

# State of South Dakota

EIGHTY-FOURTH SESSION  
LEGISLATIVE ASSEMBLY, 2009

481Q0169

## SENATE BILL NO. 127

Introduced by: Senator Knudson and Representative Cutler

1 FOR AN ACT ENTITLED, An Act to revise certain provisions relating to trust administration.

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

3 Section 1. That § 51A-6A-13 be amended to read as follows:

4 51A-6A-13. The business of any trust company shall be managed and controlled by its  
5 governing board and includes the authority to provide for bonus payments, in addition to  
6 ordinary compensation, for any of its officers and employees. The governing board shall consist  
7 of not less than three nor more than twelve members, all of whom shall be elected by the owners  
8 of the trust company at any regular annual meeting ~~that is held during the first one hundred~~  
9 ~~twenty days of each calendar year.~~ If the number of board members elected is less than twelve,  
10 the number of board members may be increased so long as the total number does not exceed  
11 twelve. If the number is increased, the first additional board members may be elected at a special  
12 meeting of the owners. The board members shall be elected and any vacancies filled in the  
13 manner as provided in the provisions regarding general corporations or limited liability  
14 companies, as applicable. At all times one of the directors shall be a resident of this state and  
15 at least two-thirds of the directors shall be citizens of the United States. Any board member of



1 any trust company who becomes indebted to the trust company on any judgment ~~shall forfeit~~  
2 forfeits the position of board member, and the vacancy shall be filled as provided by law.

3 Section 2. That § 55-1-24 be amended to read as follows:

4 55-1-24. Terms used in §§ 55-1-24 to 55-1-43, inclusive, mean:

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

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

8 (2) "Beneficiary," a person that has a present or future beneficial interest in a trust,  
9 vested or contingent. The holder of a power of appointment is not a beneficiary;

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

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

16 (5) "Power of appointment," an inter-vivos or testamentary power to direct the  
17 disposition of trust property, other than a distribution decision by a trustee to a  
18 beneficiary. Powers of appointment are held by a person to whom a power has been  
19 given, not the settlor;

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

24 (7) "Remainder interest," an interest where a trust beneficiary will receive the property

1           outright at some time during the future;

2       ~~(7)~~(8) "Reserved power," a power held by the settlor.

3       Section 3. That § 55-1-26 be amended to read as follows:

4       55-1-26. Regardless of whether or not a trust contains a spendthrift provision:

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

7       (2)   No creditor may ~~attach~~ reach a power of appointment, ~~discretionary interest~~ or a  
8           remainder interest; at the trust level. The creditor ~~must~~ shall wait until the funds are  
9           distributed before the creditor may ~~attach~~ reach the funds; and

10      (3)   No power of appointment is a property interest.

11      Section 4. That § 55-1-28 be amended to read as follows:

12      55-1-28. No creditor may ~~attach, exercise, or otherwise~~ reach an interest of a beneficiary or  
13      any other person who holds an unconditional or conditional removal or replacement power over  
14      a trustee. This power is personal to the beneficiary and may not be exercised by the beneficiary's  
15      creditors. No court can direct a beneficiary to exercise the power.

16      No creditor may reach an interest of a beneficiary who is also a trustee or a co-trustee, or  
17      otherwise compel a distribution because the beneficiary is then serving as a trustee or co-trustee.

18      No court may foreclose against such an interest.

19      Section 5. That § 55-1-31 be amended to read as follows:

20      55-1-31. Unless otherwise provided in the trust, if the settlor's spouse is named as  
21      beneficiary, the settlor's spouse is still living, and the trust is classified as a support trust, then  
22      the trustee shall consider the beneficiary's resources, including the settlor's obligation of support,  
23      prior to making a distribution. In all other cases, unless otherwise provide in the trust, the trustee  
24      need not consider the beneficiary's resources in determining whether a distribution should be

1 made.

2 Section 6. That § 55-1-32 be amended to read as follows:

3 55-1-32. In the event that a party challenges a settlor or a beneficiary's influence over a trust,  
4 none of the following factors, alone or in combination, may be considered dominion and control  
5 over a trust:

6 (1) ~~A~~ The settlor or a beneficiary serving as a trustee or a co-trustee as described in § 55-  
7 1-28;

8 (2) The settlor or a beneficiary holds an unrestricted power to remove or replace a  
9 trustee;

10 (3) The settlor or a beneficiary is a trust administrator, a general partner of a partnership,  
11 a manager of a limited liability company, an officer of a corporation, or any other  
12 managerial function of any other type of entity, and part or all of the trust property  
13 consists of an interest in the entity;

14 (4) A person related by blood or adoption to ~~a~~ the settlor or a beneficiary is appointed as  
15 trustee;

16 (5) ~~A~~ The settlor's or a beneficiary's agent, accountant, attorney, financial advisor, or  
17 friend is appointed as trustee; ~~or~~

18 (6) A business associate is appointed as a trustee;

19 (7) A beneficiary holds any power of appointment over any or all of the trust property;

20 (8) The settlor holds a power to substitute property of equivalent value;

21 (9) The trustee may loan trust property to the settlor for less than a full and adequate rate  
22 of interest or without adequate security;

23 (10) The distribution language provides any discretion; or

24 (11) The trust has only one beneficiary eligible for current distributions.

1 Section 7. That § 55-1-38 be amended to read as follows:

2 55-1-38. A distribution interest can be classified in three ways:

- 3 (1) As a mandatory interest, which is a distribution interest ~~where the trustee has no~~  
4 ~~discretion in determining whether the distribution shall be made, or the amount or~~  
5 ~~timing, in which the timing of any distribution must occur within one year from the~~  
6 ~~date the right to the distribution arises, and the trustee has no discretion in~~  
7 ~~determining whether a distribution shall be made or the amount~~ of such distribution;  
8 (2) As a support interest, which is not a mandatory interest but still contains mandatory  
9 language such as "shall make distributions" and is coupled with a standard capable  
10 of judicial interpretation; or  
11 (3) As a discretionary interest, which is any interest where a trustee has any discretion  
12 to make or withhold a distribution.

13 A discretionary interest ~~includes~~ may be evidenced by permissive language such as "may  
14 make distributions" or it may ~~include~~ be evidenced by mandatory distribution language that is  
15 negated by the ~~uncontrolled~~ discretionary language of the ~~trustee trust~~, such as "the trustee shall  
16 make distributions in the trustee's sole and absolute discretion." ~~A support~~ An interest that  
17 includes mandatory distribution language such as "shall" but is subsequently qualified by  
18 discretionary distribution language shall be classified as a discretionary interest and not as a  
19 support or a mandatory interest. A discretionary interest is any interest that is not a mandatory  
20 or a support interest.

