

# State of South Dakota

NINETY-FIRST SESSION  
LEGISLATIVE ASSEMBLY, 2016

400X0083

## HOUSE BILL NO. 1039

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

10          Section 3. That chapter 51A-6A be amended by adding a NEW SECTION to read:

11          Any publication requirement for trust company applicants, including the requirement in  
12 § 51A-2-16, is satisfied by the director publishing a public notice of the application on the  
13 division's website.

14          Section 4. That § 51A-6A-7 be amended to read:

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

24          (1) That the corporation or limited liability company is formed for the purpose of

1 engaging in the trust company business; and

2 (2) The period for which such corporation or limited liability company is organized,  
3 which may be perpetual.

4 The articles may contain any other provisions as are consistent with law. The articles shall  
5 be subscribed by one or more of the organizers of the proposed trust company and shall be  
6 acknowledged by them. The full amount of the capital required by § 51A-6A-19 shall be  
7 subscribed before the articles are filed.

8 Section 5. That § 51A-6A-11.1 be amended to read:

9 51A-6A-11.1. A public trust company shall:

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

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

23 The commission may promulgate rules, pursuant to chapter 1-26, to establish additional  
24 guidelines regarding what constitutes trust administration in South Dakota for purposes of this

1 section.

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

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

5 (1) Be in premises distinct and divided from the office space of any other entity;

6 (2) Have the name, charter, and certificate of authority of the trust company prominently  
7 displayed;

8 (3) Have access to premises in or adjacent to the office space sufficient to facilitate  
9 onsite examinations by the division;

10 (4) To the extent the trust company maintains hard copies of any documents required to  
11 be maintained pursuant to § 51A-6A-30, have a secure fireproof file cabinet that  
12 contains all such hard copies; and

13 (5) To the extent the trust company maintains any record electronically, have a secure  
14 computer terminal or other secure electronic device that provides access to such  
15 records, including account information, as necessary to facilitate an efficient and  
16 effective examination.

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

20 Section 7. That chapter 51A-6A be amended by adding a NEW SECTION to read:

21 Upon application by a trust company, the director may approve office space that does not  
22 meet the requirements of section 6 of this Act if the director determines the nature and degree  
23 of risks presented by the trust company are low based upon a review of the size, nature, and  
24 number of accounts administered by the trust company, the structure and business plan of the

1 trust company approved by the division, and the number of employees or persons performing  
2 services for the trust company in South Dakota.

3 If the size, risk profile, or rate of growth of a trust company changes, or if a trust company's  
4 office space is insufficient to facilitate onsite examinations by the division, the director may  
5 impose additional office space requirements.

6 Section 8. That § 51A-6A-15 be amended to read:

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

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

23 Section 9. That § 51A-6A-58 be amended to read:

24 51A-6A-58. After first applying for and obtaining the approval of the director, one or more

1 trust service offices may be established and operated by a trust company incorporated under the  
2 laws of this state or by an out-of-state trust institution, if and to the extent that the state,  
3 territory, or district in which the out-of-state trust institution is chartered or licensed to engage  
4 in a trust company business grants authority for a trust company organized and doing business  
5 under the laws of this state to establish an office in that state, territory, or district. An application  
6 to establish and operate a trust service office or to relocate an existing trust service office shall  
7 be submitted and approved in the manner set forth in § 51A-6A-4.

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

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

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

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

1 by the person to whom the power has been given and once granted to a person, is not capable  
2 of appropriation or of manual delivery. A power of appointment is a general power of  
3 appointment if it is exercisable in favor of the person holding the power, the person's estate, the  
4 person's creditors, or the creditors of the person's estate, whether or not the power is also  
5 exercisable in favor of others. A power of appointment is a nongeneral power of appointment  
6 if it is not a general power of appointment. As used in this ~~section~~ chapter, the term, person, has  
7 the meaning set forth in § 55-4-1.

