

State of South Dakota

NINETY-FIRST SESSION
LEGISLATIVE ASSEMBLY, 2016

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HOUSE ENGROSSED NO. **HB 1039** - 01/25/2016

Introduced by: The Committee on State Affairs at the request of the Department of Labor and Regulation

1 FOR AN ACT ENTITLED, An Act to revise various trust and trust company provisions and to
2 establish and regulate South Dakota special spousal trusts.

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

4 Section 1. That § 51A-6A-1 be amended to read:

5 51A-6A-1. Terms used in this chapter mean:

- 6 (1) "Articles," in the case of a corporation, articles of incorporation; in the case of a
7 limited liability company, articles of organization;
- 8 (2) "Board member," in the case of a corporation, a director; in the case of a limited
9 liability company, a member of the board of managers if manager-managed or board
10 of members if member-managed;
- 11 (3) "Client," an individual, corporation, association, or other legal entity receiving or
12 benefitting from fiduciary services provided by a trust company or bank;
- 13 (4) "Commission," the State Banking Commission;
- 14 (5) "Control," the power, directly or indirectly, to direct the management or policies of
15 a trust company or to vote twenty-five percent or more of any class of voting shares



- 1 of a trust company;
- 2 (6) "Director," the director of the Division of Banking;
- 3 (7) "Fiduciary for hire," acting as an administrator, conservator, custodian, executor,
4 guardian, personal representative, or trustee, for any person, trust, or estate for
5 compensation or gain or in anticipation of compensation or gain;
- 6 (8) "Financial institution," any bank, national banking association, savings and loan
7 association, or savings bank which has its principal place of business in this state but
8 which does not have trust powers, or which has trust powers, but does not exercise
9 those trust powers;
- 10 (9) "Governing board," in the case of a corporation, the board of directors; in the case of
11 a limited liability company, the board of managers if manager-managed or board of
12 members if member-managed;
- 13 ~~(10) "Originating trustee," any trust company, bank, national banking association, savings
14 and loan association, or savings bank which has trust powers and its principal place
15 of business in this state and which places or transfers any fiduciary responsibility to
16 a contracting trustee in the manner provided in this chapter;~~
- 17 ~~—(10A)~~ "Out-of-state trust institution," a nondepository corporation, limited liability
18 company, or other similar entity chartered or licensed by the banking regulatory
19 agency of a state, territory, or district, other than South Dakota, to engage in the trust
20 company business in that state, territory, or district under the primary supervision of
21 such regulator;
- 22 (11) "Owner," in the case of a corporation, a common stockholder; in the case of a limited
23 liability company, a person who owns ownership units;
- 24 (12) "Person," an individual or a corporation, partnership, trust, association, joint venture,

1 pool, syndicate, sole proprietorship, or any other form of an entity;

2 (12A) "Public trust company," a trust company that engages in trust company business with
3 the general public by advertising, solicitation, or other means, or a trust company that
4 engages in trust company business but does not fall within the definition of a private
5 trust company established by the commission through rules promulgated pursuant to
6 chapter 1-26. The commission shall consider the size, number of clients served and
7 the family and other relationships among the clients served, complexity, and related
8 safety and soundness issues as it establishes in rule a definition for the term private
9 trust company;

10 (13) "Trust company," a nondepository trust company incorporated or organized under the
11 laws of this state engaged in the trust company business, and any national bank which
12 has its main office in this state, and which has as its sole purpose the conduct of trust
13 business;

14 (14) "Trust company business," engaging in, or representing or offering to engage in, the
15 business of acting as a fiduciary for hire, except that no accountant, attorney, credit
16 union, insurance broker, insurance company, investment advisor, real estate broker
17 or sales agent, savings and loan association, savings bank, securities broker or dealer,
18 real estate title insurance company, or real estate escrow company may be deemed
19 to be engaged in a trust company business with respect to fiduciary services
20 customarily performed by them for compensation as a traditional incident to their
21 regular business activities. Trust company business as defined in this chapter does not
22 constitute banking as defined in subdivision 51A-1-2(4);

23 (15) "Trust service office," any office, agency, or other place of business at which the
24 powers granted to trust companies are exercised either by a trust company other than

1 the place of business specified in a trust company's certificate of authority or within
2 this state by an out-of-state trust institution.

3 Section 2. That § 51A-6A-2 be amended to read:

4 51A-6A-2. For the purposes of this chapter, confidential information includes the names of
5 stockholders or owners, names and addresses of the members of a private trust company's
6 governing board, ownership information, capital contributions, addresses, business affiliations,
7 state and commission findings through any examination or inquiry of any kind, and any
8 information required to be reported or filed with the director or the commission, and any
9 information or agreement relating to any merger, consolidation, or transfer.

10 Section 3. That § 51A-6A-7 be amended to read:

11 51A-6A-7. Any three or more persons may organize a public trust company and make and
12 file articles as provided by the laws of this state. Any one or more persons may organize a
13 private trust company and make and file articles as provided by the laws of this state. No trust
14 company may be organized or incorporated to engage in business as such until the articles have
15 been submitted and approved in accordance with § 51A-6A-4. The name selected for the trust
16 company may not be the name of any other trust company doing business in the state, and the
17 director shall accept or reject the name. However, the approval of a trust company name by the
18 director may not supersede any person's rights pursuant to state or federal trademark law. The
19 articles, in addition to any other information required by law, shall state:

- 20 (1) That the corporation or limited liability company is formed for the purpose of
21 engaging in the trust company business; and
- 22 (2) The period for which such corporation or limited liability company is organized,
23 which may be perpetual.

