greenfield (Lana), Johns, Lake, Olson, Peterson (Kent), Qualm, Rounds, Schoenfish, and Willadsen

1 FOR AN ACT ENTITLED, An Act to revise certain provisions regarding trusts.

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

3 Section 1. That § 55-3-16 be amended to read:

4 55-3-16. The office of a trustee is vacated:

5 (1) By ~~his~~ its death; ~~or~~

6 (2) By ~~his~~ its discharge; or

7 (3) By its resignation.

8 Section 2. That chapter 55-3 be amended by adding a NEW SECTION to read:

9 In addition to the provisions included in the governing instrument, a fiduciary may resign:

10 (1) In the case of a revocable trust:

11 (a) Without court approval upon at least thirty days' notice to the settlor, all

12 fiduciaries, all designated successors to the resigning fiduciary's office and all

13 those who have authority to appoint a successor to replace the resigning



1                   fiduciary; or

2           (b)    With court approval;

3       (2)    In the case of an irrevocable trust:

4           (a)    Without court approval upon at least thirty days' notice to the settlor, if living,  
5                   all fiduciaries, all designated successors to the resigning fiduciary's office, all  
6                   those who have authority to appoint a successor to replace the resigning  
7                   fiduciary and to those qualified beneficiaries who are known to the resigning  
8                   fiduciary other than those who are restricted from receiving notice or have  
9                   elected not to receive notice pursuant to the governing instrument, § 55-2-13  
10                  or chapter 55-18; or

11          (b)    With court approval.

12           In approving a resignation under subdivision (1)(b) or (2)(b), the court may issue orders and  
13           impose conditions reasonably necessary for the protection of the trust property.

14           Any liability of a resigning fiduciary or of any sureties on the fiduciary's bond for its acts or  
15           omissions is not discharged or affected by the fiduciary's resignation unless the court orders  
16           otherwise.

17           Following resignation, a successor fiduciary may be appointed pursuant to the terms set forth  
18           in the governing instrument or under § 21-22-12.

19           Nothing in this section may be construed to be the exclusive means of resignation by a  
20           fiduciary.

21           Section 3. That § 21-22-12 be amended to read:

22           21-22-12. In case of the ~~death, resignation, or removal of the~~ vacancy of the office of  
23           trustee, unless the instrument creating the trust names the successor, ~~such~~ or allows the  
24           resigning trustee or another person to appoint its successor, the successor shall be appointed by

1 the court upon hearing and notice as provided in this chapter. In case of necessity the court may  
2 appoint a temporary trustee pending a permanent appointment.

3 If the office of trustee remains vacant for more than thirty days, then any resigned trustee  
4 in possession of trust property may petition the court for the appointment of a successor trustee.  
5 If no successor trustee can be secured within ninety days following a hearing held of the  
6 resigned trustee's petition, the resigned trustee shall deliver the trust property within its  
7 possession to any other fiduciary or other persons, as ordered by the court.

8 The resigned trustee shall be held harmless from any liability, absent the resigned trustee's  
9 gross negligence or willful misconduct, for any action taken pursuant to this section.

10 The resigned trustee is entitled to reimbursement for advances it has made on behalf of the  
11 trust and for reasonable compensation for the performance of its duties as trustee. Such  
12 advances and compensation shall act as a lien on trust assets under § 55-1A-34.

13 Following a trustee's resignation, the resigned trustee shall be deemed to be serving only as  
14 a custodian of the documents and assets of the trust then in its possession and shall be relieved  
15 of its fiduciary and administrative duties under the terms of the trust instrument and pursuant  
16 to state law. The resigned trustee is entitled to reimbursement for advances it has made on  
17 behalf of the trust and for reasonable compensation as a custodian. Such advances and  
18 compensation shall act as a lien on trust assets under § 55-1A-34.

19 The relief afforded to the trustee under this section does not limit other relief that may be  
20 requested or authorized under this chapter.

21 Section 4. That § 55-1A-41 be amended to read:

22 55-1A-41. Unless specifically restricted by the governing instrument, a trustee may appoint  
23 an individual or a corporate fiduciary as a co-trustee. The appointed co-trustee may serve only  
24 as long as the appointing trustee serves, or as long as the last to serve if more than one trustee

1 appointed the co-trustee. The appointed co-trustee may not become a successor trustee upon the  
2 death, resignation, or incapacity of the appointing trustee, unless appointed under the terms of  
3 the governing instrument or unless no other successor trustee, or method for appointing a  
4 successor trustee, is provided in the governing instrument.

