

2020 South Dakota Legislature
Senate Bill 65

AMENDMENT 65A FOR THE INTRODUCED BILL

1 **An Act to revise certain provisions pertaining to trusts.**

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

3 ~~Section 1. That a NEW SECTION be added:~~

4 ~~Attorneys' fees and costs.~~

5 ~~In a judicial proceeding involving a trust estate, the court, as justice and equity may require,~~
6 ~~may award costs and expenses, including reasonable attorneys' fees, to any party or to the~~
7 ~~trust, to be paid by another party or from the trust that is the subject of the controversy. If~~
8 ~~paid from the trust, the payment may be charged against future distributions to a beneficiary.~~

9 **Section 1.** That § 55-1-21.4 be AMENDED:

10 **55-1-21.4. Enforcement of purpose of trust by enforcer.**

11 The purposes of a purpose trust ~~may~~ shall be enforced by an enforcer designated
12 in the governing instrument ~~and if, An enforcer may demand reasonable information~~
13 related to the administration of the trust from the trustee, including a periodic accounting.
14 If no enforcer or successor enforcer is acting pursuant to the terms of the governing
15 instrument the court may ~~shall~~ appoint one or more enforcers and successor enforcers.
16 No purpose trust may fail for want of an enforcer. An enforcer may petition for, consent
17 to, waive, or object to any matter regarding a purpose trust with regard to the purpose of
18 the trust which the enforcer represents or concerning the administration of the purpose
19 trust. ~~Enforcers are fiduciaries~~ An enforcer is a fiduciary whose duty is to enforce the
20 trust's purpose as set forth in the governing instrument and, except as otherwise provided
21 in the governing instrument, ~~are~~ is entitled to reasonable compensation ~~as determined by~~
22 the trustee. An enforcer may also serve as a trust protector or a family advisor pursuant
23 to chapter 55-1B. However, an enforcer may not serve as an enforcer while serving as a
24 trustee or a distribution trust advisor of the same trust. Except as otherwise provided in

1 the governing instrument, if more than one enforcer is acting, action may be taken by a
2 majority of the enforcers.

3 **Section 2.** That § 55-1-21.5 be AMENDED:

4 **55-1-21.5. Removal of enforcer.**

5 ~~Any~~ A trustee may petition the court for the removal of an enforcer. An enforcer
6 may be removed if the court finds:

- 7 (1) The enforcer committed a serious breach of the ~~purpose~~ enforcer's ~~responsibilities~~
8 duty, or is unfit or unwilling to serve;
- 9 (2) A significant and unjustified lack of cooperation or hostility between the enforcer
10 and the trustee, trust protector, or trust advisor; or
- 11 (3) There has been a substantial change in circumstances and removal of the enforcer
12 would best serve the purpose or purposes of the trust.

13 The governing instrument may provide different or additional procedures for the
14 removal of an enforcer.

15 **Section 3.** That § 55-1-21.9 be AMENDED:

16 **55-1-21.9. Filings, reports, accounting, separation of funds, appointment,**
17 **and registration of purpose trust not required--Exceptions.**

18 Except as may be demanded by an enforcer under § 55-1-21.4, ordered by the
19 court or required by the governing instrument, no filings, reports, periodic accounting,
20 separate maintenance of funds, appointment, or registration of a purpose trust are
21 required.

22 **Section 4.** That § 55-1-36 be AMENDED:

23 **55-1-36. Satisfaction of claims of settlor's creditors from trust estate if**
24 **settlor is beneficiary.**

25 If a settlor is also a beneficiary of the trust, and the transfer is a qualified transfer
26 pursuant to chapter 55-16, the provisions of §§ 55-1-24 to 55-1-43, inclusive, also apply.
27 Conversely, if the settlor is a beneficiary of the trust and the transfer is not a qualified
28 transfer pursuant to chapter 55-16, a provision restraining the voluntary or involuntary
29 transfer of the settlor's beneficial interest does not prevent the settlor's creditors from
30 satisfying claims from the settlor's interest in the trust estate. However, a settlor's
31 creditors may not satisfy their respective claims from an irrevocable trust if:

- (1) The settlor has retained a beneficial interest that is contingent upon surviving the settlor's spouse such as an interest in an inter vivos marital deduction trust in which the interest of the settlor's spouse is treated as qualified terminable interest property under § 2523(f) of the Internal Revenue Code of 1986 (26 U.S.C. § 2523(f)), as amended, an interest in an inter vivos marital deduction trust that is treated as a general power of appointment trust for which a marital deduction would be allowed under § 2523(a) and (e) of the Internal Revenue Code of 1986 (26 U.S.C. § 2523(a) and (e)), as amended, and an interest in an inter vivos trust commonly known as a credit shelter trust that used all or a portion of the settlor's unified credit under § 2505 of the Internal Revenue Code (26 U.S.C. § 2505), as amended;
- (2) The settlor may be named, by someone other than the settlor, as an additional beneficiary or from a class of persons that includes the settlor; or
- (3) The settlor is a permissible object of the exercise of a power of appointment over trust property held by someone other than the settlor.

Section 5. That § 55-1-44 be AMENDED:

55-1-44. Action for fraudulent transfer of settlor's assets--Jurisdiction--Attorneys' fees and costs--Burden of proof.

Notwithstanding any other provision of law, no action of any kind, including an action to enforce a judgment entered by a court or other body having adjudicative authority, may be brought at law or in equity for an attachment or other provisional remedy against property that is the subject of a South Dakota trust or for avoidance of a transfer to a South Dakota trust unless the settlor's transfer of property was made with the intent to defraud that specific creditor. A court of this state has exclusive jurisdiction over an action brought under a claim for relief that is based on a transfer of property to a trust that is the subject of this section. A court of this state may award attorneys' fees and costs to the prevailing party in such an action. In any action described in this section, the burden to prove the matter by clear and convincing evidence is upon the creditor.

Section 6. That § 55-1-45 be AMENDED:

55-1-45. Limitation of action for fraudulent transfer of settlor's assets.

A cause of action or claim for relief with respect to a fraudulent transfer of a settlor's assets pursuant to § 55-1-44 is extinguished unless the action under § 55-1-44 is brought by a creditor of the settlor who meets one of the following requirements:

- 1 (1) Is a creditor of the settlor before the settlor's assets are transferred to the trust,
 2 and the action under § 55-1-44 is brought within the later of:
 3 (a) Two years after the transfer is made; or
 4 (b) Six months after the transfer is or reasonably could have been discovered by
 5 the creditor if the creditor:
 6 (i) Can demonstrate that the creditor asserted a specific claim against the
 7 settlor before the transfer; or
 8 (ii) Files another action, other than an action under § 55-1-44, against the
 9 settlor that asserts a claim based on an act or omission of the settlor
 10 that occurred before the transfer, and the action described in this
 11 subsection is filed within two years after the transfer; or
 12 (2) Becomes a creditor subsequent to the transfer into trust, and the action under § 55-
 13 1-44 is brought within two years after the transfer is made.
 14 ~~In any action described in § 55-1-44, the burden to prove the matter by clear and~~
 15 ~~convincing evidence is upon the creditor.~~

16 **Section 7.** That § 55-1B-2 be AMENDED:

17 **55-1B-2. Liability limits of excluded fiduciary--Relief from obligations for**
 18 **excluded fiduciary--Burden of proof in action against excluded fiduciary.**

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

- 21 (1) Any loss that results from compliance with a direction of the trust advisor, including
 22 any loss from the trust advisor breaching fiduciary responsibilities or acting beyond
 23 the trust advisor's scope of authority;
 24 (2) Any loss that results from a failure to take any action proposed by an excluded
 25 fiduciary that requires a prior authorization of the trust advisor if that excluded
 26 fiduciary timely sought but failed to obtain that authorization;
 27 (3) Any loss that results from any action or inaction, except for gross negligence or
 28 willful misconduct, when an excluded fiduciary is required, pursuant to the trust
 29 agreement or any other reason, to assume the role of trust advisor or trust
 30 protector; or
 31 (4) Any loss that results from relying upon any trust advisor for valuation of trust
 32 assets.