24 The articles may contain any other provisions as are consistent with law. The articles shall

1 be subscribed by one or more of the organizers of the proposed trust company and shall be
2 acknowledged by them. The full amount of the capital required by § 51A-6A-19 shall be
3 subscribed before the articles are filed.

4 Section 4. That § 51A-6A-11.1 be amended to read:

5 51A-6A-11.1. A public trust company shall:

- 6 (1) Maintain office space in South Dakota for trust company business and for the storage
7 of, and access to, trust company records required by § 51A-6A-30;
- 8 (2) Hold no less than two quarterly governing board meetings with a majority physically
9 present in South Dakota ~~annually~~ each calendar year;
- 10 (3) Employ, engage, or contract with at least one trust officer or key employee to provide
11 services for the trust company in South Dakota related to the powers of the company
12 in § 51A-6A-29 and to facilitate the examinations required by § 51A-6A-31; and
- 13 (4) Perform trust administration in South Dakota.

14 ~~Each public trust company chartered in South Dakota prior to July 1, 2012, shall meet the~~
15 ~~requirements of this section no later than July 1, 2015, unless the director grants an extension~~
16 ~~of up to twenty-four months upon a showing of good faith effort. A public trust company~~
17 ~~seeking an extension of time shall include in its application to the director the reasons for any~~
18 ~~delay and a detailed time line for expected compliance with this section.~~

19 The commission may promulgate rules, pursuant to chapter 1-26, to establish additional
20 guidelines regarding what constitutes trust administration in South Dakota for purposes of this
21 section.

22 Section 5. That chapter 51A-6A be amended by adding a NEW SECTION to read:

23 For purposes of § 51A-6A-11.1, office space in South Dakota for each public trust company
24 shall:

- 1 (1) Be in premises distinct and divided from the office space of any other entity;
- 2 (2) Have the name, charter, and certificate of authority of the trust company prominently
3 displayed;
- 4 (3) Have access to premises in or adjacent to the office space sufficient to facilitate
5 onsite examinations by the division;
- 6 (4) To the extent the trust company maintains hard copies of any documents required to
7 be maintained pursuant to § 51A-6A-30, have a secure fireproof file cabinet that
8 contains all such hard copies; and
- 9 (5) To the extent the trust company maintains any record electronically, have a secure
10 computer terminal or other secure electronic device that provides access to such
11 records, including account information, as necessary to facilitate an efficient and
12 effective examination.

13 For public trust companies chartered in South Dakota prior to July 1, 2016, the division shall
14 determine full compliance with the provisions of this section at the first regular examination
15 after June 30, 2018.

16 Section 6. That chapter 51A-6A be amended by adding a NEW SECTION to read:

17 Upon application by a trust company, the director may approve office space that does not
18 meet the requirements of section 6 of this Act if the director determines the nature and degree
19 of risks presented by the trust company are low based upon a review of the size, nature, and
20 number of accounts administered by the trust company, the structure and business plan of the
21 trust company approved by the division, and the number of employees or persons performing
22 services for the trust company in South Dakota.

23 If the size, risk profile, or rate of growth of a trust company changes, or if a trust company's
24 office space is insufficient to facilitate onsite examinations by the division, the director may

1 impose additional office space requirements.

2 Section 7. That § 51A-6A-15 be amended to read:

3 51A-6A-15. The governing board shall hold at least four regular meetings each year, at least
4 one of which shall be held during each calendar quarter. Unless otherwise provided in the trust
5 company's organizational documents, the governing board or an authorized committee may
6 conduct, or permit any member to participate in, a regular or special meeting through the use
7 of any means of communication by which all members participating may simultaneously hear
8 each other during the meeting. A member participating in a meeting by this means is considered
9 present in person at the meeting. The governing board or an auditor selected by them shall make
10 a thorough examination of the books, records, funds, and securities held by the trust company
11 at each of the quarterly meetings. The result of the examination shall be recorded in detail. If
12 the governing board selects an auditor, the auditor's findings shall be reported directly to the
13 governing board. In lieu of the required four quarterly examinations, the governing board may
14 accept one annual audit by a certified public accountant or an independent auditor approved by
15 the director.

16 The provisions of this section do not alter, amend, or change the requirement of a public
17 trust company to hold no less than two quarterly governing board meetings with a majority
18 physically present in South Dakota each calendar year pursuant to § 51A-6A-11.1.

19 Section 8. That § 51A-6A-58 be amended to read:

20 51A-6A-58. After first applying for and obtaining the approval of the director, one or more
21 trust service offices may be established and operated by a trust company incorporated under the
22 laws of this state or by an out-of-state trust institution, if and to the extent that the state,
23 territory, or district in which the out-of-state trust institution is chartered or licensed to engage
24 in a trust company business grants authority for a trust company organized and doing business

1 under the laws of this state to establish an office in that state, territory, or district. An application
2 to establish and operate a trust service office or to relocate an existing trust service office shall
3 be submitted and approved in the manner set forth in § 51A-6A-4.