8 Section 11. That § 55-1-24 be amended to read:

9 55-1-24. Terms used in §§ 55-1-24 to 55-1-45, inclusive, mean:

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

11 A beneficial interest specifically excludes a power of appointment or a power  
12 reserved by the settlor;

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

15 (3) "Distribution interest," a distribution interest held by a distribution beneficiary. A  
16 distribution interest may be a current distribution interest or a future distribution  
17 interest. A distribution interest may be classified as a mandatory interest, a support  
18 interest, or a discretionary interest;

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

23 (5) "Reach," with respect to a distribution interest or power, to subject the distribution  
24 interest or power to a judgment, decree, garnishment, attachment, execution, levy,

1 creditor's bill or other legal, equitable, or administrative process, relief, or control of  
2 any court, tribunal, agency, or other entity as provided by law;

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

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

6 Section 12. That § 55-1-24.2 be amended to read:

7 55-1-24.2. A withdrawal power allows a ~~beneficiary person~~ a right to withdraw all or some  
8 part of the trust property, whether from income or principal. The holder of a ~~power of~~  
9 withdrawal power is not deemed to be the settlor of the trust by failing to exercise a withdrawal  
10 power or letting a withdrawal power lapse.

11 Section 13. That § 55-1-26 be amended to read:

12 55-1-26. Regardless of whether or not a trust contains a spendthrift provision:

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

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

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

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

21 Section 14. That § 55-1-36.1 be amended to read:

22 55-1-36.1. Regardless of whether ~~the transfer~~ a disposition is a qualified ~~transfer~~ disposition  
23 pursuant to chapter 55-16, ~~a settlor's creditors may not satisfy claims from either assets of the~~  
24 ~~trust because of the existence of a discretionary power granted to the trustee by the terms of the~~

1 ~~trust instrument creating the trust, or any other provisions of law, to pay directly to the taxing~~  
2 ~~authorities or to reimburse the settlor for any tax on trust income or principal which is payable~~  
3 ~~by the settlor under the law imposing the tax. No reimbursement may be made to the settlor or~~  
4 ~~direct tax payment made to a taxing authority for the settlor's benefit for any tax or trust income~~  
5 ~~or principal which is payable by the trustor under the law imposing the tax where a trustee is~~  
6 ~~granted a discretionary power by the terms of the trust instrument, or any provision of law, to~~  
7 ~~pay directly to any taxing authority, or to reimburse the person liable for, any tax imposed by~~  
8 ~~a taxing authority on the person by reason of the person being treated as the owner of all or any~~  
9 ~~portion of the trust property pursuant to §§ 671 to 678, inclusive, of the Internal Revenue Code~~  
10 ~~of 1986, 26 U.S.C. §§ 671 to 678, inclusive, as of January 1, 2016, and the U.S. Treasury~~  
11 ~~Regulations promulgated thereunder, as of January 1, 2016:~~

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

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

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

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

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

2 55-1B-1. Terms used in this chapter mean:

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

5 (2) "Trust protector," any person whose appointment as protector is provided for in the  
6 instrument. Such person may not be considered to be acting in a fiduciary capacity  
7 except to the extent the governing instrument provides otherwise. However, a  
8 protector shall be considered acting in a fiduciary capacity to the extent that the  
9 person exercises the authority of an investment trust advisor or a distribution trust  
10 advisor;

11 (3) "Trust advisor," either an investment trust advisor or a distribution trust advisor;

12 (4) "Fiduciary," a trustee or custodian under any instrument, an executor, administrator,  
13 or personal representative of a decedent's estate, or any other party, including a trust  
14 advisor, a trust protector, or a trust committee, who is acting in a fiduciary capacity  
15 for any person, trust, or estate;

16 (5) "Excluded fiduciary," any fiduciary excluded from exercising certain powers under  
17 the instrument which powers may be exercised by the grantor, custodial account  
18 owner, trust advisor, trust protector, trust committee, or other persons designated in  
19 the instrument;

20 (6) "Investment trust advisor," a fiduciary, given authority by the instrument to exercise  
21 all or any portions of the powers and discretions set forth in § 55-1B-10;

22 (7) "Distribution trust advisor," a fiduciary, given authority by the instrument to exercise  
23 all or any portions of the powers and discretions set forth in § 55-1B-11;

24 (8) "Custodial account," an account, established by a party with a bank as defined in 26

