

State of South Dakota

EIGHTIETH SESSION
LEGISLATIVE ASSEMBLY, 2005

553L0571

SENATE BILL NO. 94

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
16 the trust instrument;



1 (3) ~~"Trust advisor," the grantor of an instrument or other fiduciaries in which any power,~~
 2 ~~including the power and authority to direct the acquisition, disposition, or retention~~
 3 ~~of any investment, or the power to authorize any act that an excluded fiduciary may~~
 4 ~~propose, is reserved to the exclusion of another fiduciary also acting under the~~
 5 ~~instrument. Trust advisor also includes any party accepting the delegation of a~~
 6 ~~fiduciary's power to direct the acquisition, disposition, or retention of any investment;~~

7 (4) "Fiduciary," a trustee under any testamentary or other trust, an executor,
 8 administrator, or personal representative of a decedent's estate, or any other party,
 9 including a trust advisor ~~or~~, a trust protector, or a trust committee, who is acting in
 10 a fiduciary capacity for any person, trust, or estate; and

11 (5) "Excluded fiduciary," any fiduciary excluded from exercising certain powers under
 12 the instrument which powers may be exercised by the grantor ~~or a trust advisor or a~~
 13 ~~trust protector~~, trust advisor, trust protector, trust committee, or other persons
 14 designated in the trust instrument;

15 (6) "Investment trust advisor," a fiduciary, given authority by the trust instrument to
 16 exercise all or any portions of the powers and discretions set forth in section 6 of this
 17 Act;

18 (7) "Distribution trust advisor," a fiduciary, given authority by the trust instrument to
 19 exercise all or any portions of the powers and discretions set forth in section 7 of this
 20 Act.

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

22 55-1B-6. The powers and discretions of a trust protector shall be as provided in the
 23 governing instrument and may, ~~in the best interests of the trust,~~ be exercised or not exercised,
 24 in the best interests of the trust, in the sole and absolute discretion of the trust protector and shall

1 be binding on all other persons. Such powers and discretion may include the following:

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

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

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

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

12 (5) Terminate the trust;

13 (6) Veto or direct trust distributions;

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

15 (8) Appoint a successor trust protector;

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

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

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

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

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

24 Any of the powers enumerated in § 55-1B-6, as they exist at the time of the signing of a will

1 by a testator or at the time of the signing of a trust instrument by a trustor, may be, by
2 appropriate reference made thereto, incorporated in whole or in part in such will or trust
3 instrument, by a clearly expressed intention of a testator of a will or trustor of a trust instrument.

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

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

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

11 The powers and discretions of an investment trust advisor shall be provided in the trust
12 instrument and may be exercised or not exercised, in the best interests of the trust, in the sole
13 and absolute discretion of the investment trust advisor and are binding on any other person and
14 any other interested party, fiduciary, and excluded fiduciary. Unless the terms of the document
15 provide otherwise, the investment trust advisor has the power to perform the following:

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

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

24 The powers and discretions of a distribution trust advisor shall be provided in the trust

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

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

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

11 (1) The law of any foreign country, as defined in subdivision 10-43-1(6), prohibits or
12 does not recognize the concept of a trust; or

13 (2) The trust or disposition:

14 (a) Avoids or defeats any right, claim, or interest conferred by the law of a foreign
15 country upon any person by reason of a personal relationship to the trustor or
16 by way of heirship rights; or

17 (b) Contravenes any rule or law of a foreign country or any foreign country's
18 judicial or administrative order or action intended to recognize, protect,
19 enforce, or give effect to such a right, claim, or interest.

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

21 55-15-6. The unitrust amount shall be determined as follows:

22 (1) For the first three accounting periods of the trust, the unitrust amount for a current
23 valuation year of the trust shall be three percent, or such higher percentage specified
24 by the terms of the governing instrument or by the election of the trustee, the

1 disinterested person, or the court, of the net fair market value of the assets held in the
2 trust on the first business day of the current valuation year;

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

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

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

- 1 the trust within a current valuation year;
- 2 (5) In the case of a short accounting period, the trustee shall prorate the unitrust amount
3 on a daily basis;
- 4 (6) If the net fair market value of an asset held in the trust has been incorrectly
5 determined either in a current valuation year or in a prior valuation year, the unitrust
6 amount shall be increased in the case of an undervaluation, or be decreased in the
7 case of an overvaluation, by an amount equal to the difference between the unitrust
8 amount determined based on the correct valuation of the asset and the unitrust
9 amount originally determined;
- 10 (7) In determining the net fair market value of the assets held in trust, the determination
11 may not include the value of any residential property or any tangible personal
12 property that, as of the first business day of the current valuation year, one or more
13 income beneficiaries of the trust have or had the right to occupy, or have or had the
14 right to possess or control, other than in a capacity as trustee, and instead the right of
15 occupancy or the right of possession or control shall be deemed to be the unitrust
16 amount with respect to the residential property or the tangible personal property; or
17 any asset specifically given to a beneficiary under the terms of the trust and the return
18 on investment on that asset, which return on investment shall be distributed to the
19 beneficiary.