4 A trust company may establish a trust service office in another state, territory, or district and
5 may conduct any activities at that office that are permissible for a trust company under the laws
6 of that state, territory, or district subject to the laws of this state and subject to the rules, orders,
7 or declaratory rules of the commission or the director.

8 The provisions of this section do not apply to a private trust company unless the governing
9 board decides to establish a trust service office in another state, territory, or district.

10 Section 9. That § 55-1-12 be amended to read:

11 55-1-12. The person whose confidence creates a trust is called the trustor; the person in
12 whom the confidence is reposed is called the trustee; and the person for whose benefit the trust
13 is created is called the beneficiary. As used in this title, except as specifically provided in
14 chapters 55-13 and 55-13A, the term, beneficiary, means a person that has a present or future
15 beneficial interest in a trust, vested or contingent. A person is not a beneficiary solely by reason
16 of holding a power of appointment or by reason of the existence or exercise of a discretionary
17 power described in § 55-1-36.1 with respect to the person. As used in this title, except as
18 provided in § 55-1-26, the term, power of appointment, means a power, including a withdrawal
19 power as defined in § 55-1-24.2, to direct the disposition of trust property, but does not include
20 the authority of a trustee to make a distribution to a beneficiary. A power of appointment is held
21 by the person to whom the power has been given and once granted to a person, is not capable
22 of appropriation or of manual delivery. A power of appointment is a general power of
23 appointment if it is exercisable in favor of the person holding the power, the person's estate, the
24 person's creditors, or the creditors of the person's estate, whether or not the power is also

1 exercisable in favor of others. A power of appointment is a nongeneral power of appointment
2 if it is not a general power of appointment. As used in this ~~section~~ chapter, the term, person, has
3 the meaning set forth in § 55-4-1.

4 Section 10. That § 55-1-24 be amended to read:

5 55-1-24. Terms used in §§ 55-1-24 to 55-1-45, inclusive, mean:

6 (1) "Beneficial interest," is limited to mean a distribution interest or a remainder interest.

7 A beneficial interest specifically excludes a power of appointment or a power
8 reserved by the settlor;

9 (2) "Distribution beneficiary," a beneficiary who is an eligible distributee or permissible
10 distributee of trust income or principal;

11 (3) "Distribution interest," a distribution interest held by a distribution beneficiary. A
12 distribution interest may be a current distribution interest or a future distribution
13 interest. A distribution interest may be classified as a mandatory interest, a support
14 interest, or a discretionary interest;

15 (4) "Power of appointment," ~~an inter-vivos or testamentary power to direct the~~
16 ~~disposition of trust property, other than a distribution decision by a trustee to a~~
17 ~~beneficiary. Powers of appointment are held by a person to whom a power has been~~
18 ~~given, not the settlor~~ as defined in § 55-1-12;

19 (5) "Reach," with respect to a distribution interest or power, to subject the distribution
20 interest or power to a judgment, decree, garnishment, attachment, execution, levy,
21 creditor's bill or other legal, equitable, or administrative process, relief, or control of
22 any court, tribunal, agency, or other entity as provided by law;

23 (6) "Remainder interest," an interest where a trust beneficiary receives the property
24 outright at some time during the future;

1 (7) "Reserved power," a power held by the settlor.

2 Section 11. That § 55-1-24.2 be amended to read:

3 55-1-24.2. A withdrawal power allows a ~~beneficiary person~~ a right to withdraw all or some
4 part of the trust property, whether from income or principal. The holder of a ~~power of~~
5 withdrawal power is not deemed to be the settlor of the trust by failing to exercise a withdrawal
6 power or letting a withdrawal power lapse.

7 Section 12. That § 55-1-26 be amended to read:

8 55-1-26. Regardless of whether or not a trust contains a spendthrift provision:

9 (1) No beneficial interest, power of appointment, or reserved power in a trust may be
10 judicially foreclosed;

11 (2) No creditor may reach a power of appointment or a remainder interest at the trust
12 level. The creditor shall wait until the funds are distributed before the creditor may
13 reach the funds; and

14 (3) No power of appointment is a property or an interest in property.

15 For purposes of this section, power of appointment is held by a person to whom a power has
16 been given, not the settlor.

17 Section 13. That § 55-1-36.1 be amended to read:

18 55-1-36.1. Regardless of whether ~~the transfer a disposition~~ is a qualified transfer disposition
19 pursuant to chapter 55-16, ~~a settlor's creditors may not satisfy claims from either assets of the~~
20 ~~trust because of the existence of a discretionary power granted to the trustee by the terms of the~~
21 ~~trust instrument creating the trust, or any other provisions of law, to pay directly to the taxing~~
22 ~~authorities or to reimburse the settlor for any tax on trust income or principal which is payable~~
23 ~~by the settlor under the law imposing the tax. No reimbursement may be made to the settlor or~~
24 ~~direct tax payment made to a taxing authority for the settlor's benefit for any tax or trust income~~