1 U.S.C. 408(n), as of January 1, 2006, or with another person approved by the Internal  
2 Revenue Service as satisfying the requirements to be a nonbank trustee or a nonbank  
3 passive trustee set forth in U.S. Treasury Regulations promulgated under 26 U.S.C.  
4 408, that is governed by an instrument concerning the establishment or maintenance,  
5 or both, of an individual retirement account, qualified retirement plan, Archer  
6 medical savings account, health savings account, Coverdell education savings  
7 account, or any similar retirement or savings vehicle permitted under the Internal  
8 Revenue Code of 1986, as of January 1, 2006;

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

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

19 Section 17. That § 55-1B-2 be amended to read:

20 55-1B-2. An excluded fiduciary is not liable, either individually or as a fiduciary, for any  
21 of the following:

22 (1) Any loss that results from compliance with a direction of the trust advisor, custodial  
23 account owner, or authorized designee of a custodial account owner, including any  
24 loss from the trust advisor breaching fiduciary responsibilities or acting beyond the

1 trust advisor's scope of authority;

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

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

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

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

24 Absent contrary provisions in the governing instrument, the actions of the excluded fiduciary

1 (such as any communications with the trust advisor and others and carrying out, recording, and  
2 reporting actions taken at the trust advisor's direction) pertaining to matters within the scope of  
3 authority of the trust advisor, trust protector, investment trust advisor, or distribution trust  
4 advisor shall be deemed to be administrative actions taken by the excluded fiduciary solely to  
5 allow the excluded fiduciary to perform those duties assigned to the excluded fiduciary under  
6 the governing instrument, and such administrative actions may not be deemed to constitute an  
7 undertaking by the excluded fiduciary to monitor, participate, or otherwise take any fiduciary  
8 responsibility for actions within the scope of authority of the trust advisor, trust protector,  
9 investment trust advisor, or distribution trust advisor.

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

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

15 Section 18. That § 55-1B-6 be amended to read:

16 55-1B-6. The powers and discretions of a trust protector are as provided in the governing  
17 instrument and may be exercised or not exercised, in the best interests of the trust, in the sole  
18 and absolute discretion of the trust protector and are binding on all other persons. The powers  
19 and discretion may include the following:

- 20 (1) Modify or amend the trust instrument to achieve favorable tax status or respond to  
21 changes in the Internal Revenue Code, state law, or the rulings and regulations  
22 thereunder;
- 23 (2) Increase or decrease the interests of any beneficiaries to the trust;
- 24 (3) Modify the terms of any power of appointment granted by the trust. However, a

1 modification or amendment may not grant a beneficial interest to any individual or  
2 class of individuals not specifically provided for under the trust instrument;

3 (4) Remove and appoint a trustee, a fiduciary provided for in the governing trust  
4 instrument, trust advisor, investment committee member, or distribution committee  
5 member;

6 (5) Terminate the trust;

7 (6) Veto or direct trust distributions;

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

9 (8) Appoint a successor trust protector;

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

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

12 (11) Amend or modify the trust instrument to take advantage of laws governing restraints  
13 on alienation, distribution of trust property, or the administration of the trust; ~~and~~

14 (12) Provide direction regarding notification of qualified beneficiaries pursuant to § 55-2-  
15 13;

16 (13) Add to the trust an individual beneficiary or beneficiaries from a class of individuals  
17 identified in the governing instrument;

18 (14) Add to the trust a charitable beneficiary or beneficiaries from a class of charities  
19 identified in the trust instrument; and

20 (15) Provide other powers and discretions in the governing instrument.

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

24 The powers and discretions of a family advisor are as provided in the governing instrument

1 or by court order and may be exercised or not exercised, in the best interests of the trust, in the  
2 sole and absolute discretion of the family advisor. The powers and discretions may only include  
3 the following:

4 (1) Remove and appoint a trustee, a fiduciary provided for in the governing trust  
5 instrument, trust advisor, investment committee member, or distribution committee  
6 member;

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

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

15 (4) Provide direction regarding notification of qualified beneficiaries pursuant to  
16 § 55-2-13.

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

1 advisor's action or inaction.

2 A family advisor is entitled to compensation as provided in the governing instrument. If the  
3 governing instrument does not provide for or establish compensation, a family advisor is entitled  
4 to reasonable compensation for the exercise of the powers and discretions granted to the family  
5 advisor pursuant to this chapter.