21 Section 8. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as  
22 follows:

23 If a trust instrument containing the distribution language specifically provides that the  
24 trustee exercise discretion in a reasonable manner with regard to a discretionary interest, then

1 notwithstanding any other provision of §§ 55-1-38 to 55-1-43, inclusive, the distribution interest  
 2 shall be classified as a support interest. A beneficiary's right to a distribution as well as a  
 3 creditor's right regarding a beneficiary's support interest is governed by § 55-1-42.

4 Section 9. That § 55-1-41 be amended to read as follows:

5 55-1-41. If the trust contains a spendthrift provision, no creditor may ~~attach~~ reach present  
 6 or future mandatory distributions from the trust at the trust level. Moreover, no court may order  
 7 a trustee to distribute past due mandatory distributions directly to a creditor.

8 Section 10. That § 55-1-42 be amended to read as follows:

9 55-1-42. ~~The following provisions apply only to support interests:~~

10 ~~—(1)—~~ A beneficiary of a mandatory or a support interest has an enforceable right to a  
 11 distribution pursuant to a court's review. A trustee's distribution decision may be  
 12 reviewed for unreasonableness, dishonesty, improper motivation, or failure, if under  
 13 a duty to do so, to act. This does not, however, raise the beneficiary's support interest  
 14 to the level of a property interest;

15 ~~—(2)—~~ .

16 If the trust contains a spendthrift provision, notwithstanding the beneficiary's right to force  
 17 a distribution ~~of a~~ with regard to a mandatory or support interest, no creditor may force a  
 18 distribution ~~of a~~ with regard to a mandatory or support interest. No creditor may ~~attach~~ reach  
 19 present or future support distributions ~~of a~~ with regard to a mandatory or support interest ~~at the~~  
 20 ~~trust level.~~

21 ~~With respect to a mandatory interest, if a trust contains a spendthrift provision,~~  
 22 ~~notwithstanding the beneficiary's right to force a distribution of a mandatory interest, no creditor~~  
 23 ~~may force a distribution of a mandatory interest. No creditor may attach present or future~~  
 24 ~~mandatory distributions of a mandatory interest at the trust level.~~

1       Regardless of whether a beneficiary has any outstanding creditor, a trustee of a mandatory  
2 or a support interest may directly pay any expense on behalf of such beneficiary. No trustee is  
3 liable to any creditor for paying the expenses of a beneficiary ~~who holds~~ of a mandatory or  
4 support interest.

5       Section 11. That § 55-1-43 be amended to read as follows:

6       55-1-43. The following provisions apply only to discretionary interests:

7       (1)   A discretionary interest is neither a property interest nor an enforceable right. It is a  
8       mere expectancy;

9       (2)   No creditor may force a distribution with regard to a discretionary interest. No  
10       creditor may require the trustee to exercise the trustee's discretion to make a  
11       distribution, ~~or cause a court to foreclose~~ with regard to a discretionary interest;

12       (3)   A court may review a trustee's distribution discretion only if the trustee:

13           (a)   Acts dishonestly;

14           (b)   Acts with an improper motive; or

15           (c)   Fails, if under a duty to do so, to act.

16       ~~Words such as sole, absolute, uncontrolled, or unfettered discretion dispense with the trustee~~  
17       ~~acting reasonably. A reasonableness standard may not be applied to the exercise of discretion~~  
18       by the trustee with regard to a discretionary interest. Other than for the three circumstances  
19       listed in this subdivision, a court has no jurisdiction to review the trustee's discretion or to force  
20       a distribution.

21       Absent express language to the contrary, in the event that the distribution language in a  
22 discretionary interest permits unequal distributions between beneficiaries or distributions to the  
23 exclusion of other beneficiaries, the trustee may distribute all of the accumulated, accrued, or  
24 undistributed income and principal to one beneficiary in the trustee's discretion.

1       Regardless of whether a beneficiary has any outstanding creditor, a trustee of a discretionary  
2 interest may directly pay any expense on behalf of such beneficiary and may exhaust the income  
3 and principal of the trust for the benefit of such beneficiary. No trustee is liable to any creditor  
4 for paying the expenses of a beneficiary ~~who holds~~ of a discretionary interest.

5       Section 12. That § 55-1A-9.1 be amended to read as follows:

6       55-1A-9.1. (a) As used in this section:

- 7       (1) "Investment" ~~shall mean~~ means any security as defined in § 2(a)(1) of the Securities  
8 Act of 1933, any contract of sale of a commodity for future delivery within the  
9 meaning of § 2(i) of the Commodity Exchange Act, or any other asset permitted for  
10 trustee accounts pursuant to the terms of this title or by the terms of the governing  
11 instrument, including by way of illustration and not limitation, individual portfolios  
12 of investment holdings, shares or interests in a private investment fund (including a  
13 private investment fund organized as a limited partnership, limited liability company,  
14 trust or other form, a statutory or common law business trust, or a real estate  
15 investment trust), joint venture or other general or limited partnership, or an open-end  
16 or closed-end management type investment company or investment trust registered,  
17 unregistered, or exempt from registration under the Investment Company Act of  
18 1940;
- 19       (2) "Affiliate" means any corporation or other entity that directly or indirectly through  
20 one or more intermediaries controls, is controlled by or is under common control  
21 with the trustee;
- 22       (3) "Affiliated Investment" means an investment for which the trustee or an affiliate of  
23 the trustee acts as investment adviser, sponsor, administrator, distributor, placement  
24 agent, underwriter, broker, custodian, transfer agent, registrar or in any other capacity



1 for which it receives or has received a fee or commission from such investment or  
2 an investment acquired or disposed of in a transaction for which the trustee or an  
3 affiliate of the trustee receives or has received a fee or commission;

4 (4) "Fee or commission" means compensation paid to a trustee or an affiliate thereof on  
5 account of its services to or on behalf of an investment, including by way of  
6 illustration and not limitation, advisory fees, management fees, brokerage fees,  
7 service fees, special performance fees, profit allocations, and expense  
8 reimbursements.

9 (b) In the absence of an express prohibition in the trust instrument, a trustee may purchase,  
10 sell, hold or otherwise deal with an affiliate or an interest in an affiliated investment and, upon  
11 satisfaction of the conditions stated in subsection (c) of this section, such trustee may receive  
12 trustee compensation from such account at the same rate as the trustee would otherwise be  
13 entitled to be compensated.

14 (c) A trustee seeking compensation pursuant to subsection (b) of this section shall disclose  
15 to all qualified beneficiaries, as defined in § 55-2-13, all fees, commissions, compensation or  
16 other benefits and profits paid or to be paid by the account, or received or to be received by an  
17 affiliate arising from such affiliated investment. The disclosure required under this subsection  
18 may be given either in a copy of the prospectus or any other disclosure document prepared for  
19 the affiliated investment under federal or state securities laws or in a written summary that  
20 includes all fees, commissions, compensation or other benefits and profits received or to be  
21 received by the trustee or any affiliate of the trustee and an explanation of the manner in which  
22 such fees, commissions, compensation or other benefits and profits are calculated (either as a  
23 percentage of the assets invested or by some other method). Such disclosure shall be made at  
24 least annually unless there has been no increase in the rate at which such fees or commissions

1 are calculated since the most recent disclosure.

