

AN ACT

ENTITLED, An Act to permit trustees to decant a trust under certain circumstances.

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

Section 1. Unless the terms of the instrument expressly provide otherwise, a trustee who has discretionary authority, under the terms of a testamentary instrument or irrevocable inter vivos trust agreement, to make a distribution of income or principal to, or for the benefit of, one or more beneficiaries of a trust (the "first trust"), may instead exercise such authority by appointing all or part of the income or principal subject to the power in favor of a trustee of a trust (the "second trust") under an instrument other than that under which the power to distribute is created or under the same instrument, in the event that the trustee of the first trust decides that 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. However, the following apply:

- (1) The second trust has as beneficiaries only one or more of those beneficiaries of the first trust to or for whom a discretionary distribution may be made from the first trust and who are proper objects of the exercise of the power, or one or more of those other beneficiaries of the first trust to or for whom a distribution of income or principal may have been made in the future from the first trust at a time or upon the happening of an event specified under the first trust;
- (2) No trustee of the first trust may:
  - (a) Exercise such authority to make a distribution from the first trust if the trustee is a beneficiary of the first trust, or if any beneficiary may change the trustees of the first trust, unless the exercise of such authority is for health, education, maintenance, or support; or
  - (b) Exercise such authority to the extent that doing so would have the effect either of

- (i) increasing the distributions that can be made in the future from the second trust to the trustee of the first trust or to a beneficiary who may change the trustees of the first trust, or (ii) removing restrictions on discretionary distributions imposed by the agreement under which the first trust was created, except that in either case participating in a change that is needed for the health, education, maintenance, or support of any such beneficiary is permitted;
- (3) In the case of any trust contributions which have been treated as gifts qualifying for the exclusion from gift tax described in § 2503(b) of the Internal Revenue Code of 1986, by reason of the application of I.R.C. § 2503(c), the governing instrument for the second trust shall provide that the beneficiary's remainder interest shall vest and become distributable no later than the date upon which such interest would have vested and become distributable under the terms of the governing instrument for the first trust;
- (4) The exercise of such authority does not reduce any income interest of any income beneficiary of a trust for which a marital deduction has been taken for federal tax purposes under I.R.C. § 2056 or § 2523 or for state tax purposes under any comparable provision of applicable state law; and
- (5) The exercise of such 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.

Section 2. Any action that may not be taken by a trustee of the first trust by reason of the restrictions in subdivision (2) of section 1 of this Act may instead be taken by any other trustee of the first trust who is not so restricted, or, if none, by the next available party who can be a successor trustee and who is not so restricted. The second trust may be a trust created or administered under the laws of any jurisdiction, within or without the United States.

Section 3. For the purposes of section 1 of this Act, a beneficiary shall be considered to have the power to "change the trustees" if he or she can name himself or herself as a trustee or can remove a trustee and replace that trustee with a new trustee who is the beneficiary or who is related or subordinate (as defined in § 672 of the I.R.C.) to the beneficiary.

Section 4. The exercise of the power to distribute the income or principal of the trust under section 1 of this Act shall be by an instrument in writing, signed and acknowledged by the trustee and filed with the records of the trust.

Section 5. The exercise of the power to distribute the income or principal of the trust under section 1 of this Act shall be considered the exercise of a power of appointment (other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate).

Section 6. The power under section 1 of this Act may not be exercised to suspend the power to alienate trust property or extend the first trust beyond any applicable termination date under the terms of the instrument of the first trust or the permissible period of any rule against perpetuities applicable to the first trust.

Section 7. No provision of this Act may be construed to abridge the right of any trustee who has power to distribute income or principal in further trust which arises under statute or common law.

Section 8. That § 55-4-38 be amended to read as follows:

55-4-38. Unless the terms of the trust refer to this section and provide otherwise, a power, including the power to make a distribution to another trust under section 1 of this Act, that is exercisable by or attributable to a person, other than the settlor, in such person's capacity as a trustee to make discretionary distribution of either principal or income:

- (1) To or for the benefit of himself or herself is exercisable by the person only for the person's health, education, maintenance, and support in the person's accustomed manner of living;

or

- (2) To or for the benefit of others, is not exercisable to discharge any of the person's own legal obligations.

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I certify that the attached Act  
originated in the

HOUSE as Bill No. 1288

\_\_\_\_\_  
Chief Clerk  
\_\_\_\_\_

\_\_\_\_\_  
Speaker of the House

Attest:

\_\_\_\_\_  
Chief Clerk

\_\_\_\_\_  
President of the Senate

Attest:

\_\_\_\_\_  
Secretary of the Senate

House Bill No. 1288

File No. \_\_\_\_\_

Chapter No. \_\_\_\_\_

\_\_\_\_\_  
Received at this Executive Office  
this \_\_\_\_\_ day of \_\_\_\_\_ ,

20\_\_\_\_ at \_\_\_\_\_ M.

By \_\_\_\_\_  
for the Governor  
\_\_\_\_\_

The attached Act is hereby  
approved this \_\_\_\_\_ day of  
\_\_\_\_\_, A.D., 20\_\_\_\_

\_\_\_\_\_  
Governor

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

Filed \_\_\_\_\_, 20\_\_\_\_  
at \_\_\_\_\_ o'clock \_\_\_\_ M.

\_\_\_\_\_  
Secretary of State

By \_\_\_\_\_  
Asst. Secretary of State