5 The powers and the responsibilities of the appointed co-trustee may be limited by the  
6 appointing trustee in a writing signed by the appointing trustee at the time of the appointment.  
7 If the powers or responsibilities are so limited, the powers or responsibilities of the co-trustee  
8 shall be limited as set forth in writing. Unless the powers or responsibilities are so limited, the  
9 appointed co-trustee may exercise all the powers of the appointing trustee. The combined  
10 powers of the appointed co-trustee and the appointing trustee may not exceed the powers of the  
11 appointing trustee alone. The trustee appointing a co-trustee may, in writing, revoke the  
12 appointment at any time, with or without cause.

13 If the governing instrument is silent concerning the trustee's power to appoint a co-trustee,  
14 the trustee shall notify in writing, the trustor, if living, and all current income and principal  
15 beneficiaries at least thirty days prior to the effective date of the trustee's exercise of the power  
16 granted under this section and ~~§ 55-2-15~~. The notice, which shall include a copy of the proposed  
17 action, shall advise the trustor and current beneficiaries that if they object to the trustee's  
18 appointment they need to file a written objection with the trustee prior to the effective date set  
19 out in the notice of the proposed action. If an objection is received by the trustee, prior to the  
20 effective date of the appointment, the trustee may not appoint a co-trustee. However, this section  
21 does not limit the power of the trustee under law to petition the court for approval of the  
22 appointment. If no objection has been timely made, the proposed appointment shall go into  
23 effect on the later of the date set out in the notice or thirty days after notice has been given. The  
24 notice shall be mailed, postage prepaid, to the last known address of the trustor or current

1 beneficiary.

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

5 Section 5. That § 55-3-6 be amended to read:

6 55-3-6. ~~If the declaration of trust reserves a power of revocation to the trustor, the trust may~~  
7 ~~be revoked if the power is strictly pursued.~~ Unless the terms of a trust expressly reserve a power  
8 to the settlor to revoke or modify a trust, a trust shall be irrevocable.

9 Section 6. That § 55-3-24 be amended to read:

10 55-3-24. An irrevocable trust may be modified or terminated upon the consent of all of the  
11 beneficiaries if continuance of the trust on its existing terms is not necessary to carry out a  
12 material purpose. Whether or not continuance of the trust on its existing terms is necessary to  
13 carry out a material purpose, an irrevocable trust may be modified or terminated upon the  
14 consent of the trustor and all of the beneficiaries. Upon termination of a trust under this section,  
15 the trustee shall distribute the trust property in accordance with the trustor's probable intention  
16 or in any other manner as agreed by all the beneficiaries. No person may be required to seek  
17 court affirmation of the trust's modification or termination made pursuant to this section. The  
18 provisions of chapter 55-18 apply to this section.

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

24 Section 7. That § 55-4-51.1 be amended to read:

1        55-4-51.1. A certificate of trust executed under § 55-4-51 may be recorded in the office of  
2 the register of deeds with respect to land described in the certificate of trust or any attachment  
3 to it. If it is recorded or filed in any county where real property is situated, or in the case of  
4 personal property, if it is presented to a third party, the certificate of trust serves to document  
5 the existence of the trust, the identity of the trustees, the powers of the trustees, and any  
6 limitations on those powers, and other matters the certificate of trust sets out, as though the full  
7 trust instrument had been recorded, filed, or presented. Until amended or revoked, or until the  
8 full trust instrument or will is recorded, filed, or presented, a certificate of trust is conclusive  
9 proof as to the matters contained in it and any party may rely upon the certificate, except a party  
10 ~~dealing directly with the trustee or trustees who have~~ who has actual knowledge of the facts to  
11 the contrary.

12        Section 8. That § 55-16-5 be amended to read:

13        55-16-5. Any ~~individual~~ person may serve as an investment trust advisor described in  
14 subdivision 55-1B-1(6), notwithstanding that ~~such individual~~ the person is the transferor of the  
15 qualified disposition, but ~~such an individual~~ the person may not otherwise serve as a fiduciary  
16 of a trust that is a qualified disposition except with respect to the retention of the veto right  
17 permitted by subdivision 55-16-2(2). While serving as an advisor of the trust, the ~~individual~~  
18 person may have all powers authorized by statute or by the trust instrument, including the power  
19 to vote by proxy any stock owned by the trust.

