

State of South Dakota

EIGHTIETH SESSION
LEGISLATIVE ASSEMBLY, 2005

553L0571

SENATE JUDICIARY COMMITTEE ENGROSSED NO. **SB 94** - 02/02/2005

Introduced by: Senator Knudson and Representative Cutler

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

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

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

4 55-1-19. If the trustor is also a beneficiary of the trust, a provision restraining the voluntary
5 or involuntary transfer of the trustor's beneficial interest does not prevent the trustor's creditors
6 from satisfying claims from the trustor's interest in the trust estate. However, a trustor's creditors
7 may not satisfy claims from federal income tax reimbursements made to the trustor or direct tax
8 payments made by an independent trustee for the trustor's benefit from an irrevocable trust taxed
9 for federal income tax purposes pursuant to the grantor trust rules of the Internal Revenue Code
10 Sections 671 to 679, inclusive, as of January 1, 2005.

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

12 55-1B-1. Terms used in this chapter mean:

- 13 (1) "Instrument," any revocable or irrevocable trust document created inter vivos or
14 testamentary;
- 15 (2) "Trust protector," any disinterested third party whose appointment is provided for in



- 1 the trust instrument;
- 2 (3) ~~"Trust advisor," the grantor of an instrument or other fiduciaries in which any power,~~
3 ~~including the power and authority to direct the acquisition, disposition, or retention~~
4 ~~of any investment, or the power to authorize any act that an excluded fiduciary may~~
5 ~~propose, is reserved to the exclusion of another fiduciary also acting under the~~
6 ~~instrument. Trust advisor also includes any party accepting the delegation of a~~
7 ~~fiduciary's power to direct the acquisition, disposition, or retention of any investment;~~
- 8 (4) "Fiduciary," a trustee under any testamentary or other trust, an executor,
9 administrator, or personal representative of a decedent's estate, or any other party,
10 including a trust advisor ~~or~~, a trust protector, or a trust committee, who is acting in
11 a fiduciary capacity for any person, trust, or estate; and
- 12 (5) "Excluded fiduciary," any fiduciary excluded from exercising certain powers under
13 the instrument which powers may be exercised by the grantor ~~or a trust advisor or a~~
14 ~~trust protector~~, trust advisor, trust protector, trust committee, or other persons
15 designated in the trust instrument;
- 16 (6) "Investment trust advisor," a fiduciary, given authority by the trust instrument to
17 exercise all or any portions of the powers and discretions set forth in section 6 of this
18 Act;
- 19 (7) "Distribution trust advisor," a fiduciary, given authority by the trust instrument to
20 exercise all or any portions of the powers and discretions set forth in section 7 of this
21 Act.

22 Section 3. That § 55-1B-6 be amended to read as follows:

23 55-1B-6. The powers and discretions of a trust protector shall be as provided in the
24 governing instrument and may, ~~in the best interests of the trust,~~ be exercised or not exercised,

1 in the best interests of the trust, in the sole and absolute discretion of the trust protector and shall
2 be binding on all other persons. Such powers and discretion may include the following:

3 (1) ~~To modify~~ Modify or amend the trust instrument to achieve favorable tax status or
4 ~~because of~~ respond to changes in the Internal Revenue Code, state law, or the rulings
5 and regulations thereunder;

6 (2) ~~To increase~~ Increase or decrease the interests of any beneficiaries to the trust; ~~and~~

7 (3) ~~To modify~~ Modify the terms of any power of appointment granted by the trust.
8 However, a modification or amendment may not grant a beneficial interest to any
9 individual or class of individuals not specifically provided for under the trust
10 instrument;

11 (4) Remove and appoint a trustee, trust advisor, investment committee member, or
12 distribution committee member;

13 (5) Terminate the trust;

14 (6) Veto or direct trust distributions;

15 (7) Change situs or governing law of the trust, or both;

16 (8) Appoint a successor trust protector;

17 (9) Interpret terms of the trust instrument at the request of the trustee;

18 (10) Advise the trustee on matters concerning a beneficiary; and

19 (11) Amend or modify the trust instrument to take advantage of laws governing restraints
20 on alienation, distribution of trust property, or the administration of the trust.