1 ~~or principal which is payable by the trustor under the law imposing the tax~~ where a trustee is
 2 granted a discretionary power by the terms of the trust instrument, or any provision of law, to
 3 pay directly to any taxing authority, or to reimburse the person liable for, any tax imposed by
 4 a taxing authority on the person by reason of the person being treated as the owner of all or any
 5 portion of the trust property pursuant to §§ 671 to 678, inclusive, of the Internal Revenue Code
 6 of 1986, 26 U.S.C. §§ 671 to 678, inclusive, as of January 1, 2016, and the U.S. Treasury
 7 Regulations promulgated thereunder, as of January 1, 2016:

8 (1) A creditor of the person shall not satisfy a claim from the property of the trust solely
 9 because of the existence or exercise of the discretionary power; and

10 (2) The use of trust property to pay the tax shall not be deemed a distribution or transfer
 11 of trust property to the person for any purpose, and the amount paid from the trust to
 12 the taxing authority or to the person in reimbursement of the person's payment of the
 13 tax is not subject to the claims of a creditor of the person solely because of the
 14 existence or exercise of the discretionary power.

15 Section 14. That chapter 55-1 be amended by adding a NEW SECTION to read:

16 A trust is valid and enforceable even though it may not be funded at a given time, or from
 17 time to time, or does not initially have any res or corpus or otherwise contain any asset of any
 18 nature. A trust is valid and enforceable even though its res is neither ascertainable nor
 19 identifiable at the time of the trust's creation. No trustee, trust protector, or trust advisor has any
 20 duty prior to the time a trust has a res, corpus, or any asset.

21 Section 15. That § 55-1B-1 be amended to read:

22 55-1B-1. Terms used in this chapter mean:

23 (1) "Instrument," any revocable or irrevocable trust document created inter vivos or
 24 testamentary or any custodial account agreement;

- 1 (2) "Trust protector," any person whose appointment as protector is provided for in the
2 instrument. Such person may not be considered to be acting in a fiduciary capacity
3 except to the extent the governing instrument provides otherwise. However, a
4 protector shall be considered acting in a fiduciary capacity to the extent that the
5 person exercises the authority of an investment trust advisor or a distribution trust
6 advisor;
- 7 (3) "Trust advisor," either an investment trust advisor or a distribution trust advisor;
- 8 (4) "Fiduciary," a trustee or custodian under any instrument, an executor, administrator,
9 or personal representative of a decedent's estate, or any other party, including a trust
10 advisor, a trust protector, or a trust committee, who is acting in a fiduciary capacity
11 for any person, trust, or estate;
- 12 (5) "Excluded fiduciary," any fiduciary excluded from exercising certain powers under
13 the instrument which powers may be exercised by the grantor, custodial account
14 owner, trust advisor, trust protector, trust committee, or other persons designated in
15 the instrument;
- 16 (6) "Investment trust advisor," a fiduciary, given authority by the instrument to exercise
17 all or any portions of the powers and discretions set forth in § 55-1B-10;
- 18 (7) "Distribution trust advisor," a fiduciary, given authority by the instrument to exercise
19 all or any portions of the powers and discretions set forth in § 55-1B-11;
- 20 (8) "Custodial account," an account, established by a party with a bank as defined in 26
21 U.S.C. 408(n), as of January 1, 2006, or with another person approved by the Internal
22 Revenue Service as satisfying the requirements to be a nonbank trustee or a nonbank
23 passive trustee set forth in U.S. Treasury Regulations promulgated under 26 U.S.C.
24 408, that is governed by an instrument concerning the establishment or maintenance,

1 or both, of an individual retirement account, qualified retirement plan, Archer
2 medical savings account, health savings account, Coverdell education savings
3 account, or any similar retirement or savings vehicle permitted under the Internal
4 Revenue Code of 1986, as of January 1, 2006;

5 (9) "Custodial account owner," any party who establishes a custodial account; or has the
6 power to designate the beneficiaries or appoint the custodian of the custodial account;
7 or otherwise is the party who possesses the power to direct the investment,
8 disposition, or retention of any assets in the custodial account or name an authorized
9 designee to effect the same;

10 (10) "Family advisor," any person whose appointment is provided for in the governing
11 instrument or by court order who is authorized to consult with or advise a fiduciary
12 with regard to fiduciary or nonfiduciary matters and actions, and who may also be
13 authorized by the governing instrument or court order to otherwise act in a
14 nonfiduciary capacity.

15 Section 16. That § 55-1B-2 be amended to read:

16 55-1B-2. An excluded fiduciary is not liable, either individually or as a fiduciary, for any
17 of the following:

18 (1) Any loss that results from compliance with a direction of the trust advisor, custodial
19 account owner, or authorized designee of a custodial account owner, including any
20 loss from the trust advisor breaching fiduciary responsibilities or acting beyond the
21 trust advisor's scope of authority;

22 (2) Any loss that results from a failure to take any action proposed by an excluded
23 fiduciary that requires a prior authorization of the trust advisor if that excluded
24 fiduciary timely sought but failed to obtain that authorization;

1 (3) Any loss that results from any action or inaction, except for gross negligence or
2 willful misconduct, when an excluded fiduciary is required, pursuant to the trust
3 agreement or any other reason, to assume the role of trust advisor, trust protector,
4 investment trust advisor, or distribution trust advisor.