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

7 55-3-3. When a trustee is appointed by a court or public officer as ~~such, such a trustee, the~~  
8 court or officer is the trustor. A court may otherwise establish or create a trust and may act as  
9 the trustor of a trust.

10 Section 21. That § 55-3-7 be amended to read:

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

16 Section 22. That § 55-3-23 be amended to read:

17 55-3-23. In addition to the methods specified in §§ 55-3-24 to 55-3-27, inclusive, a trust  
18 terminates if:

- 19 (1) The term of the trust expires;
- 20 (2) The trust purpose ~~if~~ is fulfilled;
- 21 (3) The trust purpose becomes unlawful or impossible to fulfill; or
- 22 (4) The trust is revoked.

23 Section 23. That § 55-3-28 be amended to read:

24 55-3-28. On petition by a trustee or beneficiary, the court may reform the terms of the trust,

1 based upon a showing by the preponderance of the evidence and without any preliminary  
2 showing of an ambiguity, to conform to the trustor's intention if the failure to conform was due  
3 to a mistake of fact or law and the trustor's intent can be established. The terms of the trust may  
4 be construed or modified, in a manner that does not violate the trustor's probable intention, to  
5 achieve the trustor's tax objectives.

6 Section 24. That § 55-3-48 be amended to read:

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

12 Section 25. That § 55-16-10 be amended to read:

13 55-16-10. A cause of action or claim for relief with respect to a fraudulent transfer of a  
14 settlor's assets under § 55-16-9 is extinguished unless the action under § 55-16-9 is brought by  
15 a creditor of the settlor who meets one of the following requirements:

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

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

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

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

23 (ii) Files another action, other than an action under § 55-16-9, against the  
24 settlor that asserts a claim based on an act or omission of the settlor that

1                    occurred before the transfer, and the action described in this sub-  
2                    subsection is filed within two years after the transfer; or

3        (2)    Becomes a creditor subsequent to the transfer into trust, and the action under § 55-  
4            16-9 is brought within two years after the transfer is made;

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

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

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

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

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

21        Section 26. That § 55-16-11 be amended to read:

22           55-16-11. A qualified disposition that is made by means of a disposition by a transferor who  
23 is a trustee is deemed to have been made as of the time, whether before, on, or after July 1,  
24 2005, the property that is the subject of the qualified disposition was originally transferred to

1 the transferor, or any predecessor trustee, making the qualified disposition in a form that meets  
2 the requirements of subdivisions 55-16-2(2) and (3). Further, the provisions of this section apply  
3 to determine the date the transfer is deemed to have been made, notwithstanding that the original  
4 transfer was to a trust originally within or outside of the jurisdiction of South Dakota.

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

11 Section 27. That § 55-16-13 be amended to read:

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

23 Section 28. That § 21-22-2 be amended to read:

24 21-22-2. This chapter applies to all trusts if any part of the trust estate has its situs within

1 this state or if the trustee or a beneficiary resides in this state, except as otherwise specifically  
2 provided by statute or rule of court, the intent being to exclude therefrom such trusts as a  
3 statutory assignment for the benefit of creditors, probate administrations, conservatorships, and  
4 all other trusts as to which specific provision is made for court supervision. The provisions of  
5 §§ 55-3-24 to ~~55-3-44~~ 55-3-48, inclusive, are applicable to actions or proceedings relating to  
6 trusts supervised or administered under this chapter.

7 Section 29. That § 21-22-28 be amended to read:

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

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

18 An arrangement is a South Dakota special spousal trust if one or both spouses in a marriage  
19 transfer property to a trust, the trust expressly declares that some or all the property transferred  
20 is South Dakota special spousal property as provided in this section to section 43, inclusive, of  
21 this Act, and at least one trustee is a qualified person. A South Dakota special spousal trust is  
22 enforceable without consideration. Both spouses or either spouse may be a trustee. The trust  
23 must be signed by both spouses. The trust may be revocable or irrevocable.

24 For purposes of this section, a qualified person is any person who meets the requirements

1 of §§ 55-3-41 and 55-3-39, but without regard to whether that person is the transferor.