2 (d) A trustee that has complied with subsection (c) of this section (whether by making the  
3 applicable disclosure or by relying on the terms of a governing instrument or court order) shall  
4 have full authority to administer an affiliated investment (including the authority to vote proxies  
5 thereon) without regard to the affiliation between the trustee and the investment.

6 Section 13. That § 55-1B-2 be amended to read as follows:

7 55-1B-2. An excluded fiduciary is not liable, either individually or as a fiduciary, for ~~either~~  
8 any of the following:

- 9 (1) Any loss that results from compliance with a direction of the trust advisor, custodial  
10 account owner, or authorized designee of a custodial account owner;
- 11 (2) Any loss that results from a failure to take any action proposed by an excluded  
12 fiduciary that requires a prior authorization of the trust advisor if that excluded  
13 fiduciary timely sought but failed to obtain that authorization;
- 14 (3) Any loss that results from any action or inaction, except for gross negligence or  
15 willful misconduct, when an excluded fiduciary is required, pursuant to the trust  
16 agreement or any other reason, to assume the role of trust advisor, trust protector,  
17 investment trust advisor, or distribution trust advisor.

18 Any excluded fiduciary is also relieved from any obligation to perform investment or  
19 suitability reviews, inquiries, or investigations or to make recommendations or evaluations with  
20 respect to any investments to the extent the trust advisor, custodial account owner, or authorized  
21 designee of a custodial account owner had authority to direct the acquisition, disposition, or  
22 retention of any such investment.

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

1 Section 14. That § 55-1B-6 be amended to read as follows:

2 55-1B-6. The powers and discretions of a trust protector shall be as provided in the  
3 governing instrument and may be exercised or not exercised, in the best interests of the trust,  
4 in the sole and absolute discretion of the trust protector and ~~shall be~~ are binding on all other  
5 persons. Such powers and discretion may include the following:

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

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

3 Section 15. That § 55-1B-11 be amended to read as follows:

4 55-1B-11. The powers and discretions of a distribution trust advisor shall be provided in the  
5 trust instrument and may be exercised or not exercised, in the best interests of the trust, in the  
6 sole and absolute discretion of the distribution trust advisor and are binding on any other person  
7 and any other interested party, fiduciary, and excluded fiduciary. Unless the terms of the  
8 document provide otherwise, the distribution trust advisor shall direct the trustee with regard  
9 to all discretionary distributions to beneficiaries. The distribution trust advisor may also provide  
10 direction regarding notification of qualified beneficiaries pursuant to § 55-2-13.

11 Section 16. That § 55-2-13 be amended to read as follows:

12 55-2-13. For purposes of this section, the term, qualified beneficiary, means a beneficiary  
13 who is twenty-one years of age and who, on the date the beneficiary's qualification is  
14 determined:

- 15 (1) Is a distributee or permissible distributee of trust income or principal;  
16 (2) Would be a distributee or permissible distributee of trust income or principal if the  
17 interests of the distributees terminated on that date; or  
18 (3) Would be a distributee or permissible distributee of trust income or principal if the  
19 trust terminated on that date.

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

22 Except as otherwise provided by the terms of ~~the~~ an irrevocable trust or otherwise directed  
23 by the settlor ~~at any time~~, distribution advisor, or trust protector, the trustee shall, within sixty  
24 days after ~~the date the trustee of an irrevocable trust acquires knowledge of the creation of an~~

1 ~~irrevocable trust, or upon~~ has accepted trusteeship of the trust, or with sixty days after the date  
2 the trustee acquires knowledge that a formerly revocable trust has become irrevocable, ~~whether~~  
3 ~~by death of the settlor or otherwise, the trustee shall notify the qualified beneficiaries~~ notify the  
4 qualified beneficiaries of the trust's existence, ~~of the identity of the settlor or settlors,~~ and of the  
5 right of the beneficiary to request a copy of the trust instrument pertaining to the beneficiary's  
6 interest in the trust.

7 Subject to the previous provision, a trustee of an irrevocable trust:

8 (1) Upon request of a qualified beneficiary, shall promptly furnish to the qualified  
9 beneficiary a copy of the trust instrument;

10 (2) If notification of the trust has not been accomplished pursuant to this section within  
11 sixty days after accepting a trusteeship, shall notify the qualified beneficiaries of the  
12 acceptance and of the trustee's name, address, and telephone number;

13 (3) Shall promptly respond to a qualified beneficiary's request for information related to  
14 the administration of the trust, unless the request is unreasonable under the  
15 circumstances.

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

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

21 If a fiduciary is bound by a duty of confidentiality with respect to a trust or its assets, a  
22 fiduciary may require that any beneficiary who is eligible to receive information pursuant to this  
23 section be bound by the duty of confidentiality that binds the trustee before receiving such  
24 information from the trustee.

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

3 (1) The administration of the trust with respect to any specific duty or function being  
4 performed by the trust advisor, trust protector, or other fiduciary to the extent that the  
5 duty or function would normally be performed by the excluded fiduciary or to the  
6 extent that providing such information to the excluded fiduciary is reasonably  
7 necessary for the excluded fiduciary to perform its duties; and

8 (2) Any other material information that the excluded fiduciary would be required to  
9 disclose to the qualified beneficiaries under this section regardless of whether the  
10 terms of the trust relieve the excluded fiduciary from providing such information to  
11 qualified beneficiaries. Neither the performance nor the failure to perform of a trust  
12 advisor, trust protector, or other fiduciary designated by the terms of the trust as  
13 provided in this subdivision shall affect the limitation on the liability of the excluded  
14 fiduciary.

15 The provisions of this section are effective for trusts created after July 1, 2002, except as  
16 otherwise directed by the settlor, trust protector, or distribution trust advisor.