5 Any excluded fiduciary is also relieved from any obligation to review or evaluate any
6 direction from a distribution trust advisor or to perform investment or suitability reviews,
7 inquiries, or investigations or to make recommendations or evaluations with respect to any
8 investments to the extent the trust advisor, custodial account owner, or authorized designee of
9 a custodial account owner had authority to direct the acquisition, disposition, or retention of any
10 such investment. If the excluded fiduciary offers such communication to the trust advisor, trust
11 protector, investment trust advisor, or distribution trust advisor or any investment person
12 selected by the investment trust advisor, such action may not be deemed to constitute an
13 undertaking by the excluded fiduciary to monitor or otherwise participate in actions within the
14 scope of the advisor's authority or to constitute any duty to do so.

15 Any excluded fiduciary is also relieved of any duty to communicate with or warn or apprise
16 any beneficiary or third party concerning instances in which the excluded fiduciary would or
17 might have exercised the excluded fiduciary's own discretion in a manner different from the
18 manner directed by the trust advisor, trust protector, investment trust advisor, or distribution
19 trust advisor.

20 Absent contrary provisions in the governing instrument, the actions of the excluded fiduciary
21 (such as any communications with the trust advisor and others and carrying out, recording, and
22 reporting actions taken at the trust advisor's direction) pertaining to matters within the scope of
23 authority of the trust advisor, trust protector, investment trust advisor, or distribution trust
24 advisor shall be deemed to be administrative actions taken by the excluded fiduciary solely to

1 allow the excluded fiduciary to perform those duties assigned to the excluded fiduciary under
2 the governing instrument, and such administrative actions may not be deemed to constitute an
3 undertaking by the excluded fiduciary to monitor, participate, or otherwise take any fiduciary
4 responsibility for actions within the scope of authority of the trust advisor, trust protector,
5 investment trust advisor, or distribution trust advisor.

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

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

11 Section 17. That § 55-1B-6 be amended to read:

12 55-1B-6. The powers and discretions of a trust protector are as provided in the governing
13 instrument and may be exercised or not exercised, in the best interests of the trust, in the sole
14 and absolute discretion of the trust protector and are binding on all other persons. The powers
15 and discretion may include the following:

- 16 (1) Modify or amend the trust instrument to achieve favorable tax status or respond to
17 changes in the Internal Revenue Code, state law, or the rulings and regulations
18 thereunder;
- 19 (2) Increase or decrease the interests of any beneficiaries to the trust;
- 20 (3) Modify the terms of any power of appointment granted by the trust. However, a
21 modification or amendment may not grant a beneficial interest to any individual or
22 class of individuals not specifically provided for under the trust instrument;
- 23 (4) Remove and appoint a trustee, a fiduciary provided for in the governing trust
24 instrument, trust advisor, investment committee member, or distribution committee

- 1 member;
- 2 (5) Terminate the trust;
- 3 (6) Veto or direct trust distributions;
- 4 (7) Change situs or governing law of the trust, or both;
- 5 (8) Appoint a successor trust protector;
- 6 (9) Interpret terms of the trust instrument at the request of the trustee;
- 7 (10) Advise the trustee on matters concerning a beneficiary;
- 8 (11) Amend or modify the trust instrument to take advantage of laws governing restraints
- 9 on alienation, distribution of trust property, or the administration of the trust; ~~and~~
- 10 (12) Provide direction regarding notification of qualified beneficiaries pursuant to § 55-2-
- 11 13;
- 12 (13) Add to the trust an individual beneficiary or beneficiaries from a class of individuals
- 13 identified in the governing instrument;
- 14 (14) Add to the trust a charitable beneficiary or beneficiaries from a class of charities
- 15 identified in the trust instrument; and
- 16 (15) Provide other powers and discretions in the governing instrument.

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

19 Section 18. That chapter 55-1B be amended by adding a NEW SECTION to read:

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

- 24 (1) Remove and appoint a trustee, a fiduciary provided for in the governing trust

1 instrument, trust advisor, investment committee member, or distribution committee
2 member;

3 (2) Appoint a successor trust protector or a successor family advisor;

4 (3) Advise the trustee on matters concerning any beneficiary; receive trust accountings,
5 investment reports, and other information from the trustee or to which a beneficiary
6 is entitled; attend meetings whether in person or by any other means with the trustee,
7 investment trust advisors, distribution trust advisors, or other advisors whether in
8 person or by any means, electronic or otherwise; and to consult with a fiduciary
9 regarding both fiduciary and nonfiduciary matters or actions, all without any power
10 or discretion to take any action as a fiduciary; or

11 (4) Provide direction regarding notification of qualified beneficiaries pursuant to
12 § 55-2-13.

13 A family advisor is not required to exercise any powers or discretions under any
14 circumstances. Every action or inaction by a family advisor is a nonfiduciary action or inaction
15 and a family advisor is absolutely excluded from liability to any other person for an action or
16 inaction as a family advisor. A court may review a family advisor's exercise of the powers
17 described in subdivisions (1), (2), and (4) only if the family advisor acts dishonestly or with an
18 improper motive but may not review a family advisor's failure to exercise any powers. A
19 reasonableness standard may not be applied to any action or inaction of a family advisor. Other
20 than for the two circumstances listed above, a court has no jurisdiction to review a family
21 advisor's action or inaction.