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

23 Section 4. That chapter 55-1B be amended by adding thereto a NEW SECTION to read as
24 follows:

1 Any of the powers enumerated in § 55-1B-6, as they exist at the time of the signing of a will
2 by a testator or at the time of the signing of a trust instrument by a trustor, may be, by
3 appropriate reference made thereto, incorporated in whole or in part in such will or trust
4 instrument, by a clearly expressed intention of a testator of a will or trustor of a trust instrument.

5 Section 5. That chapter 55-1B be amended by adding thereto a NEW SECTION to read as
6 follows:

7 A trust instrument governed by the laws of South Dakota may provide for a person to act
8 as an investment trust advisor or a distribution trust advisor, respectively, with regard to
9 investment decisions or discretionary distributions.

10 Section 6. That chapter 55-1B be amended by adding thereto a NEW SECTION to read as
11 follows:

12 The powers and discretions of an investment trust advisor shall be provided in the trust
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 investment trust advisor and are binding on any other person and
15 any other interested party, fiduciary, and excluded fiduciary. Unless the terms of the document
16 provide otherwise, the investment trust advisor has the power to perform the following:

- 17 (1) Direct the trustee with respect to the retention, purchase, sale, or encumbrance of
18 trust property and the investment and reinvestment of principal and income of the
19 trust;
- 20 (2) Vote proxies for securities held in trust; and
- 21 (3) Select one or more investment advisers, managers, or counselors, including the
22 trustee, and delegate to them any of its powers.

23 Section 7. That chapter 55-1B be amended by adding thereto a NEW SECTION to read as
24 follows:

1 The powers and discretions of a distribution trust advisor shall be provided in the trust
2 instrument and may be exercised or not exercised, in the best interests of the trust, in the sole
3 and absolute discretion of the distribution trust advisor and are binding on any other person and
4 any other interested party, fiduciary, and excluded fiduciary. Unless the terms of the document
5 provide otherwise, the distribution trust advisor shall direct the trustee with regard to all
6 discretionary distributions to beneficiaries.

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

9 No trust with South Dakota situs or governed by the laws of the State of South Dakota and
10 no disposition of property to be held upon the terms of such trust is void, voidable, liable to be
11 set aside, or defective in any manner by reason that:

- 12 (1) The law of any foreign country, as defined in subdivision 10-43-1(6), prohibits or
13 does not recognize the concept of a trust; or
- 14 (2) The trust or disposition:
 - 15 (a) Avoids or defeats any right, claim, or interest conferred by the law of a foreign
16 country upon any person by reason of a personal relationship to the trustor or
17 by way of heirship rights; or
 - 18 (b) Contravenes any rule or law of a foreign country or any foreign country's
19 judicial or administrative order or action intended to recognize, protect,
20 enforce, or give effect to such a right, claim, or interest.

21 Section 9. That § 55-15-6 be amended to read as follows:

22 55-15-6. The unitrust amount shall be determined as follows:

- 23 (1) For the first three accounting periods of the trust, the unitrust amount for a current
24 valuation year of the trust shall be three percent, or such higher percentage specified

1 by the terms of the governing instrument or by the election of the trustee, the
2 disinterested person, or the court, of the net fair market value of the assets held in the
3 trust on the first business day of the current valuation year;

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

11 (3) The percentage that may be elected by the trustee, the disinterested person, or the
12 court in determining the unitrust amount shall be a reasonable current return from the
13 trust, taking into account the intentions of the trustor of the trust as expressed in the
14 governing instrument, the needs of the beneficiaries, general economic conditions,
15 projected current earnings and appreciation for the trust, and projected inflation and
16 its impact on the trust. However, ~~if such percentage is three percent or greater, or if~~
17 ~~no percentage is specified, then that percentage shall be three percent~~ such election
18 by the trustee, the disinterested person, or the court in determining the unitrust
19 amount shall be three percent or greater;

20 (4) The unitrust amount for the current valuation year shall be proportionately reduced
21 for any distributions, in whole or in part, other than distributions of the unitrust
22 amount, and for any payments of expenses, including debts, disbursements and taxes,
23 from the trust within a current valuation year that the trustee determines to be
24 material and substantial, and shall be proportionately increased for the receipt, other

1 than a receipt that represents a return on investment, of any additional property into
2 the trust within a current valuation year;