33 Any excluded fiduciary is also relieved from any obligation to independently value trust
 34 assets, to review or evaluate any direction from a distribution trust advisor, or to perform

1 investment or suitability reviews, inquiries, or investigations or to make recommendations
2 or evaluations with respect to any investments to the extent the trust advisor had
3 authority to direct the acquisition, disposition, or retention of the investment. If the
4 excluded fiduciary offers such communication to the trust advisor, trust protector, or any
5 investment person selected by the investment trust advisor, such action may not be
6 deemed to constitute an undertaking by the excluded fiduciary to monitor or otherwise
7 participate in actions within the scope of the advisor's authority or to constitute any duty
8 to do so.

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

13 Absent contrary provisions in the governing instrument, the actions of the excluded
14 fiduciary (such as any communications with the trust advisor and others and carrying out,
15 recording, and reporting actions taken at the trust advisor's direction) pertaining to
16 matters within the scope of authority of the trust advisor or trust protector shall be
17 deemed to be administrative actions taken by the excluded fiduciary solely to allow the
18 excluded fiduciary to perform those duties assigned to the excluded fiduciary under the
19 governing instrument, and such administrative actions may not be deemed to constitute
20 an undertaking by the excluded fiduciary to monitor, participate, or otherwise take any
21 fiduciary responsibility for actions within the scope of authority of the trust advisor or trust
22 protector.

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

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

28 **Section 8.** That § 55-1B-6 be AMENDED:

29 **55-1B-6. Powers and discretions of trust protector.**

30 The powers and discretions of a trust protector are as provided in the governing
31 instrument and may be exercised or not exercised, in the best interests of the trust, in
32 the sole and absolute discretion of the trust protector and are binding on all other persons.
33 The powers and discretion may include the following:

34 (1) Modify or amend the trust instrument to achieve favorable tax status or respond to

- 1 changes in the Internal Revenue Code, state law, or the rulings and regulations
 2 thereunder;
- 3 (2) Increase or decrease the interests of any beneficiaries to the trust;
- 4 (3) Modify the terms of any power of appointment granted by the trust. However, a
 5 modification or amendment may not grant a beneficial interest to any individual or
 6 class of individuals not specifically provided for under the trust instrument;
- 7 (4) Remove and appoint a trustee, a fiduciary provided for in the governing trust
 8 instrument, trust advisor, investment committee member, or distribution
 9 committee member;
- 10 (5) Terminate the trust;
- 11 (6) Veto or direct trust distributions;
- 12 (7) Change situs or governing law of the trust, or both;
- 13 (8) Appoint a successor trust protector;
- 14 (9) Interpret terms of the trust instrument at the request of the trustee;
- 15 (10) Advise the trustee on matters concerning a beneficiary;
- 16 (11) Amend or modify the trust instrument to take advantage of laws governing
 17 restraints on alienation, distribution of trust property, or the administration of the
 18 trust;
- 19 (12) ~~Provide direction regarding notification of qualified beneficiaries pursuant to § 55-~~
 20 ~~2-13~~Reserved;
- 21 (13) Add to the trust an individual beneficiary or beneficiaries from a class of individuals
 22 identified in the governing instrument;
- 23 (14) Add to the trust a charitable beneficiary or beneficiaries from a class of charities
 24 identified in the trust instrument;
- 25 (15) Provide other powers and discretions in the governing instrument;
- 26 (16) Remove a representative as provided in subdivision 55-18-4(3);
- 27 (17) Appoint a representative as provided in subdivision 55-18-9(12); and
- 28 (18) Act as a representative as provided in subdivision 55-18-9(11).

29 In addition to the powers and discretions granted to the trust protector in the
 30 governing instrument, the trust protector may also exercise any of the powers and
 31 discretions granted to a trust protector under § 55-2-13 to the extent such exercise is not
 32 prohibited under the terms of the governing instrument.

33 The powers referenced in subdivisions (5), (6), and (11) may be granted
 34 notwithstanding the provisions of §§ 55-3-24 to 55-3-28, inclusive.