22 A family advisor is entitled to compensation as provided in the governing instrument. If the
23 governing instrument does not provide for or establish compensation, a family advisor is entitled
24 to reasonable compensation for the exercise of the powers and discretions granted to the family

1 advisor pursuant to this chapter.

2 Section 19. That § 55-3-3 be amended to read:

3 55-3-3. When a trustee is appointed by a court or public officer as ~~such, such~~ a trustee, the
4 court or officer is the trustor. A court may otherwise establish or create a trust and may act as
5 the trustor of a trust.

6 Section 20. That § 55-3-7 be amended to read:

7 55-3-7. A trustee is a general agent for the trust and the trust property. ~~His~~ The trustee's
8 authority is ~~such as~~ the authority that is conferred upon ~~him~~ the trustee by the declaration of trust
9 and by this chapter and none other. ~~His~~ The trustee's acts, within the scope of ~~his~~ the trustee's
10 authority, bind the trust and the trust property to the same extent as the acts of an agent bind ~~his~~
11 the agent's principal.

12 Section 21. That § 55-3-23 be amended to read:

13 55-3-23. In addition to the methods specified in §§ 55-3-24 to 55-3-27, inclusive, a trust
14 terminates if:

- 15 (1) The term of the trust expires;
- 16 (2) The trust purpose if is fulfilled;
- 17 (3) The trust purpose becomes unlawful or impossible to fulfill; or
- 18 (4) The trust is revoked.

19 Section 22. That § 55-3-28 be amended to read:

20 55-3-28. On petition by a trustee or beneficiary, the court may reform the terms of the trust,
21 based upon a showing by the preponderance of the evidence and without any preliminary
22 showing of an ambiguity, to conform to the trustor's intention if the failure to conform was due
23 to a mistake of fact or law and the trustor's intent can be established. The terms of the trust may
24 be construed or modified, in a manner that does not violate the trustor's probable intention, to

1 achieve the trustor's tax objectives.

2 Section 23. That § 55-3-48 be amended to read:

3 55-3-48. ~~Except as otherwise expressly provided by the terms of a governing instrument~~
4 ~~specifically addressing the governing law for trust administration or by court order~~ Unless the
5 governing instrument or a court order expressly prohibits the change of the law of another
6 jurisdiction to govern the administration of the trust, the laws of South Dakota shall govern the
7 administration of a trust while the trust is administered in South Dakota.

8 Section 24. That § 55-16-10 be amended to read:

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

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

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

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

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

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

23 (2) Becomes a creditor subsequent to the transfer into trust, and the action under § 55-
24 16-9 is brought within two years after the transfer is made;

1 (3) In any action described in § 55-16-9, the burden to prove the matter by clear and
2 convincing evidence is upon the creditor;

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

8 (5) The filing of a bill of sale or other transfer instrument which conveys personal
9 property to a trust which is governed by this chapter shall be filed in the applicable
10 public filing office determined as follows:

11 (a) If the transferor is a natural person and is a resident of this state, the personal
12 property transfer instrument shall be recorded in the county in this state where
13 the transferor maintains the transferor's principal residence; and

14 (b) In all other cases, the personal property transfer instrument shall be recorded
15 in the county in this state where the trustee of the trust maintains a principal
16 residence or principal place of business.

17 Section 25. That § 55-16-11 be amended to read:

18 55-16-11. A qualified disposition that is made by means of a disposition by a transferor who
19 is a trustee is deemed to have been made as of the time, whether before, on, or after July 1,
20 2005, the property that is the subject of the qualified disposition was originally transferred to
21 the transferor, or any predecessor trustee, making the qualified disposition in a form that meets
22 the requirements of subdivisions 55-16-2(2) and (3). Further, the provisions of this section apply
23 to determine the date the transfer is deemed to have been made, notwithstanding that the original
24 transfer was to a trust originally within or outside of the jurisdiction of South Dakota.

1 If property transferred to a spendthrift trust is conveyed to the settlor or to a beneficiary for
2 the purpose of obtaining a loan secured by a mortgage or deed of trust on the property and then
3 reconveyed to the trust within one hundred eighty days of recording the mortgage or deed of
4 trust, for purposes of subdivision 55-16-10(1), the transfer is disregarded and the reconveyance
5 relates back to the date the property was originally transferred to the trust. The mortgage or deed
6 of trust on the property is enforceable against the trust.

7 Section 26. That § 55-16-13 be amended to read:

8 55-16-13. Notwithstanding any other provision of law, no action of any kind, including an
9 action to enforce a judgment entered by a court or other body having adjudicative authority, may
10 be brought at law or in equity against the trustee, or advisor described in § 55-16-4, of a trust
11 that is the subject of a qualified disposition, or against any person involved in the counseling,
12 drafting, preparation, execution, or funding of a trust that is the subject of a qualified
13 disposition, if, as of the date such action is brought, an action by a creditor with respect to such
14 qualified disposition would be barred under §§ 55-16-9 to 55-16-12, inclusive. A court of this
15 state has exclusive jurisdiction over an action brought under a claim for relief that is based on
16 a transfer of property to a trust that is the subject of this section. A court of this state may award
17 attorneys' fees and costs to the prevailing party in such an action. In any action described in this
18 section, the burden to prove the matter by clear and convincing evidence is upon the creditor.