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

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

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

21 Section 10. That § 51A-6A-44 be amended to read as follows:

22 51A-6A-44. When the director takes charge of any trust company, the director shall ascertain
23 its actual condition as soon as possible by making a thorough investigation into its affairs and
24 condition. If the director is satisfied that the trust company cannot resume business or liquidate

1 its indebtedness to the satisfaction of its creditors, the director shall appoint a receiver and
2 require the receiver to give such bond as the director considers proper. The director also shall
3 fix reasonable compensation for the receiver, but the compensation for the receiver is subject
4 to the approval of the circuit court of the county in which the trust company is located upon the
5 application of any party in interest.

6 Any receiver ~~shall be a resident of the state and~~ shall have had at least five years of
7 experience with financial institutions. However, upon written application made within thirty
8 days after the findings of insolvency, the director shall appoint as receiver any person whom the
9 holders of more than sixty percent of the claims against the trust company agree upon in writing.
10 The creditors may also agree upon the compensation and charges to be paid the receiver. Any
11 receiver so appointed shall make a complete report to the director covering the receiver's acts
12 and proceedings as a receiver. The director may remove for cause any receiver and appoint the
13 receiver's successor.

14 Section 11. That chapter 51-6A be amended by adding thereto a NEW SECTION to read
15 as follows:

16 No receiver, appointed pursuant to § 51A-6A-44, is liable to any person for good faith
17 compliance with any law, statute, rule, or judgment, decree, or order of a court. Nor is any
18 receiver liable to any person for any action taken or omitted unless a court finds that the receiver
19 acted or failed to act as a result of misfeasance, bad faith, gross negligence, or reckless disregard
20 of duty.

21 Section 12. That § 51A-6A-1 be amended by adding thereto a NEW SUBDIVISION to read
22 as follows:

23 "Out-of-state trust institution," a nondepository corporation, limited liability company, or
24 other similar entity chartered or licensed by the banking regulatory agency of a state, territory,

1 or district, other than South Dakota, to engage in the trust company business in that state,
2 territory, or district under the primary supervision of such regulator.

3 Section 13. That subdivision (15) of § 51A-6A-1 be amended to read as follows:

4 (15) "Trust service office," any office, agency, or other place of business ~~located within~~
5 this state at which the powers granted to trust companies are exercised either by a
6 trust company other than the place of business specified in ~~the~~ a trust company's
7 certificate of authority, ~~at which the powers granted to trust companies are exercised~~
8 or within this state by an out-of-state trust institution. A trust service office does not
9 include a trust service desk, as established in § 51A-6A-55.

10 Section 14. That § 51A-6A-58 be amended to read as follows:

11 51A-6A-58. After first applying for and obtaining the approval of the commission, one or
12 more trust service offices may be established and operated ~~anywhere within this state~~ by a trust
13 company incorporated under the laws of this state or by an out-of-state trust institution, if and
14 to the extent that the state, territory, or district in which the out-of-state trust institution is
15 chartered or licensed to engage in a trust company business grants authority for a trust company
16 organized and doing business under the laws of this state to establish an office in that state,
17 territory, or district. An application to establish and operate a trust service office or to relocate
18 an existing trust service office shall be in the form and contain the information as the director
19 shall require. The application shall include an affidavit of publication of notice that applicant
20 trust company or out-of-state institution intends to file an application to establish a trust service
21 office or relocate an existing trust service office. This notice shall be published in a newspaper
22 of general circulation in the county where the applicant trust company or out-of-state institution
23 proposes to locate the trust service office. The notice shall be in the form prescribed by the
24 commission and at a minimum shall contain the name and address of the applicant trust

1 company or out-of-state institution, the location of the proposed trust service office, a
2 solicitation for written comments concerning the proposed trust service office to be submitted
3 to the commission, and provide for a comment period of not less than ten days prior to the
4 commission's final consideration of the application.

5 A trust company may establish a trust service office in another state, territory, or district and
6 may conduct any activities at that office that are permissible for a trust company under the laws
7 of that state, territory, or district subject to the laws of this state and subject to the rules, orders,
8 or declaratory rules of the commission or the director. However, a trust company need not
9 comply with the publication requirements of this section if opening a trust service office in
10 another state, territory, or district.