35 **Section 9.** That § 55-1B-10 be AMENDED:

1 **55-1B-10. Powers and discretions of investment trust advisor.**

2 The powers and discretions of an investment trust advisor shall be as provided in
3 the trust instrument and may be exercised or not exercised, in the best interests of the
4 trust, in the sole and absolute discretion of the investment trust advisor and are binding
5 on any other person and any other interested party, fiduciary, and excluded fiduciary.
6 ~~Unless the terms of the governing instrument provide otherwise,~~ In addition to the powers
7 and discretions granted to the investment trust advisor has the power to perform the
8 following in the governing instrument, the investment trust advisor may also exercise any
9 of the following powers and discretions to the extent such exercise is not prohibited under
10 the terms of the governing instrument:

- 11 (1) Direct the trustee with respect to the retention, purchase, sale, exchange, tender,
12 or other transaction affecting the ownership thereof or rights therein of trust
13 investments. These powers include the pledge or encumbrance of trust property,
14 lending of trust assets, either secured or unsecured, at terms defined by the
15 investment trust advisor to any party including beneficiaries of the trust and the
16 investment and reinvestment of principal and income of the trust;
- 17 (2) Vote proxies for securities held in trust;
- 18 (3) Select one or more investment advisers, managers, or counselors, including the
19 trustee, and delegate to them any of its powers;
- 20 (4) Direct the trustee with respect to any additional powers and discretions over
21 investment and management of trust assets provided in the governing instrument;
- 22 (5) Direct the trustee as to the value of nonpublicly traded trust investments; ~~and~~
- 23 (6) Direct the trustee as to any investment or management power referenced in chapter
24 55-1A; and
- 25 (7) Exercise the powers granted to an investment trust advisor in § 55-2-13.

26 **Section 10.** That § 55-1B-11 be AMENDED:

27 **55-1B-11. Powers and discretions of distribution trust advisor.**

28 The powers and discretions of a distribution trust advisor over any discretionary
29 distributions of income or principal, including distributions pursuant to an ascertainable
30 standard or other criteria and appointments pursuant to § 55-2-15, shall be provided in
31 the trust instrument and may be exercised or not exercised, in the best interests of the
32 trust, in the sole and absolute discretion of the distribution trust advisor and are binding
33 on any other person and any other interested party, fiduciary, and excluded fiduciary.
34 Unless the terms of the ~~document~~ governing instrument provide otherwise, then, in

1 addition to the powers and discretions granted to the distribution trust advisor in the trust
2 instrument, the distribution trust advisor shall direct the trustee with regard to all
3 discretionary distributions to beneficiaries ~~and,~~ may direct appointments pursuant to § 55-
4 2-15. ~~The distribution trust advisor may also provide direction regarding notification of~~
5 ~~qualified beneficiaries pursuant to,~~ and may exercise any of the powers and discretions
6 granted to a distribution trust advisor in § 55-2-13.

7 **Section 11.** That § 55-1B-12 be AMENDED:

8 **55-1B-12. Powers and discretions of family advisor.**

9 The powers and discretions of a family advisor are as provided in the governing
10 instrument or by court order and may be exercised or not exercised, in the best interests
11 of the trust, in the sole and absolute discretion of the family advisor. The powers and
12 discretions may only include the following:

- 13 (1) Remove and appoint a trustee, a fiduciary provided for in the governing trust
14 instrument, trust advisor, investment committee member, or distribution
15 committee member;
- 16 (2) Appoint a ~~successor~~ trust protector, ~~or a successor~~ family advisor;
- 17 (3) Advise the trustee on matters concerning any beneficiary; receive trust
18 accountings, investment reports, and other information from the trustee or to which
19 a beneficiary is entitled; attend meetings whether in person or by any other means
20 with the trustee, investment trust advisors, distribution trust advisors, or other
21 advisors whether in person or by any means, electronic or otherwise; and to consult
22 with a fiduciary regarding both fiduciary and nonfiduciary matters or actions, all
23 without any power or discretion to take any action as a fiduciary; or
- 24 (4) Provide direction regarding notification of qualified beneficiaries pursuant to § 55-
25 2-13.