17 Section 17. That § 55-2-15 be amended to read as follows:

18 55-2-15. Unless the terms of the instrument expressly provide otherwise, a trustee who has  
19 discretionary authority, under the terms of a testamentary instrument or irrevocable inter vivos  
20 trust agreement, to make a distribution of income or principal to, or for the benefit of, one or  
21 more beneficiaries of a trust (the "first trust"), may instead exercise such authority by appointing  
22 all or part of the income or principal subject to the power in favor of a trustee of a trust (the  
23 "second trust") under an instrument other than that under which the power to distribute is  
24 created or under the same instrument, in the event that the trustee of the first trust decides that

1 the appointment is necessary or desirable after taking into account the purposes of the first trust,  
2 the terms and conditions of the second trust, and the consequences of the distribution. However,  
3 the following apply:

4 (1) The second trust ~~has~~ may have as beneficiaries only one or more of those  
5 beneficiaries of the first trust to or for whom a discretionary distribution may be  
6 made from the first trust and who are proper objects of the exercise of the power, or  
7 one or more of those other beneficiaries of the first trust to or for whom a distribution  
8 of income or principal may have been made in the future from the first trust at a time  
9 or upon the happening of an event specified under the first trust;

10 (2) No trustee of the first trust may:

11 (a) Exercise such authority to make a distribution from the first trust if the trustee  
12 is a beneficiary of the first trust, or if any beneficiary may change the trustees  
13 of the first trust, unless the exercise of such authority is for health, education,  
14 maintenance, or support; or

15 (b) Exercise such authority to the extent that doing so would have the effect either  
16 of (i) increasing the distributions that can be made in the future from the  
17 second trust to the trustee of the first trust or to a beneficiary who may change  
18 the trustees of the first trust, or (ii) removing restrictions on discretionary  
19 distributions imposed by the agreement under which the first trust was created,  
20 except that in either case participating in a change that is needed for the health,  
21 education, maintenance, or support of any such beneficiary is permitted;

22 However, the provisions of subdivision (2) only apply to restrict the authority of a  
23 trustee if either a trustee, or a beneficiary who may change the trustee, is a United  
24 States citizen or domiciliary under the Internal Revenue Code, or the trust owns

1 property that would be subject to United States estate or gift taxes if owned directly  
2 by such a person.

3 (3) In the case of any trust contributions which have been treated as gifts qualifying for  
4 the exclusion from gift tax described in § 2503(b) of the Internal Revenue Code of  
5 1986, by reason of the application of I.R.C. § 2503(c), the governing instrument for  
6 the second trust shall provide that the beneficiary's remainder interest shall vest ~~and~~  
7 ~~become distributable~~ no later than the date upon which such interest would have  
8 vested ~~and become distributable~~ under the terms of the governing instrument for the  
9 first trust;

10 (4) The exercise of such authority ~~does~~ may not reduce any income interest of any  
11 income beneficiary of any of the following trusts:

12 (a) A trust for which a marital deduction has been taken for federal tax purposes  
13 under I.R.C. § 2056 or § 2523 or for state tax purposes under any comparable  
14 provision of applicable state law;

15 (b) A charitable remainder trust under I.R.C. § 664; or

16 (c) A grantor retained annuity trust under I.R.C. § 2702; ~~and~~

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

22 (6) The exercise of such authority is not prohibited by a spendthrift clause or by a  
23 provision in the trust instrument that prohibits amendment or revocation of the trust.

24 This section applies to any trust governed by the laws of this state, including a trust whose



1 governing jurisdiction is transferred to this state.

2 Section 18. That § 55-2-17 be amended to read as follows:

3 55-2-17. For the purposes of § 55-2-15, a beneficiary shall be considered to have the power  
4 to "change the trustees" if he or she can, alone or with others, name himself or herself as a  
5 trustee or can remove a trustee and replace that trustee with a new trustee who is the beneficiary  
6 or who is related or subordinate (as defined in § 672 of the I.R.C.) to the beneficiary.

7 Section 19. That § 55-2-18 be amended to read as follows:

8 55-2-18. The exercise of the power to distribute the income or principal of the trust under  
9 § 55-2-15 shall be by an instrument in writing, signed and acknowledged by the trustee and filed  
10 with the records of the trust. The trustee of the first trust shall notify all beneficiaries of the first  
11 trust, in writing, at least twenty days prior to the effective date of the trustee's exercise of the  
12 power under § 55-2-15 (applying the South Dakota Virtual Representation Statutes, §§ 55-3-31  
13 to 55-3-38, inclusive). If all beneficiaries entitled to notice waive the notice requirement by a  
14 signed writing delivered to the trustee, the trustee may exercise the power under § 55-2-15  
15 immediately. A copy of the proposed exercise of this authority and the second trust agreement  
16 shall satisfy this notice obligation. For the purposes of this section, the term, beneficiaries,  
17 means those persons who would be entitled to notice and a copy of the first trust instrument  
18 under § 55-2-13.

19 Section 20. That § 55-2-21 be amended to read as follows:

20 55-2-21. No provision of §§ 55-2-15 to 55-2-20 may be construed to abridge the right of any  
21 trustee who has power to distribute income or principal in further trust which arises under  
22 statute ~~or~~, common law, or the terms of the first trust.

23 Section 21. That chapter 55-2 be amended by adding thereto a NEW SECTION to read as  
24 follows:

1 Notwithstanding the terms of a trust instrument, if a settlor has a power to substitute  
2 property of equivalent value, a trustee has a fiduciary duty to determine that the substituted  
3 property is of equivalent value, prior to allowing the substitution.

4 Section 22. That chapter 55-3 be amended by adding thereto a NEW SECTION to read as  
5 follows:

6 No beneficiary of a trust may assert the defense of laches in any proceeding to modify,  
7 reform, or terminate a trust pursuant to §§ 55-3-23 to 55-3-29, inclusive.

8 Section 23. That chapter 55-3 be amended by adding thereto a NEW SECTION to read as  
9 follows:

10 In addition to other remedies available by law and procedures or powers set out in a trust  
11 instrument, the settlor, or the settlor's agent, a cotrustee, or a qualified beneficiary as defined in  
12 § 55-2-13, may request the court to remove a trustee, or a trustee may be removed by the court  
13 on the court's own initiative.

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

- 15 (1) The trustee has committed a serious breach of trust;
- 16 (2) Lack of cooperation among cotrustees substantially impairs the administration of the  
17 trust;
- 18 (3) Because of unfitness, unwillingness, persistent failure of the trustee to administer the  
19 trust effectively, the court determines that removal of the trustee best serves the  
20 interests of the beneficiaries;
- 21 (4) There has been a substantial change of circumstances or removal is requested by all  
22 of the qualified beneficiaries, the court finds that removal of the trustee best serves  
23 the interests of all of the beneficiaries and is not inconsistent with a material purpose  
24 of the trust, and a suitable cotrustee or successor trustee is available; or

1 (5) If the trustee merges with another institution or the location or place of  
2 administration of the trust changes, and the court finds that removal of the trustee  
3 best serves the interests of all of the beneficiaries, and a suitable cotrustee or  
4 successor trustee is available.