19 Section 27. That § 21-22-2 be amended to read:

20 21-22-2. This chapter applies to all trusts if any part of the trust estate has its situs within
21 this state or if the trustee or a beneficiary resides in this state, except as otherwise specifically
22 provided by statute or rule of court, the intent being to exclude therefrom such trusts as a
23 statutory assignment for the benefit of creditors, probate administrations, conservatorships, and
24 all other trusts as to which specific provision is made for court supervision. The provisions of

1 §§ 55-3-24 to ~~55-3-44~~ 55-3-48, inclusive, are applicable to actions or proceedings relating to
2 trusts supervised or administered under this chapter.

3 Section 28. That § 21-22-28 be amended to read:

4 21-22-28. The privacy of those who have established a court trust or other trust shall be
5 protected in any court proceeding concerning the trust ~~if the acting fiduciary, the trustor (if~~
6 ~~living), or any beneficiary so petition the court.~~ Upon the filing of such a any petition, the
7 instrument on which the trust is based, inventory, statement filed by any fiduciary, annual
8 verified report of a fiduciary, final report of a fiduciary, and all petitions relevant to trust
9 administration and all court orders thereon shall be sealed upon filing and may not be made a
10 part of the public record of the proceeding, but are available to the court, to the trustor, to any
11 fiduciary, to any beneficiary, to their attorneys, and to such other interested persons as the court
12 may order upon a showing of the need.

13 Section 29. That the code be amended by adding a NEW SECTION to read:

14 An arrangement is a South Dakota special spousal trust if one or both spouses in a marriage
15 transfer property to a trust, the trust expressly declares that some or all the property transferred
16 is South Dakota special spousal property as provided in this section to section 42, inclusive, of
17 this Act, and at least one trustee is a qualified person. A South Dakota special spousal trust is
18 enforceable without consideration. Both spouses or either spouse may be a trustee. The trust
19 must be signed by both spouses. The trust may be revocable or irrevocable.

20 For purposes of this section, a qualified person is any person who meets the requirements
21 of §§ 55-3-41 and 55-3-39, but without regard to whether that person is the transferor.

22 Section 30. That the code be amended by adding a NEW SECTION to read:

23 A South Dakota special spousal trust shall contain the following language in capital letters
24 at the beginning of the trust:

1 THE CONSEQUENCES OF THIS TRUST MAY BE VERY EXTENSIVE, INCLUDING
2 YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND
3 YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE COURSE OF YOUR
4 MARRIAGE, AT THE TIME OF A DIVORCE, AND AT THE DEATH OF YOU OR YOUR
5 SPOUSE. ACCORDINGLY, THIS TRUST AGREEMENT SHOULD ONLY BE SIGNED
6 AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS
7 TRUST AGREEMENT, YOU SHOULD SEEK INDEPENDENT LEGAL ADVICE.

8 Section 31. That the code be amended by adding a NEW SECTION to read:

9 Spouses may classify all or any of their property as special spousal property by transferring
10 property to a South Dakota special spousal trust established pursuant to sections 29 to 42,
11 inclusive, of this Act, and by expressly declaring in the trust that the property is community
12 property.

13 Section 32. That the code be amended by adding a NEW SECTION to read:

14 A South Dakota special spousal trust may not be amended or revoked unless the trust
15 agreement provides for amendment or revocation, or unless the trust agreement is amended or
16 revoked by a later South Dakota special spousal trust. To amend or revoke the trust, the later
17 South Dakota special spousal trust is not required to declare any property held by the trustee as
18 special spousal property. The amended trust or the revocation is enforceable without
19 consideration. However, notwithstanding the other provisions of sections 29 to 42, inclusive,
20 of this Act, unless the South Dakota special spousal trust expressly provides otherwise, at any
21 time after the death of the first spouse the surviving spouse may amend the South Dakota special
22 spousal trust with regard to the surviving spouse's property to be disposed of at the surviving
23 spouse's death. For purposes of this section, the term, surviving spouse's property, means the
24 property that consists of the surviving spouse's property that is not South Dakota special spousal

1 property and the surviving spouse's share of the special spousal property determined as of the
2 date of the first spouse's death.

3 Section 33. That the code be amended by adding a NEW SECTION to read:

4 For purposes of the application of § 1014(b)(6) of the Internal Revenue Code of 1986, 26
5 U.S.C. § 1014(b)(6), as of January 1, 2016, a South Dakota special spousal trust is considered
6 a trust established under the community property laws of South Dakota. For purposes of sections
7 29 to 42, inclusive, of this Act, the term, special spousal property, means community property
8 for those purposes. Community property as classified by a jurisdiction other than South Dakota
9 transferred to a South Dakota special spousal trust retains its character as community property
10 while in the trust. If the trust is revoked and property is transferred on revocation of the trust,
11 the community property as classified by a jurisdiction other than South Dakota retains its
12 character as community property to the extent otherwise provided by South Dakota law.