26 A family advisor is not required to exercise any powers or discretions under any
27 circumstances. Every action or inaction by a family advisor is a nonfiduciary action or
28 inaction and a family advisor is absolutely excluded from liability to any other person for
29 an action or inaction as a family advisor. A court may review a family advisor's exercise
30 of the powers described in subdivisions (1), (2), and (4) only if the family advisor acts
31 dishonestly or with an improper motive but may not review a family advisor's failure to
32 exercise any powers. A reasonableness standard may not be applied to any action or
33 inaction of a family advisor. Other than for the two circumstances listed above, a court
34 has no jurisdiction to review a family advisor's action or inaction.

1 A family advisor is entitled to compensation as provided in the governing instrument.
2 If the governing instrument does not provide for or establish compensation, a family
3 advisor is entitled to reasonable compensation for the exercise of the powers and
4 discretions granted to the family advisor pursuant to this chapter.

5 **Section 12.** That § 55-2-13 be AMENDED:

6 **55-2-13. Notice to qualified beneficiaries of existence of trust--Written**
7 **directions--Information to be provided to excluded fiduciaries--Liability limits**
8 **of trustee--Variation of right of a beneficiary to be informed--Confidentiality of**
9 **trust information.**

10 Notification to any qualified beneficiary under this section may be carried out
11 personally, by mail, postage prepaid, addressed to the entity or individual's last known
12 post office address, or electronically pursuant to the provisions of § 15-6-5(d), and on
13 representatives of qualified beneficiaries pursuant to chapter 55-18.

14 For purposes of this section, the term, qualified beneficiary, means a beneficiary that
15 is an entity then in existence or an individual who is twenty-one years of age or older and
16 who, on the date the beneficiary's qualification is determined:

- 17 (1) Is a distributee or permissible distributee of trust income or principal;
18 (2) Would be a distributee or permissible distributee of trust income or principal if the
19 interests of the distributees terminated on that date; or
20 (3) Would be a distributee or permissible distributee of trust income or principal if the
21 trust terminated on that date. However, if the distributee is then unknown because
22 a person holds a power to change the distributee, the trustee shall give notice only
23 to the holder of the power.

24 Except as otherwise provided by the terms of a revocable trust, a trustee has no duty
25 to notify the qualified beneficiaries of the trust's existence.

26 Except as otherwise provided by the terms of an irrevocable trust or otherwise directed
27 in writing by the settlor, trust advisor, or trust protector, the trustee shall, within sixty
28 days after the trustee has accepted trusteeship of the trust, or within sixty days after the
29 date the trustee acquires knowledge that a formerly revocable trust has become
30 irrevocable, notify the qualified beneficiaries of the trust's existence and of the right of the
31 beneficiary to request a copy of the trust instrument pertaining to the beneficiary's interest
32 in the trust.

33 For purposes of this section, the terms, trust advisor and trust protector, have the
34 same meanings as those defined in § 55-1B-1.

1 Except as otherwise provided by the terms of an irrevocable trust or otherwise directed
2 in writing by the settlor, trust advisor, or trust protector, a trustee of an irrevocable trust:

- 3 (1) Upon request of a qualified beneficiary, shall promptly furnish to the qualified
4 beneficiary a copy of the trust instrument;
- 5 (2) If notification of the trust has not been accomplished pursuant to this section within
6 sixty days after accepting a trusteeship, shall notify the qualified beneficiaries of
7 the acceptance and of the trustee's name, address, and telephone number;
- 8 (3) Shall promptly respond to a qualified beneficiary's request for information related
9 to the administration of the trust, unless the request is unreasonable under the
10 circumstances.

11 The settlor, trust advisor, or trust protector, may, by the terms of the governing
12 instrument, or in writing delivered by providing written directions to the trustee, expand,
13 restrict, eliminate, or otherwise modify the rights of beneficiaries to information relating
14 to a trust. The trustee incurs no liability for a loss or otherwise for relying upon the written
15 directions, including an instance when the governing instrument of an irrevocable trust
16 does not expressly authorize an expansion, restriction, or other modification of the rights
17 of beneficiaries to information relating to a trust. The written directions remain

