

State of South Dakota

EIGHTY-SECOND SESSION
LEGISLATIVE ASSEMBLY, 2007

268N0503

HOUSE ENGROSSED NO. **SB 98** - 02/28/2007

Introduced by: Senator Knudson and Representative Cutler

1 FOR AN ACT ENTITLED, An Act to revise or clarify certain provisions relating to the
2 classification and creation of trusts.

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

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

6 Terms used in this Act mean:

- 7 (1) "Beneficial interest," is limited to mean a current distribution interest or a remainder
8 interest. A beneficial interest specifically excludes a power of appointment or a
9 power reserved by the settlor;
- 10 (2) "Beneficiary," a person that has a present or future beneficial interest in a trust,
11 vested or contingent. The holder of a power of appointment is not a beneficiary;
- 12 (3) "Current beneficiary," a beneficiary who, on the date the beneficiary's qualification
13 is determined, is an eligible distributee or permissible distributee of trust income or
14 principal;
- 15 (4) "Current distribution interest," a distribution interest held by a current beneficiary.
16 A current distribution interest may be classified as a mandatory interest, a support



1 interest, or a discretionary interest;

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

6 (6) "Remainder interest," an interest where a trust beneficiary will receive the property
7 outright at some time during the future;

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

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

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

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

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

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

1 (2) No creditor may attach a power of appointment, discretionary interest or a remainder
2 interest, at the trust level. The creditor must wait until the funds are distributed before
3 the creditor may attach the funds; and

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

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

7 Although a remainder interest may be an enforceable right, where it is not absolutely certain
8 based on the language of the trust that the remainder interest will be distributed within one year,
9 it may not be classified as a property interest. This section does not affect eligibility for any
10 public assistance program administered by the Department of Social Services pursuant to § 28-
11 1-1.

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

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

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

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

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

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

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

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

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

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

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

- 14 (1) A beneficiary serving as a trustee or a co-trustee as described in section 5 of this Act;
- 15 (2) The settlor or a beneficiary holds an unrestricted power to remove or replace a
16 trustee;
- 17 (3) The settlor or a beneficiary is a trust administrator, a general partner of a partnership,
18 a manager of a limited liability company, an officer of a corporation, or any other
19 managerial function of any other type of entity, and part or all of the trust property
20 consists of an interest in the entity;
- 21 (4) A person related by blood or adoption to a settlor or a beneficiary is appointed as
22 trustee;
- 23 (5) A settlor's or a beneficiary's agent, accountant, attorney, financial advisor, or friend
24 is appointed as trustee; or

1 (6) A business associate is appointed as a trustee.

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

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

8 (1) Any combination of the factors listed in section 9 of this Act;

9 (2) Isolated occurrences where the settlor has signed checks, made disbursements, or
10 executed other documents related to the trust as a trustee, when in fact the settlor was
11 not a trustee;

12 (3) Making any requests for distributions on behalf of beneficiaries;

13 (4) Making any requests to the trustee to hold, purchase, or sell any trust property.

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

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

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

21 A declaration in a trust that the interest of a beneficiary shall be held subject to a spendthrift
22 trust is sufficient to restrain voluntary or involuntary alienation of a beneficial interest by a
23 beneficiary to the maximum extent provided by law.

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

1 follows:

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

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

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

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

19 A current distribution interest can be classified in three ways:

- 20 (1) As a mandatory interest, which is a current distribution interest where the trustee has
21 no discretion in determining whether the distribution shall be made, or the amount
22 or timing of such distribution;
- 23 (2) As a support interest, which is not a mandatory interest but still contains mandatory
24 language such as "shall make distributions" and is coupled with a standard capable

1 of judicial interpretation; or

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

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

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

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

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

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

22 Although not the exclusive means to create a current distribution interest, absent clear and
23 convincing evidence to the contrary, the following language by itself results in the following
24 classification of current beneficial interest:

1 (1) Mandatory interest:

2 (a) "All income shall be distributed to (named beneficiary)"; or

3 (b) "One hundred thousand dollars a year shall be distributed to (named
4 beneficiary)";

5 (2) Support interest:

6 (a) "The trustee shall make distributions for health, education, maintenance, and
7 support";

8 (3) Discretionary interest:

9 (a) "The trustee, may, in the trustee's sole and absolute discretion make
10 distributions for health, education, maintenance, and support";

11 (b) "The trustee, in the trustee's sole and absolute discretion, shall make
12 distributions for health, education, maintenance, and support";

13 (c) "The trustee may make distributions for health, education, maintenance, and
14 support";

15 (d) "The trustee shall make distributions for health, education, maintenance, and
16 support. The trustees may exclude any of the beneficiaries or may make
17 unequal distributions among them";

18 (e) "The trustee may make distributions for health, education, maintenance,
19 support, comfort, and general welfare."

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

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

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

3 The following provisions apply only to support interests:

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

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

14 The following provisions apply only to discretionary interests:

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

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

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

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

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

10 ~~—55-1-16. A trustor may provide in the terms of the trust that the interest of a beneficiary in~~
11 ~~the income, or in the principal, or in both, may not be voluntarily or involuntarily transferred~~
12 ~~before payment or delivery of the interest to the beneficiary by the trustee.~~

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

14 ~~—55-1-17. A declaration in a trust instrument that the interest of a beneficiary shall be held~~
15 ~~subject to a spendthrift trust is sufficient to restrain voluntary or involuntary alienation of the~~
16 ~~interest by a beneficiary to the maximum extent permitted by law.~~

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

18 ~~—55-1-18. Any trust containing terms authorized pursuant to § 55-1-16 or 55-1-17 is a~~
19 ~~spendthrift trust.~~

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

21 ~~—55-1-19. If the trustor is also a beneficiary of the trust, a provision restraining the voluntary~~
22 ~~or involuntary transfer of the trustor's beneficial interest does not prevent the trustor's creditors~~
23 ~~from satisfying claims from the trustor's interest in the trust estate, unless the transfer~~
24 ~~specifically references and is qualified as a transfer under chapter 55-16. However, a trustor's~~

1 ~~creditors may not satisfy claims from federal income tax reimbursements made to the trustor or~~
2 ~~direct tax payments made by an independent trustee for the trustor's benefit from an irrevocable~~
3 ~~trust taxed for federal income tax purposes pursuant to the grantor trust rules of the Internal~~
4 ~~Revenue Code Sections 671 to 679, inclusive, as of January 1, 2005.~~

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

6 ~~—55-3-9. A discretionary power conferred upon a trustee is presumed not to be left to his~~
7 ~~arbitrary discretion but may be controlled by the circuit court, if not reasonably exercised, unless~~
8 ~~an absolute discretion is clearly conferred by the declaration of trust.~~

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

10 ~~—43-10-13. Where a trust is created to receive the rents and profits of real property and no~~
11 ~~valid direction for accumulation is given, the surplus of such rents and profits beyond the sum~~
12 ~~that may be necessary for the education and support of the person for whose benefit the trust is~~
13 ~~created is liable to the claims of the creditors of such person in the same manner as personal~~
14 ~~property which cannot be reached by execution.~~