

AN ACT

ENTITLED, An Act to revise or clarify certain provisions relating to the classification and creation of trusts.

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

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

Terms used in this Act mean:

- (1) "Beneficial interest," is limited to mean a current distribution interest or a remainder interest. A beneficial interest specifically excludes a power of appointment or a power reserved by the settlor;
- (2) "Beneficiary," a person that has a present or future beneficial interest in a trust, vested or contingent. The holder of a power of appointment is not a beneficiary;
- (3) "Current beneficiary," a beneficiary who, on the date the beneficiary's qualification is determined, is an eligible distributee or permissible distributee of trust income or principal;
- (4) "Current distribution interest," a distribution interest held by a current beneficiary. A current distribution interest may be classified as a mandatory interest, a support interest, or a discretionary interest;
- (5) "Power of appointment," an inter-vivos or testamentary power to direct the disposition of trust property, other than a distribution decision by a trustee to a beneficiary. Powers of appointment are held by a person to whom a power has been given, not the settlor;
- (6) "Remainder interest," an interest where a trust beneficiary will receive the property outright at some time during the future;
- (7) "Reserved power," a power held by the settlor.

Section 2. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as follows:

The common law distinction between a discretionary trust and a support trust and the dual judicial review standards related to this distinction shall be maintained. In the area of creditor rights, the Restatement of Trusts (Third) and the Uniform Trust Code creates many new positions of law as well as adopts many minority positions of law. This Act affirmatively rejects many of these positions. Therefore, the Legislature does not intend the courts to consult the Restatement (Third) of the Law of Trusts Articles § 50, § 56, § 58, § 59, or § 60 as approved by the American Law Institute of Uniform Trust Code Article 5 and Section 814(a) as approved by the National Conference of Commissioners on Uniform State Laws in 2004 with respect to subject matters addressed by this Act.

Section 3. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as follows:

Regardless of whether or not a trust contains a spendthrift provision:

- (1) No beneficial interest, power of appointment, or reserved power in a trust may be judicially foreclosed;
- (2) No creditor may attach a power of appointment, discretionary interest or a remainder interest, at the trust level. The creditor must wait until the funds are distributed before the creditor may attach the funds; and
- (3) No power of appointment is a property interest.

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

Although a remainder interest may be an enforceable right, where it is not absolutely certain based on the language of the trust that the remainder interest will be distributed within one year, it may not be classified as a property interest. This section does not affect eligibility for any public assistance program administered by the Department of Social Services pursuant to § 28-1-1.

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

No creditor may attach, exercise, or otherwise reach an interest of a beneficiary or any other

person who holds an unconditional or conditional removal or replacement power over a trustee. This power is personal to the beneficiary and may not be exercised by the beneficiary's creditors. No court can direct a beneficiary to exercise the power.

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

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

Trust property is not subject to the personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

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

Neither a current distribution interest nor a remainder interest are factors in the equitable division of marital property.

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

Unless otherwise provided in the trust, the trustee need not consider the beneficiary's resources in determining whether a distribution should be made.

Section 9. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as follows:

In the event that a party challenges a settlor or a beneficiary's influence over a trust, none of the following factors, alone or in combination, may be considered dominion and control over a trust:

- (1) A beneficiary serving as a trustee or a co-trustee as described in section 5 of this Act;
- (2) The settlor or a beneficiary holds an unrestricted power to remove or replace a trustee;
- (3) The settlor or a beneficiary is a trust administrator, a general partner of a partnership, a manager of a limited liability company, an officer of a corporation, or any other managerial function of any other type of entity, and part or all of the trust property consists of an interest in the entity;

- (4) A person related by blood or adoption to a settlor or a beneficiary is appointed as trustee;
- (5) A settlor's or a beneficiary's agent, accountant, attorney, financial advisor, or friend is appointed as trustee; or
- (6) A business associate is appointed as a trustee.

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

Absent clear and convincing evidence, no settlor of an irrevocable trust may be deemed to be the alter ego of a trustee. The following factors by themselves or in combination are not sufficient evidence for a court to conclude that the settlor controls a trustee or is the alter ego of a trustee:

- (1) Any combination of the factors listed in section 9 of this Act;
- (2) Isolated occurrences where the settlor has signed checks, made disbursements, or executed other documents related to the trust as a trustee, when in fact the settlor was not a trustee;
- (3) Making any requests for distributions on behalf of beneficiaries;
- (4) Making any requests to the trustee to hold, purchase, or sell any trust property.

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

A settlor may provide in the terms of the trust that a beneficiary's beneficial interest in a trust's income, principal, or in both, may not be voluntarily or involuntarily transferred before payment or delivery of the beneficial interest to the beneficiary by the trustee.

Section 12. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as follows:

A declaration in a trust that the interest of a beneficiary shall be held subject to a spendthrift trust is sufficient to restrain voluntary or involuntary alienation of a beneficial interest by a beneficiary

to the maximum extent provided by law.

Section 13. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as follows:

If a settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of the settlor's beneficial interest does not prevent the settlor's creditors from satisfying claims from the settlor's interest in the trust estate, unless the transfer specifically references and is qualified as a transfer under chapter 55-16. However, a settlor's creditors may not satisfy claims from either assets of the trust because of the existence of a discretionary power granted to the trustee by the terms of the trust instrument creating the trust, or any other provisions of law, to pay directly to the taxing authorities or to reimburse the settlor for any tax on trust income or principal which is payable by the settlor under the law imposing such tax; or reimbursements made to the settlor or direct tax payments made to a taxing authority for the settlor's benefit for any tax or trust income or principal which is payable by the trustor under the law imposing such tax.