18 ~~Written directions provided by the settlor, trust advisor, or trust protector as set forth~~
19 ~~in this section remain in effect effective until and or unless the settlor, trust advisor, or~~
20 ~~trust protector who provided the written directions~~ revokes the written instructions
21 directions by providing a writing to that effect to the trustee or the trustee receives
22 notification that the settlor, trust advisor, or trust protector who provided the written
23 directions is incapacitated. Additionally, the written directions remain in effect only while
24 the trust advisor or trust protector providing the written directions is serving as the current
25 trust advisor or trust protector. Unless otherwise specifically provided in the written
26 directions, upon the death or incapacity of a settlor who provided the written directions
27 described in this section, the directions shall be deemed revoked. However, upon the
28 death or incapacity of the settlor, a trust advisor or trust protector, if any, may further
29 direct the trustee in writing pursuant to this section. Unless otherwise stated in the
30 governing instrument, the direction of the settlor shall control in the event of a conflict in
31 direction, the direction of the settlor shall control among written directions provided to the
32 trustee pursuant to this section.

33 The terms of an irrevocable trust or written directions provided pursuant to this section
34 may expand, restrict, eliminate, or otherwise vary the right of a beneficiary to be informed
35 of the beneficiary's interest in a trust for a period of time, including:

- 1 (1) A period of time related to the age of a beneficiary;
2 (2) A period of time related to the lifetime of either a settlor or spouse of a settlor, or
3 both;
4 (3) A period of time related to a term of years or specific date; and
5 (4) A period of time related to a specific event that is certain to occur.

6 The terms of the governing instrument or written directions provided pursuant to this
7 section may authorize either the settlor, trust advisor, or trust protector to appoint a
8 representative as provided in subdivisions 55-18-9 (11) and (12) for the period of time
9 that the right of a beneficiary to be informed about a beneficiary's interest is restricted or
10 eliminated pursuant to this section.

11 A beneficiary may waive the right to the notice or information otherwise required to
12 be furnished under this section and, with respect to future reports and other information,
13 may withdraw a waiver previously given.

14 The change in the identity of a trustee, occurring as the result of a mere name change
15 or a merger, consolidation, combination, or reorganization of a trustee, does not require
16 notice.

17 If a fiduciary is bound by a duty of confidentiality with respect to a trust or its assets,
18 a fiduciary may require that any beneficiary who is eligible to receive information pursuant
19 to this section be bound by the duty of confidentiality that binds the trustee before
20 receiving such information from the trustee. If trust information is sought through service
21 of a subpoena on a fiduciary, the fiduciary may petition the court for an order that makes
22 disclosure of trust information contingent upon the receiving party being bound by
23 reasonable conditions to ensure the protection of confidentiality of trust information by
24 the receiving party.

25 A trust advisor, trust protector, or other fiduciary designated by the terms of the trust
26 shall keep each excluded fiduciary designated by the terms of the trust reasonably
27 informed about:

- 28 (1) The administration of the trust with respect to any specific duty or function being
29 performed by the trust advisor, trust protector, or other fiduciary to the extent that
30 the duty or function would normally be performed by the excluded fiduciary or to
31 the extent that providing such information to the excluded fiduciary is reasonably
32 necessary for the excluded fiduciary to perform its duties; and
33 (2) Any other material information that the excluded fiduciary would be required to
34 disclose to the qualified beneficiaries under this section regardless of whether the
35 terms of the trust relieve the excluded fiduciary from providing such information to

1 qualified beneficiaries. Neither the performance nor the failure to perform of a trust
 2 advisor, trust protector, or other fiduciary designated by the terms of the trust as
 3 provided in this subdivision shall affect the limitation on the liability of the excluded
 4 fiduciary.

5 The provisions of this section are effective for trusts created, amended, or restated
 6 after June 30, 2002, except as otherwise directed by the settlor, trust protector, trust
 7 advisor, or other fiduciary designated by the terms of the trust. For trusts created before
 8 July 1, 2002, a trustee has no duty at common law or otherwise to notify a qualified
 9 beneficiary of the trust's existence unless otherwise directed by the settlor. The provisions
 10 of this paragraph do not apply if otherwise directed by the settlor, trust protector, trust
 11 advisor, or other fiduciary designated by the terms of the trust.