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

8 Section 24. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as  
9 follows:

10 Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the  
11 trustee may furnish to the person a certificate of trust containing the following information:

- 12 (1) That the trust exists and the date the trust instrument was executed;
- 13 (2) The identity of the settlor;
- 14 (3) The identity and address of the currently acting trustee;
- 15 (4) The powers of the trustee;
- 16 (5) The revocability or irrevocability of the trust and the identity of any person holding  
17 a power to revoke the trust;
- 18 (6) The authority of cotrustees to sign or otherwise authenticate and whether all or less  
19 than all are required in order to exercise powers of the trustee;
- 20 (7) The manner of taking title to trust property.

21 A certificate of trust may be signed or otherwise authenticated by any trustee.

22 A certificate of trust must state that the trust has not been revoked, modified, or amended  
23 in any manner that would cause the representations contained in the certificate of trust to be  
24 incorrect.

1 A certificate of trust need not contain the dispositive terms of a trust.

2 Section 25. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as  
3 follows:

4 A recipient of a certificate of trust may require the trustee to furnish copies of those excerpts  
5 from the original trust instrument and later amendments that designate the trustee and confer on  
6 the trustee the power to act in the pending transaction.

7 Section 26. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as  
8 follows:

9 Any person who acts in reliance on a certificate of trust without knowledge that the  
10 representations contained in the certification are incorrect is not liable to any person for so  
11 acting and may assume without inquiry the existence of the facts contained in the certification.  
12 Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all  
13 or part of the trust instrument is held by the person relying on the certification.

14 Section 27. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as  
15 follows:

16 Any person who in good faith enters into a transaction in reliance on a certificate of trust  
17 may enforce the transaction against the trust property as if the representations contained in the  
18 certification were correct.

19 Section 28. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as  
20 follows:

21 Any person making a demand for the trust instrument in addition to a certificate of trust or  
22 excerpts is liable for damages if the court determines that the person did not act in good faith  
23 in demanding the trust instrument.

24 Section 29. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as

1 follows:

2 The provisions of sections 24 to 29, inclusive, of this Act do not limit the right of a person  
3 to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

4 Section 30. That § 55-5-7 be amended to read as follows:

5 55-5-7. No specific investment or course of action is, taken alone, prudent or imprudent. The  
6 trustee may invest in every kind of property and type of investment, subject to this chapter. ~~The~~  
7 ~~trustee's investment decisions and actions shall be judged in terms of the trustee's reasonable~~  
8 ~~business judgment regarding the anticipated effect on the trust portfolio as a whole under the~~  
9 ~~facts and circumstances prevailing at the time of the decision or action.~~ The prudent investor  
10 rule is a test of conduct and not of resulting performance. The prudent investor rule may be  
11 expanded, restricted, eliminated, or otherwise altered by the terms of the trust instrument or  
12 court order. No trustee is liable to a beneficiary to the extent that the trustee acted in reliance on  
13 the provisions of the trust instrument or court order.

14 Section 31. That § 55-5-8 be amended to read as follows:

15 55-5-8. The trustee shall diversify the investments of the trust unless, under the  
16 circumstances, the trustee reasonably believes it is in the interests of the beneficiaries and  
17 furthers the purposes of the trust not to diversify. Regardless of concentration or lack of  
18 diversification, the trustee need not diversify if the trust instrument or court order allows or  
19 directs retention of assets forming part of the trust corpus. If a trust instrument or court order  
20 requires a fiduciary to invest in a specific investment, type of investment, or investment  
21 concentration, no trustee is liable to a beneficiary to the extent that the trustee acted in reliance  
22 on the provisions of the trust instrument or court order.

23 Section 32. That § 55-5-9 be amended to read as follows:

24 55-5-9. The trustee shall, within a reasonable time after the acceptance of the trusteeship,

1 review trust assets and make and implement decisions concerning the retention and disposition  
2 of original pre-existing investments in order to conform to the provisions of this section. The  
3 trustee's decision to retain or dispose of an asset may properly be influenced by the asset's  
4 special relationship or value to the purposes of the trust or to some or all of the beneficiaries,  
5 consistent with the trustee's duty of impartiality.

6 If a trust owns an interest in a closely held entity, and the trust agreement provides that the  
7 trustee has no duty to inquire or review the activities of the closely held entity, no trustee is  
8 liable to a beneficiary to the extent that the trustee acted in reliance on the provisions of the trust  
9 or court order.

10 For purposes of this section, the term, closely held entity, means any entity in which the  
11 following persons in aggregate own at least twenty percent of the entity:

- 12 (1) The settlor;
- 13 (2) The settlor's grandparents or their descendants;
- 14 (3) The settlor's spouse; or
- 15 (4) Any trust created by anyone of the aforementioned persons.

16 Section 33. That § 55-13A-104 be amended to read as follows:

17 55-13A-104. (a) A trustee may adjust between principal and income to the extent the trustee  
18 considers necessary if the trustee invests and manages trust assets as a prudent investor, the  
19 terms of the trust describe the amount that may or must be distributed to a beneficiary by  
20 referring to the trust's income, and the trustee determines, after applying the rules in § 55-13A-  
21 103(a), that the trustee is unable to comply with § 55-13A-103(b).

22 (b) In deciding whether and to what extent to exercise the power conferred by subsection  
23 (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the  
24 following factors to the extent they are relevant:

- 1 (1) The nature, purpose, and expected duration of the trust;
- 2 (2) The intent of the settlor;
- 3 (3) The identity and circumstances of the beneficiaries;
- 4 (4) The needs for liquidity, regularity of income, and preservation and appreciation of  
5 capital;
- 6 (5) The assets held in the trust; the extent to which they consist of financial assets,  
7 interests in closely held enterprises, tangible and intangible personal property, or real  
8 property; the extent to which an asset is used by a beneficiary; and whether an asset  
9 was purchased by the trustee or received from the settlor;
- 10 (6) The net amount allocated to income under the other sections of this chapter and the  
11 increase or decrease in the value of the principal assets, which the trustee may  
12 estimate as to assets for which market values are not readily available;
- 13 (7) Whether and to what extent the terms of the trust give the trustee the power to invade  
14 principal or accumulate income or prohibit the trustee from invading principal or  
15 accumulating income, and the extent to which the trustee has exercised a power from  
16 time to time to invade principal or accumulate income;
- 17 (8) The actual and anticipated effect of economic conditions on principal and income and  
18 effects of inflation and deflation; and
- 19 (9) The anticipated tax consequences of an adjustment.
- 20 (c) A trustee may not make an adjustment:
  - 21 (1) That diminishes the income interest in a trust that requires all of the income to be  
22 paid at least annually to a spouse and for which an estate tax or gift tax marital  
23 deduction would be allowed, in whole or in part, if the trustee did not have the power  
24 to make the adjustment;

- 1       (2)    That reduces the actuarial value of the income interest in a trust to which a person  
2           transfers property with the intent to qualify for a gift tax exclusion;
- 3       (3)    That changes the amount payable to a beneficiary as a fixed annuity or a fixed  
4           fraction of the value of the trust assets;
- 5       (4)    From any amount that is permanently set aside for charitable purposes under a will  
6           or the terms of a trust unless both income and principal are so set aside;
- 7       (5)    If possessing or exercising the power to make an adjustment causes an individual to  
8           be treated as the owner of all or part of the trust for income tax purposes, and the  
9           individual would not be treated as the owner if the trustee did not possess the power  
10          to make an adjustment;
- 11       (6)    If possessing or exercising the power to make an adjustment causes all or part of the  
12          trust assets to be included for estate tax purposes in the estate of an individual who  
13          has the power to remove a trustee or appoint a trustee, or both, and the assets would  
14          not be included in the estate of the individual if the trustee did not possess the power  
15          to make an adjustment;
- 16       (7)    If the trustee is a beneficiary of the trust; or
- 17       (8)    If the trustee is not a beneficiary, but the adjustment would benefit the trustee directly  
18           or indirectly.