20        Section 9. That § 55-18-1 be amended to read:

21        55-18-1. Terms used in this chapter mean:

- 22        (1) "Bind" or "bound," to consent, receive notice or service of process, approve, agree,  
23                object, resist, waive, or demand for or as a person with the same binding and  
24                conclusive effective as if the person represented had;

- 1 (2) "Conflict of interest," a situation in which a representative's interest in the trust  
2 causes a significant likelihood that a reasonable person would disregard a  
3 representative's duty to a represented beneficiary. A conflict of interest, however,  
4 excludes (i) any adversity, conflict or opposed interests substantially unrelated to the  
5 representative's interest in the trust; (ii) any past situation which is not likely to re-  
6 occur; and (iii) any conflict of interest which falls short of a material conflict of  
7 interest;
- 8 (3) "Co-representative," more than one simultaneously acting representative of the same  
9 class pursuant to § 55-18-9, as when co-guardians are acting:
- 10 (4) "Conservator," a person appointed pursuant to chapter 29A-5 or equivalent  
11 provisions of another jurisdiction's laws including a temporary conservator, a  
12 guardian ad litem, and a limited conservator;
- 13 (5) "Fiduciary," a person defined by subdivision 21-22-1(3), except as used in § 55-18-  
14 17;
- 15 (6) "Guardian," a person appointed pursuant to chapter 29A-5 or equivalent provisions  
16 of another jurisdiction's laws including a temporary guardian and a limited guardian;
- 17 (7) "Incapacitated" or "incapacity," lacking the capacity to meaningfully understand the  
18 matter in question because of a mental or physical impairment;
- 19 (8) "Interest," a beneficial interest as defined by subdivision 55-1-24(1) but including the  
20 holder of a power of appointment, and any power to remove or replace a fiduciary or  
21 a representative;
- 22 (9) "Interested beneficiary," a person who, on the date the person's qualification is  
23 determined:
- 24 (a) Is a current distributee or permissible distributee of trust income or principal;

- 1 (b) Would be a distributee or permissible distributee of trust income or principal
- 2 if the interests of the current distributees terminated on that date;
- 3 (c) Would be a distributee or permissible distributee of trust income or principal
- 4 if the trust terminated on that date;
- 5 (d) Holds a power of appointment; or
- 6 (e) Would hold a power of appointment if the interests of the current distributees
- 7 terminated on that date or the interests of the persons currently holding a
- 8 power of appointment under this subdivision terminated on that date;
- 9 (10) "Knows" or "knowingly," actual knowledge of the fact in question;
- 10 (11) "Minor," any person who has not attained the age of eighteen. The term includes a
- 11 minor with an incapacity;
- 12 (12) "Nonjudicial settlement," an agreement, release, or other action whether or not
- 13 approved by a court, which may include, without limitation:
- 14 (a) The interpretation or construction of the terms of a trust;
- 15 (b) The approval of any fiduciary's report or accounting;
- 16 (c) Direction to any fiduciary to refrain from performing a particular act or the
- 17 grant to a fiduciary of any necessary or desirable power;
- 18 (d) The resignation or appointment of any fiduciary;
- 19 (e) The determination of a fiduciary or a representative's compensation;
- 20 (f) The transfer of a trust's principal place of administration or situs;
- 21 (g) The liability of any fiduciary's action or omission relating to a trust;
- 22 (h) Partial or final settlement agreements regarding a trust or its administration;
- 23 or
- 24 (i) The modification, amendment, reformation, or termination of a trust;



- 1 (13) "Notice" or "notifies," notice provided personally, by mail, postage prepaid,  
2 addressed to the person's last known post office address, or electronically in  
3 accordance with § 15-6-5(d);
- 4 (14) "Notifier," a person who is undertaking notice or proposing consent with regard to  
5 a matter concerning a trust;
- 6 (15) "Power of appointment," a power defined by § 55-1-12;
- 7 (16) "Proceeding," any judicial or nonjudicial trust proceeding, accounting, termination,  
8 modification, reformation, decanting, settlement, nonjudicial settlement, and any  
9 proceeding conducted pursuant to chapter 21-22 or title 29A which concerns a trust;
- 10 (17) "Protected person," a person other than a minor for whom a guardian or conservator  
11 is appointed;
- 12 (18) "Reasonably available," with respect to a person, that the person can be identified and  
13 located with the exercise of reasonable diligence;
- 14 (19) "Representative," a person who may bind another person pursuant to § 55-18-9;
- 15 (20) "Trust," an express inter vivos or testamentary trust;
- 16 (21) "Uninterested beneficiary," a beneficiary other than an interested beneficiary.

17 Section 10. That § 55-18-21 be amended to read:

18 55-18-21. ~~Except as provided in subdivisions 55-18-9(5), (11) and (16)~~ Without diminishing  
19 the powers of a trustee over the affairs of the trust or trust property, a trustee may not bind a  
20 beneficiary of the trustee's trust except as provided in subdivisions 55-18-9(5), (9), (11), and  
21 (16).