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

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

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

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

13 Spouses may classify all or any of their property as special spousal property by transferring  
14 property to a South Dakota special spousal trust established pursuant to sections 30 to 43,  
15 inclusive, of this Act, and by expressly declaring in the trust that the property is community  
16 property.

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

18 A South Dakota special spousal trust may not be amended or revoked unless the trust  
19 agreement provides for amendment or revocation, or unless the trust agreement is amended or  
20 revoked by a later South Dakota special spousal trust. To amend or revoke the trust, the later  
21 South Dakota special spousal trust is not required to declare any property held by the trustee as  
22 special spousal property. The amended trust or the revocation is enforceable without  
23 consideration. However, notwithstanding the other provisions of sections 30 to 43, inclusive,  
24 of this Act, unless the South Dakota special spousal trust expressly provides otherwise, at any

1 time after the death of the first spouse the surviving spouse may amend the South Dakota special  
2 spousal trust with regard to the surviving spouse's property to be disposed of at the surviving  
3 spouse's death. For purposes of this section, the term, surviving spouse's property, means the  
4 property that consists of the surviving spouse's property that is not South Dakota special spousal  
5 property and the surviving spouse's share of the special spousal property determined as of the  
6 date of the first spouse's death.

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

8 For purposes of the application of § 1014(b)(6) of the Internal Revenue Code of 1986, 26  
9 U.S.C. § 1014(b)(6), as of January 1, 2016, a South Dakota special spousal trust is considered  
10 a trust established under the community property laws of South Dakota. For purposes of sections  
11 30 to 43, inclusive, of this Act, the term, special spousal property, means community property  
12 for those purposes. Community property as classified by a jurisdiction other than South Dakota  
13 transferred to a South Dakota special spousal trust retains its character as community property  
14 while in the trust. If the trust is revoked and property is transferred on revocation of the trust,  
15 the community property as classified by a jurisdiction other than South Dakota retains its  
16 character as community property to the extent otherwise provided by South Dakota law.

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

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

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

21 In addition to other transfers of property to a South Dakota special spousal trust, property  
22 is considered transferred to a South Dakota special spousal trust if the property is subject to a  
23 nonprobate transfer on death under an insurance policy, contract of employment, bond,  
24 mortgage, promissory note, certificated or uncertificated security, account agreement, custodial

1 agreement, deposit agreement, compensation plan, pension plan, individual retirement plan,  
2 employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other  
3 written instrument of a similar nature and the South Dakota special spousal trust is designated  
4 as a beneficiary to receive the property under the transfer. The property is considered the  
5 surviving spouse's property that is not South Dakota special spousal property.

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

7 The trustee of a South Dakota special spousal trust shall maintain records that identify which  
8 property held by the trust is South Dakota special spousal property and which property held by  
9 the trust is not South Dakota special spousal property.

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

11 Except as provided in sections 39 and 40 of this Act, in a South Dakota special spousal trust,  
12 spouses may agree on:

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

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

22 Notwithstanding anything contained in section 38 of this Act to the contrary, a South Dakota  
23 special spousal trust may not adversely affect the right of a child to support.

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

1 Notwithstanding anything contained in section 38 of this Act to the contrary:

2 (1) A provision of a revocable South Dakota special spousal property trust does not  
3 adversely affect the interest of a creditor unless the creditor has actual knowledge of  
4 the trust when the obligation to the creditor is incurred. The interest of a creditor in  
5 an irrevocable South Dakota special spousal property trust may be subject to the  
6 rights and liabilities of a creditor with respect to transfers under chapter 55-16 as  
7 provided in section 35 of this Act;

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

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

12 Notwithstanding anything contained in section 38 of this Act to the contrary:

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

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

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

21 For purposes of section 41 of this Act, the term, bona fide purchaser, means a purchaser of  
22 property for value who has not knowingly been a party to fraud or illegality affecting the interest  
23 of the spouses or other parties to the transaction, does not have notice of an adverse claim by  
24 a spouse, and has acted in the transaction in good faith.

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

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

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

9 Section 43. That the code be amended by adding a NEW SECTION to read:

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

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

24 Whether a South Dakota special spousal trust is unconscionable is determined by a court as

1 a matter of law.