19       (d) If subsection (c)(5), (6), (7), or (8) applies to a trustee and there is more than one trustee,  
20       a cotrustee to whom the provision does not apply may make the adjustment unless the exercise  
21       of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

22       (e) A trustee may release the entire power conferred by subsection (a) or may release only  
23       the power to adjust from income to principal or the power to adjust from principal to income  
24       if the trustee is uncertain about whether possessing or exercising the power will cause a result



1 described in subsection (c)(1) through (6) or (c)(8) or if the trustee determines that possessing  
2 or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not  
3 described in subsection (c). The release may be permanent or for a specified period, including  
4 a period measured by the life of an individual.

5 (f) Terms of a trust that limit the power of a trustee to make an adjustment between principal  
6 and income do not affect the application of this section unless it is clear from the terms of the  
7 trust that the terms are intended to deny the trustee the power of adjustment conferred by  
8 subsection (a).

9 (g) Unless prohibited by the governing instrument, the trustee of a trust has the power to  
10 consider gains from the sale of capital assets in the trust to be part of a distribution of principal  
11 to a beneficiary, or part of an adjustment from principal to income, and if such power is  
12 exercised, such gains shall be treated consistently by the trustee on the trust's books, records,  
13 and tax returns as part of a distribution to a beneficiary.

14 Section 34. That § 55-13A-202 be amended to read as follows:

15 55-13A-202. (a) ~~Unless otherwise provided in the trust instrument, an increase in the value~~  
16 ~~of the following investments owned by any trust~~ Notwithstanding any contrary provision of this  
17 chapter, if the trust instrument adopts the provisions of this section by reference, an increase in  
18 the value of the following investments owned by a charitable remainder unitrust, of the type  
19 authorized in § 664(d)(3) of the Internal Revenue Code (26 U.S.C. § 664), as of January 1, 2009,  
20 is distributable as income when it becomes available for distribution:

- 21 (1) A zero coupon bond;
- 22 (2) An annuity contract before annuitization;
- 23 (3) A life insurance contract before the death of the insured;
- 24 (4) An interest in a common trust fund (as defined under § 584 of the Internal Revenue

1 Code) (26 U.S.C. § 584);

2 (5) An interest in a partnership, as defined in § 7701 of the Internal Revenue Code (26  
3 U.S.C. § 7701); or

4 (6) Any other obligation for the payment of money that is payable at a future time in  
5 accordance with a fixed, variable, or discretionary schedule of appreciation in excess  
6 of the price at which it was issued.

7 (b) For purposes of this section, the increase in value of an investment described in  
8 subsection (a) is available for distribution only if the trustee receives cash on account of the  
9 investment.

10 (c) The increase in value of the obligations described in subsection (a) is distributable to the  
11 beneficiary who was the income beneficiary at the time of the increase from the first principal  
12 cash available or, if none is available, when realized by sale, redemption, or other disposition.  
13 If unrealized increase is distributed as income but out of principal, the principal shall be  
14 reimbursed from the increase when realized.

15 Section 35. That § 55-13A-409 be amended to read as follows:

16 55-13A-409. (a) In this section, ~~the term, payment,;~~

17 (1) "Payment" means a payment that a trustee may receive over a fixed number of years  
18 or during the life of one or more individuals because of services rendered or property  
19 transferred to the payer in exchange for future payments. The term includes a  
20 payment made in money or property from the payer's general assets or from a  
21 separate fund created by the payer, including. For purposes of subsections (d), (e), (f),  
22 and (g), the term also includes any payment from any separate fund, regardless of the  
23 reason for the payment.

24 (2) "Separate fund" includes a private or commercial annuity, an individual retirement

1 account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

2 (b) To the extent that a payment is characterized as interest ~~or~~, a dividend, or a payment  
3 made in lieu of interest or a dividend, a trustee shall allocate it the payment to income. The  
4 trustee shall allocate to principal the balance of the payment and any other payment received in  
5 the same accounting period that is not characterized as interest, a dividend, or an equivalent  
6 payment.

7 (c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment,  
8 and all or part of the payment is required to be made, a trustee shall allocate to income ten  
9 percent of the part that is required to be made during the accounting period and the balance to  
10 principal. If no part of a payment is required to be made or the payment received is the entire  
11 amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal.  
12 For purposes of this subsection, a payment is not required to be made to the extent that it is  
13 made because the trustee exercises a right of withdrawal.

14 ~~(d) If, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a~~  
15 ~~payment to income than provided for by this section, the trustee shall allocate to income the~~  
16 ~~additional amount necessary to obtain the marital deduction.~~

17 ~~—(e) Except as otherwise provided in subsection (e), subsections (f) and (g) apply, and~~  
18 ~~subsections (b) and (c) do not apply, in determining the allocation of a payment made from a~~  
19 ~~separate fund to:~~

- 20 (1) A trust to which an election to qualify for a marital deduction under Section  
21 2056(b)(7) of the Internal Revenue Code of 1986, has been made; or  
22 (2) A trust that qualifies for the marital deduction under Section 2056(b)(5) of the  
23 Internal Revenue Code of 1986.

24 (e) Subsections (d), (f), and (g) do not apply if and to the extent that the series of payments

1 would, without the application of subsection (d), qualify for the marital deduction under Section  
2 2056(b)(7)(C) of the Internal Revenue Code of 1986.

3 (f) A trustee shall determine the internal income of each separate fund for the accounting  
4 period as if the separate fund were a trust subject to this chapter. Upon request of the surviving  
5 spouse, the trustee shall demand that the person administering the separate fund distribute the  
6 internal income to the trust. The trustee shall allocate a payment from the separate fund to  
7 income to the extent of the internal income of the separate fund and distribute that amount to  
8 the surviving spouse. The trustee shall allocate the balance of the payment to principal. Upon  
9 request of the surviving spouse, the trustee shall allocate principal to income to the extent the  
10 internal income of the separate fund exceeds payments made from the separate fund to the trust  
11 during the accounting period.