12 **Section 13.** That § 55-3-13 be AMENDED:

13 **55-3-13. Expenses incurred by trustee in performance of trust--**
 14 **Reimbursement.**

15 A trustee, including a former trustee, is entitled to the repayment, out of the trust
 16 property, of all expenses actually and properly incurred by the trustee in the performance
 17 ~~of his or her trust~~ the trustee's duties. The trustee is entitled to the repayment of even
 18 unlawful expenditures, if the expenditures were productive of actual benefit to the estate.
 19 Expenses in performance of the trust include those expenses actually and properly
 20 incurred in the exercise of the trustee's powers as described in the governing instrument,
 21 in any applicable court order, or in chapter 55-1A. A former trustee is entitled to the
 22 repayment, out of trust property, of all expenses actually and properly incurred by the
 23 former trustee in the defense of proceedings relating to the performance of the trustee's
 24 duties to the same extent as the current trustee is entitled to repayment.

25 **Section 14.** That § 55-3-20.1 be AMENDED:

26 **55-3-20.1. Grounds for removal of trustee.**

27 In addition to other remedies available by law and procedures or powers set out in
 28 a trust instrument, the settlor, or the settlor's agent, a trust protector, a cotrustee, or a
 29 qualified beneficiary as defined in § 55-2-13, or an enforcer, as defined in § 55-1-21.4,
 30 may request the court to remove a trustee, or a trustee may be removed by the court on
 31 the court's own initiative.

32 In addition to the powers otherwise granted the court, the court may remove a trustee
 33 if:

- 1 (1) The trustee commits a serious breach of trust;
- 2 (2) Lack of cooperation among cotrustees substantially impairs the administration of
- 3 the trust;
- 4 (3) Because of unfitness, unwillingness, persistent failure of the trustee to administer
- 5 the trust effectively, the court determines that removal of the trustee best serves
- 6 the interests of the beneficiaries;
- 7 (4) There is a substantial change of circumstances or removal is requested by all of the
- 8 qualified beneficiaries, the court finds that removal of the trustee best serves the
- 9 interests of all of the beneficiaries and is not inconsistent with a material purpose
- 10 of the trust, and a suitable cotrustee or successor trustee is available; or
- 11 (5) If the trustee merges with another institution or the location or place of
- 12 administration of the trust changes, and the court finds that removal of the trustee
- 13 best serves the interests of all of the beneficiaries, and a suitable cotrustee or
- 14 successor trustee is available.

15 Pending a final decision on a request to remove a trustee, the court may order such
 16 appropriate relief as may be necessary to protect the trust property or the interests of the
 17 beneficiaries.

18 **Section 15.** That § 55-3-45 be AMENDED:

19 **55-3-45. Beneficiary approval of trustee's accounting--Alternative approval**
 20 **of trustee's accounting--Accounting defined.**

21 If a trust is not subject to court supervision under chapter 21-22, and if no
 22 objection has been made by a distribution beneficiary, as defined in this title, of a trust
 23 within one hundred eighty days after a copy of the trustee's accounting has been mailed,
 24 postage prepaid, to the last known address of such distribution beneficiary, personally, or
 25 electronically in accordance with § 15-6-5(d), the distribution beneficiary is deemed to
 26 have approved such accounting of the trustee, and the trustee, absent fraud, intentional
 27 misrepresentation, or material omission, shall be released and discharged from any and
 28 all liability to all beneficiaries of the trust as to all matters set forth in such accounting.
 29 Alternatively, the trustee's accounting may be approved on behalf of all beneficiaries by a
 30 trust advisor or trust protector, or in accordance with § 55-18-9 if:

- 31 (1) Notice or information to the beneficiaries has been waived or modified in
 32 accordance with § 55-2-13; or
- 33 (2) Authorized under the terms of the governing instrument.

34 The provisions of chapter 55-18 apply to this section.

1 For purposes of this section, the term, accounting, means any interim or final report
2 or other statement provided by a trustee reflecting all transactions, receipts, and
3 disbursements during the reporting period and a list of assets as of the end of the period
4 covered by the report or statement, and including written notice to the distribution
5 beneficiary of the provisions of this section.