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

A spendthrift provision applies to both current distribution interests and remainder interest. A spendthrift provision is a material provision of a trust.

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

A current distribution interest can be classified in three ways:

- (1) As a mandatory interest, which is a current distribution interest where the trustee has no discretion in determining whether the distribution shall be made, or the amount or timing of such distribution;
- (2) As a support interest, which is not a mandatory interest but still contains mandatory

language such as "shall make distributions" and is coupled with a standard capable of judicial interpretation; or

- (3) As a discretionary interest, which is any interest where a trustee has any discretion to make or withhold a distribution.

A discretionary interest includes permissive language such as "may make distributions" or it may include mandatory language that is negated by the uncontrolled language of the trustee, such as "the trustee shall make distributions in the trustee's sole and absolute discretion." A support interest that includes mandatory language such as "shall" but is subsequently qualified by discretionary language shall be classified as a discretionary interest and not as a support interest. A discretionary interest is any interest that is not a mandatory or a support interest.

Section 16. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as follows:

To the extent a trust contains any combination of a mandatory provision, a support provision, the trust shall be bifurcated as follows:

- (1) The trust shall be a mandatory interest only to the extent of the mandatory language;
- (2) The trust shall be a support interest only to the extent of such support language;
- (3) The remaining trust property shall be held as a discretionary interest;
- (4) A support interest that includes mandatory language such as "shall" but is subsequently qualified by discretionary language, shall be classified as a discretionary interest and not as a support interest.

Section 17. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as follows:

Although not the exclusive means to create a current distribution interest, absent clear and convincing evidence to the contrary, the following language by itself results in the following

classification of current beneficial interest:

- (1) Mandatory interest:
 - (a) "All income shall be distributed to (named beneficiary)"; or
 - (b) "One hundred thousand dollars a year shall be distributed to (named beneficiary)";
- (2) Support interest:
 - (a) "The trustee shall make distributions for health, education, maintenance, and support";
- (3) Discretionary interest:
 - (a) "The trustee, may, in the trustee's sole and absolute discretion make distributions for health, education, maintenance, and support";
 - (b) "The trustee, in the trustee's sole and absolute discretion, shall make distributions for health, education, maintenance, and support";
 - (c) "The trustee may make distributions for health, education, maintenance, and support";
 - (d) "The trustee shall make distributions for health, education, maintenance, and support. The trustees may exclude any of the beneficiaries or may make unequal distributions among them";
 - (e) "The trustee may make distributions for health, education, maintenance, support, comfort, and general welfare."

Section 18. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as follows:

If the trust contains a spendthrift provision, no creditor may attach present or future mandatory distributions from the trust at the trust level. Moreover, no court may order a trustee to distribute past due mandatory distributions directly to a creditor.

Section 19. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as follows:

The following provisions apply only to support interests:

- (1) A beneficiary of a support interest has an enforceable right to a distribution pursuant to a court's review. A trustee's distribution decision may be reviewed for reasonableness. This does not raise the beneficiary's interest to the level of a property interest;
- (2) If the trust contains a spendthrift provision, notwithstanding the beneficiary's right to force a distribution from a support trust, no creditor may force a distribution from a support interest. No creditor may attach present or future support distributions from a support interest at the trust level.

Section 20. That chapter 55-1 be amended by adding thereto a NEW SECTION to read as follows:

The following provisions apply only to discretionary interests:

- (1) A discretionary interest is neither a property interest nor an enforceable right. It is a mere expectancy;
- (2) No creditor may require the trustee to exercise the trustee's discretion to make a distribution, or cause a court to foreclose a discretionary interest;
- (3) A court may review a trustee's distribution discretion only if the trustee:
 - (a) Acts dishonestly;
 - (b) Acts with an improper motive; or
 - (c) Fails to act.

Words such as sole, absolute, uncontrolled, or unfettered discretion dispense with the trustee acting reasonably.

Absent express language to the contrary, in the event that the distribution language in a

discretionary interest permits unequal distributions between beneficiaries or distributions to the exclusion of other beneficiaries, the trustee may distribute all of the accumulated, accrued, or undistributed income and principal to one beneficiary in the trustee's discretion.

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

Section 21. That § 55-1-16 be repealed.

Section 22. That § 55-1-17 be repealed.

Section 23. That § 55-1-18 be repealed.

Section 24. That § 55-1-19 be repealed.

Section 25. That § 55-3-9 be repealed.

Section 26. That § 43-10-13 be repealed.

An Act to revise or clarify certain provisions relating to the classification and creation of trusts.

I certify that the attached Act
originated in the

SENATE as Bill No. 98

Secretary of the Senate

President of the Senate

Attest:

Secretary of the Senate

Speaker of the House

Attest:

Chief Clerk

Senate Bill No. 98
File No. _____
Chapter No. _____

Received at this Executive Office
this ____ day of _____ ,

20__ at _____ M.

By _____
for the Governor

The attached Act is hereby
approved this _____ day of
_____, A.D., 20__

Governor

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

Filed _____, 20__
at _____ o'clock __ M.

Secretary of State

By _____
Asst. Secretary of State