12 (g) If a trustee cannot determine the internal income of a separate fund but can determine  
13 the value of the separate fund, the internal income of the separate fund is deemed to equal four  
14 percent of the fund's value, according to the most recent statement of value preceding the  
15 beginning of the accounting period. If the trustee can determine neither the internal income of  
16 the separate fund nor the fund's value, the internal income of the fund is deemed to equal the  
17 product of the interest rate and the present value of the expected future payments, as determined  
18 under Section 7520 of the Internal Revenue Code of 1986 (26 U.S.C. Section 7520), for the  
19 month preceding the accounting period for which the computation is made.

20 (h) This section does not apply to payments a payment to which § 55-13A-410 applies.

21 Section 36. That § 55-13A-505 be amended to read as follows:

22 55-13A-505. (a) A tax required to be paid by a trustee based on receipts allocated to income  
23 must be paid from income.

24 (b) A tax required to be paid by a trustee based on receipts allocated to principal must be

1 paid from principal, even if the tax is called an income tax by the taxing authority.

2 (c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income  
3 must be paid ~~proportionately~~:

4 (1) From income to the extent that receipts from the entity are allocated only to income;  
5 ~~and~~

6 (2) From principal to the extent that:

7 ~~———— (A) Receipts receipts from the entity are allocated only to principal; and~~

8 ~~———— (B) The trust's share of the entity's taxable income exceeds the total receipts  
9 described in paragraphs (1) and (2)(A)~~

10 (3) Proportionately from principal and income to the extent that receipts from the entity  
11 are allocated to both income and principal; and

12 (4) From principal to the extent that the tax exceeds the total receipts from the entity.

13 (d) ~~For purposes of this section, receipts allocated to principal or income must be reduced  
14 by the amount distributed to a beneficiary from principal or income for which the trust receives  
15 a deduction in calculating the tax. After applying subsections (1) through (c), the trustee shall  
16 adjust income or principal receipts to the extent that the trust's taxes are reduced because the  
17 trust receives a deduction for payments made to a beneficiary.~~

18 Section 37. That § 55-13A-602 be amended to read as follows:

19 55-13A-602. This chapter applies to every trust or will created after July 1, 2007, except as  
20 otherwise expressly provided in the will or the terms of the trust or in this chapter. No trust or  
21 decedent's estate based upon a will executed after July 1, 2007, may utilize the provisions of  
22 chapter 55-13. Every trust existing on June 30, 2007, or any decedent's estate existing on June  
23 30, 2007, and based upon a will executed prior to July 1, 2007, may elect to apply the provisions  
24 of either chapter 55-13 or this chapter. The election may be made by the trustee or personal

1 representative upon providing sixty days written notice of the election to the beneficiaries of the  
2 trust or estate, as the case may be.

3 Any election made prior to July 1, 2008, is hereby ratified and remains in full force and  
4 effect.

5 The provisions of section 35 of this Act apply to a trust described in § 55-13A-409(a)(2)(d)  
6 on and after the following dates:

7 (1) If the trust is not funded as of July 1, 2009, the date of the decedent's death;

8 (2) If the trust is initially funded in the calendar year beginning January 1, 2010, the date  
9 of the decedent's death;

10 (3) If the trust is not described in subdivision (1) or (2), January 1, 2010.

11 Section 38. That chapter 55-15 be amended by adding thereto a NEW SECTION to read as  
12 follows:

13 This chapter does not apply to a charitable remainder unitrust as defined by § 664(d) of the  
14 Internal Revenue Code of 1986 (26 U.S.C. § 664), as of January 1, 2009.

15 As used in this section:

16 (1) "Unitrust" means a trust, the terms of which require or permit distribution of a  
17 unitrust amount, without regard to whether the trust has been converted to a unitrust  
18 in accordance with this section or whether the trust is established by express terms  
19 of the governing instrument; and

20 (2) "Unitrust amount" means an amount equal to a percentage of a unitrust's assets that  
21 may or are required to be distributed to one or more beneficiaries annually in  
22 accordance with the terms of the unitrust. The unitrust amount may be determined  
23 by reference to the net fair market value of the unitrust's assets as of a particular date  
24 each year or as an average determined on a multiple year basis.

1 Section 39. That § 55-15-6 be amended to read as follows:

2 55-15-6. The unitrust amount shall be determined as follows:

3 (1) For the first three accounting periods of the trust, the unitrust amount for a current  
4 valuation year of the trust shall be three percent, or such higher percentage specified  
5 by the terms of the governing instrument or by the election of the trustee, the  
6 disinterested person, or the court, of the net fair market value of the assets held in the  
7 trust on the ~~first business day~~ valuation date of the current valuation year;

8 (2) Beginning with the fourth accounting period of the trust, the unitrust amount for a  
9 current valuation year of the trust shall be three percent, or such higher percentage  
10 specified by the terms of the governing instrument or by the election of the trustee,  
11 the disinterested person, or the court, of the average of the net fair market value of  
12 the assets held in the trust on the ~~first business day~~ valuation date of the current  
13 valuation year and the net fair market value of the assets held in the trust on the ~~first~~  
14 ~~business day~~ valuation date of each prior valuation year, as defined in subdivision 55-  
15 15-1(10);

16 (3) The percentage that may be elected by the trustee, the disinterested person, or the  
17 court in determining the unitrust amount shall be a reasonable current return from the  
18 trust, taking into account the intentions of the trustor of the trust as expressed in the  
19 governing instrument, the needs of the beneficiaries, general economic conditions,  
20 projected current earnings and appreciation for the trust, and projected inflation and  
21 its impact on the trust. However, such election by the trustee, the disinterested  
22 person, or the court in determining the unitrust amount shall be three percent or  
23 greater;

24 (4) The unitrust amount for the current valuation year shall be proportionately reduced

1 for any distributions, in whole or in part, other than distributions of the unitrust  
2 amount, and for any payments of expenses, including debts, disbursements and taxes,  
3 from the trust within a current valuation year that the trustee determines to be  
4 material and substantial, and shall be proportionately increased for the receipt, other  
5 than a receipt that represents a return on investment, of any additional property into  
6 the trust within a current valuation year;

7 (5) In the case of a short accounting period, the trustee shall prorate the unitrust amount  
8 on a daily basis;

9 (6) If the net fair market value of an asset held in the trust has been incorrectly  
10 determined either in a current valuation year or in a prior valuation year, the unitrust  
11 amount shall be increased in the case of an undervaluation, or be decreased in the  
12 case of an overvaluation, by an amount equal to the difference between the unitrust  
13 amount determined based on the correct valuation of the asset and the unitrust  
14 amount originally determined;

15 (7) In determining the net fair market value of the assets held in trust, the determination  
16 may not include the value of any residential property or any tangible personal  
17 property that, as of the first business day of the current valuation year, one or more  
18 income beneficiaries of the trust have or had the right to occupy, or have or had the  
19 right to possess or control, other than in a capacity as trustee, and instead the right of  
20 occupancy or the right of possession or control shall be deemed to be the unitrust  
21 amount with respect to the residential property or the tangible personal property; or  
22 any asset specifically given to a beneficiary under the terms of the trust and the return  
23 on investment on that asset, which return on investment shall be distributed to the  
24 beneficiary.