13 Section 34. That the code be amended by adding a NEW SECTION to read:

14 A transfer to a South Dakota special spousal trust may also be a qualified disposition in trust
15 if the transfer complies with the provisions of chapter 55-16.

16 Section 35. That the code be amended by adding a NEW SECTION to read:

17 In addition to other transfers of property to a South Dakota special spousal trust, property
18 is considered transferred to a South Dakota special spousal trust if the property is subject to a
19 nonprobate transfer on death under an insurance policy, contract of employment, bond,
20 mortgage, promissory note, certificated or uncertificated security, account agreement, custodial
21 agreement, deposit agreement, compensation plan, pension plan, individual retirement plan,
22 employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other
23 written instrument of a similar nature and the South Dakota special spousal trust is designated
24 as a beneficiary to receive the property under the transfer. The property is considered the

1 surviving spouse's property that is not South Dakota special spousal property.

2 Section 36. That the code be amended by adding a NEW SECTION to read:

3 The trustee of a South Dakota special spousal trust shall maintain records that identify which
4 property held by the trust is South Dakota special spousal property and which property held by
5 the trust is not South Dakota special spousal property.

6 Section 37. That the code be amended by adding a NEW SECTION to read:

7 Except as provided in sections 38 and 39 of this Act, in a South Dakota special spousal trust,
8 spouses may agree on:

- 9 (1) The rights and obligations in the property transferred to the trust, notwithstanding
10 when and where the property is acquired or located;
- 11 (2) The management and control of the property transferred to the trust;
- 12 (3) The disposition of the property transferred to the trust on dissolution, death, or the
13 occurrence or nonoccurrence of another event;
- 14 (4) The choice of law governing the interpretation of the trust; and
- 15 (5) Any other matter that affects the property transferred to the trust and does not violate
16 public policy or a statute imposing a criminal penalty.

17 Section 38. That the code be amended by adding a NEW SECTION to read:

18 Notwithstanding anything contained in section 37 of this Act to the contrary, a South Dakota
19 special spousal trust may not adversely affect the right of a child to support.

20 Section 39. That the code be amended by adding a NEW SECTION to read:

21 Notwithstanding anything contained in section 37 of this Act to the contrary:

- 22 (1) A provision of a revocable South Dakota special spousal property trust does not
23 adversely affect the interest of a creditor unless the creditor has actual knowledge of
24 the trust when the obligation to the creditor is incurred. The interest of a creditor in

1 an irrevocable South Dakota special spousal property trust may be subject to the
2 rights and liabilities of a creditor with respect to transfers under chapter 55-16 as
3 provided in section 34 of this Act;

4 (2) A spouse shall act in good faith with respect to the other spouse in matters involving
5 South Dakota special spousal property. The obligation under and effect of this section
6 may not be varied by a South Dakota special spousal property trust.

7 Section 40. That the code be amended by adding a NEW SECTION to read:

8 Notwithstanding anything contained in section 37 of this Act to the contrary:

9 (1) Notice of the existence of a South Dakota special spousal property trust, a marriage,
10 or the termination of a marriage does not affect the status of a purchaser as a bona
11 fide purchaser;

12 (2) Special spousal property purchased by a bona fide purchaser from a spouse having
13 the right to manage and control the property is acquired free of any claim of the other
14 spouse. The effect of this subsection may not be varied by a South Dakota special
15 spousal property trust.

16 Section 41. That the code be amended by adding a NEW SECTION to read:

17 For purposes of section 40 of this Act, the term, bona fide purchaser, means a purchaser of
18 property for value who has not knowingly been a party to fraud or illegality affecting the interest
19 of the spouses or other parties to the transaction, does not have notice of an adverse claim by
20 a spouse, and has acted in the transaction in good faith.

21 For purposes of this section, the term, purchaser, means a person who acquires property by
22 sale, lease, discount, negotiation, mortgage, pledge, or lien, or otherwise deals with property in
23 a voluntary transaction other than making a gift.

24 A purchaser gives value for property if the property is acquired:

- 1 (1) In return for a binding commitment to extend credit;
- 2 (2) As security for or in total or partial satisfaction of a preexisting claim;
- 3 (3) By accepting delivery under a preexisting contract for purchase; or
- 4 (4) In return for other consideration sufficient to support a contract.

5 Section 42. That the code be amended by adding a NEW SECTION to read:

6 A South Dakota special spousal trust executed during marriage is not enforceable if the
7 spouse against whom enforcement is sought proves that:

- 8 (1) The trust was unconscionable when made;
- 9 (2) The spouse against whom enforcement is sought did not execute the South Dakota
10 special spousal trust agreement voluntarily; or
- 11 (3) Before execution of the South Dakota special spousal trust agreement, the spouse
12 against whom enforcement is sought:
 - 13 (a) Was not given a fair and reasonable disclosure of the property and financial
14 obligations of the other spouse;
 - 15 (b) Did not voluntarily sign a written waiver expressly waiving right to disclosure
16 of the property and financial obligations of the other spouse beyond the
17 disclosure provided; and
 - 18 (c) Did not have notice of the property or financial obligations of the other
19 spouse.

20 Whether a South Dakota special spousal trust is unconscionable is determined by a court as
21 a matter of law.