6 **Section 16.** That § 55-16-2 be AMENDED:

7 **55-16-2. Trust instrument defined.**

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

- 11 (1) Expressly incorporates the law of this state to govern the validity, construction, and
12 administration of the trust;
- 13 (2) Is irrevocable, but a trust instrument may not be deemed revocable on account of
14 its inclusion of one or more of the following:
- 15 (a) A transferor's power to veto a distribution from the trust;
- 16 (b) An inter vivos power of appointment, other than an inter vivos power ~~to~~
17 appoint to exercisable solely by the transferor in favor of the transferor, the
18 transferor's creditors, the transferor's estate, or the creditors of the
19 transferor's estate;
- 20 (c) A testamentary power of appointment;
- 21 (d) The transferor's potential or actual receipt of income, including rights to such
22 income retained in the trust instrument;
- 23 (e) The transferor's potential or actual receipt of income or principal from a
24 charitable remainder unitrust or charitable remainder annuity trust as such
25 terms are defined in § 664 of the Internal Revenue Code of 1986, 26 U.S.C.
26 § 664, as of January 1, 2009;
- 27 (f) The transferor's receipt each year of a percentage of the value as determined
28 from time to time pursuant to the trust instrument, but not exceeding the
29 amount that may be defined as income under § 643(b) of the Internal
30 Revenue Code of 1986, 26 U.S.C. § 643(b), as of January 1, 2009;
- 31 (g) The transferor's potential or actual receipt or use of principal if the potential
32 or actual receipt or use of principal would be the result of a qualified person,
33 including a qualified person acting at the direction of a trust advisor described
34 in this section, acting either in the qualified person's sole discretion or

- 1 pursuant to an ascertainable standard contained in the trust instrument;
- 2 (h) The transferor's right to remove a trustee, protector, or trust advisor and to
- 3 appoint a new trustee, protector, or trust advisor, other than a trustee who
- 4 is a related or subordinate party with respect to the transferor within the
- 5 meaning of § 672(c) of the Internal Revenue Code of 1986, 26 U.S.C.
- 6 § 672(c), as of January 1, 2009;
- 7 (i) The transferor's potential or actual use of real property held under a qualified
- 8 personal residence trust within the meaning of such term as described in the
- 9 regulations promulgated under § 2702(c) of the Internal Revenue Code of
- 10 1986, 26 U.S.C. § 2702(c), as of January 1, 2009;
- 11 (j) A pour back provision that pours back to the transferor's will or revocable
- 12 trust all or part of the trust assets;
- 13 (k) The transferor's potential or actual receipt of income or principal to pay, in
- 14 whole or in part, income taxes due on income of the trust if the potential or
- 15 actual receipt of income or principal is pursuant to a provision in the trust
- 16 instrument that expressly provides for the payment of the taxes and if the
- 17 potential or actual receipt of income or principal would be the result of a
- 18 qualified person's acting in the qualified person's discretion or pursuant to a
- 19 mandatory direction in the trust instrument or acting at the direction of an
- 20 advisor described in § 55-16-4; ~~or~~
- 21 (l) The ability, whether pursuant to discretion, direction, or the grantor's
- 22 exercise of a testamentary power of appointment, of a qualified person to
- 23 pay, after the death of the transferor, all or any part of the debts of the
- 24 transferor outstanding at the time of the transferor's death, the expenses of
- 25 administering the transferor's estate, or any estate or inheritance tax
- 26 imposed on or with respect to the transferor's estate; ~~and or~~
- 27 (m) A transferor's service as a noncontrolling member of a distribution committee
- 28 that functions as a distribution trust advisor, as defined in subdivision 55-1B-
- 29 1(7); and
- 30 (3) Provides that the interest of the transferor or other beneficiary in the trust property
- 31 or the income from the trust property may not be transferred, assigned, pledged,
- 32 or mortgaged, whether voluntarily or involuntarily, before the qualified person
- 33 actually distributes the property or income from the property to the beneficiary, and
- 34 such provision of the trust instrument shall be deemed to be a restriction on the
- 35 transfer of the transferor's beneficial interest in the trust that is enforceable under

1 applicable nonbankruptcy law within the meaning of § 541(c)(2) of the Bankruptcy
2 Code, 11 U.S.C. § 541(c)(2), as of January 1, 2009.

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

6 **Section 17.** That § 55-16-5 be AMENDED:

7 **55-16-5. Service as investment trust advisor--Service as fiduciary by**
8 **transferor.**

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