1 Section 40. That § 55-15-7 be repealed.

2 ~~—55-15-7. The unitrust amount may not be less than the net income of the trust, determined~~  
3 ~~without regard to the provisions of § 55-15-8, for (i) a trust for which a marital deduction has~~  
4 ~~been taken for federal tax purposes under I.R.C. section 2056 or 2523 (during the lifetime of the~~  
5 ~~spouse for whom the trust was created), or (ii) a trust to which the generation-skipping transfer~~  
6 ~~tax due under I.R.C. section 2601 does not apply by reason of any effective date or transition~~  
7 ~~rule.~~

8 Section 41. That § 55-16-2 be amended to read as follows:

9 55-16-2. For the purposes of this chapter, a trust instrument, is an instrument appointing a  
10 qualified trustee for the property that is the subject of a disposition, 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 its  
14 inclusion of one or more of the following:
- 15 (a) A transferor's power to veto a distribution from the trust;
- 16 (b) ~~A~~ An inter vivos power of appointment, other than a an inter vivos power to  
17 appoint to the transferor, the transferor's creditors, the transferor's estate, or the  
18 creditors of the transferor's estate, exercisable by will or other written  
19 instrument of the transferor effective only upon the transferor's death;
- 20 (c) A testamentary power of appointment;
- 21 ~~(e)~~(d) The transferor's potential or actual receipt of income, including rights to such  
22 income retained in the trust instrument;
- 23 ~~(d)~~(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

1 terms are defined in § 664 of the Internal Revenue Code of 1986, 26 U.S.C.  
2 § 664, as of January 1, ~~2005~~ 2009;

3 ~~(e)~~(f) The transferor's receipt each year of a percentage, ~~not to exceed five percent,~~  
4 ~~specified in the trust instrument of the initial value of the trust or its value of~~ of  
5 ~~the value as~~ determined from time to time pursuant to the trust instrument, ~~but~~  
6 ~~not exceeding the amount that may be defined as income under § 643(b) of the~~  
7 ~~Internal Revenue Code of 1986, 26 U.S.C. § 643(b), as of January 1, 2009;~~

8 ~~(f)~~(g) The transferor's potential or actual receipt or use of principal if such potential  
9 or actual receipt or use of principal would be the result of a qualified trustee  
10 or qualified trustees, including a qualified trustee or qualified trustees acting  
11 at the direction of a trust advisor described in this section, acting either in such  
12 qualified trustee's or qualified trustees' sole discretion or pursuant to an  
13 ascertainable standard contained in the trust instrument;

14 ~~(g)~~(h) The transferor's right to remove a trustee or trust advisor and to appoint a new  
15 trustee or trust advisor, other than a person who is a related or subordinate  
16 party with respect to the transferor within the meaning of § 672(c) of the  
17 Internal Revenue Code of 1986, 26 U.S.C. § 672(c), as of January 1, ~~2005~~  
18 2009;

19 ~~(h)~~(i) The transferor's potential or actual use of real property held under a qualified  
20 personal residence trust within the meaning of such term as described in  
21 § 2702(c) of the Internal Revenue Code of 1986, 26 U.S.C. § 2702(c), as of  
22 January 1, ~~2005~~ 2009;

23 ~~(i)~~(j) A pour back provision that pours back to the transferor's will or revocable trust  
24 all or part of the trust assets;

1 (3) Provides that the interest of the transferor or other beneficiary in the trust property  
2 or the income therefrom may not be transferred, assigned, pledged, or mortgaged,  
3 whether voluntarily or involuntarily, before the qualified trustee or qualified trustees  
4 actually distribute the property or income therefrom to the beneficiary, and such  
5 provision of the trust instrument shall be deemed to be a restriction on the transfer  
6 of the transferor's beneficial interest in the trust that is enforceable under applicable  
7 nonbankruptcy law within the meaning of § 541(c)(2) of the Bankruptcy Code, 11  
8 U.S.C. § 541(c)(2), as of January 1, ~~2005~~ 2009;

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

12 Section 42. That § 55-16-3 be amended to read as follows:

13 55-16-3. For the purposes of this chapter, a qualified ~~trustee person~~, is any person who ~~in~~  
14 ~~the case of a natural person, is a resident of this state~~ qualifies as a qualified person under § 55-  
15 3-41 and who meets all the requirements of § 55-3-39 other than the transferor ~~or, in all other~~  
16 ~~cases, is authorized by the law of this state to act as a trustee and whose activities are subject~~  
17 ~~to supervision by the Division of Banking, the Federal Deposit Insurance Corporation, the~~  
18 ~~Comptroller of the Currency, or the Office of Thrift Supervision, or any successor thereto, and~~  
19 ~~maintains or arranges for custody in this state of some or all of the property that is the subject~~  
20 ~~of the qualified disposition, maintains records for the trust on an exclusive or nonexclusive~~  
21 ~~basis, prepares or arranges for the preparation of fiduciary income tax returns for the trust, or~~  
22 ~~otherwise materially participates in the administration of the trust.~~

23 Section 43. That chapter 55-16 be amended by adding thereto a NEW SECTION to read as  
24 follows:

1       The term, qualified trustee, as used in this chapter means qualified person. The code counsel  
2 in future supplements and revisions of the South Dakota Codified Laws shall substitute the term,  
3 qualified person, and its derivatives for the term, qualified trustee, and its derivatives.

4       Section 44. That § 55-16-13 be amended to read as follows:

5       55-16-13. Notwithstanding any other provision of law, no action of any kind, including an  
6 action to enforce a judgment entered by a court or other body having adjudicative authority, may  
7 be brought at law or in equity against the trustee, or advisor described in § 55-16-4, of a trust  
8 that is the subject of a qualified disposition, or against any person involved in the counseling,  
9 drafting, preparation, execution, or funding of a trust that is the subject of a qualified  
10 disposition, if, as of the date such action is brought, an action by a creditor with respect to such  
11 qualified disposition would be barred under §§ 55-16-9 to 55-16-12, inclusive. A court of this  
12 state has exclusive jurisdiction over an action brought under a claim for relief that is based on  
13 a transfer of property to a trust that is the subject of this section. A court of this state may award  
14 attorneys fees and costs to the prevailing party in such an action.