

State of South Dakota

EIGHTY-NINTH SESSION
LEGISLATIVE ASSEMBLY, 2014

400V0236

HOUSE STATE AFFAIRS
ENGROSSED NO. **HB 1047** - 01/24/2014

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.

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

3 Section 1. That § 51A-6A-29 be amended to read as follows:

4 51A-6A-29. A trust company may exercise the following powers necessary or incidental to
5 carrying on a trust company business, including:

6 (1) Act as agent, custodian, or attorney-in-fact for any person, and, in such capacity, take
7 and hold property on deposit for safekeeping and act as general or special agent or
8 attorney-in-fact in the acquisition, management, sale, assignment, transfer,
9 encumbrance, conveyance, or other disposition of property, in the collection or
10 disbursement of income from or principal of property, and generally in any matter
11 incidental to any of the foregoing;

12 (2) Act as registrar or transfer agent for any corporation, partnership, association, limited
13 liability company, municipality, state, or public authority, and in such capacity,
14 receive and disburse money, transfer, register, and countersign certificates of stock,



1 bonds, or other evidences of indebtedness or securities, and perform any acts which
2 may be incidental thereto;

3 (3) Act as trustee or fiduciary under any mortgage or bond issued by a person;

4 (4) Act as trustee or fiduciary under any trust established by a person;

5 (5) Act as fiduciary, assignee for the benefit of creditors, receiver, or trustee under or
6 pursuant to the order or direction of any court or public official of competent
7 jurisdiction;

8 (6) Act as fiduciary, guardian, conservator, assignee, or receiver of the estate of any
9 person and as executor of the last will and testament or administrator, fiduciary, or
10 personal representative of the estate of any deceased person when appointed by a
11 court or public official of competent jurisdiction;

12 (7) Establish and maintain common trust funds or collective investment funds pursuant
13 to the provisions of §§ ~~55-6-2 to 55-6-7, inclusive~~ chapter 55-6; or

14 (8) Act in any fiduciary capacity and perform any act as a fiduciary which a South
15 Dakota bank with trust powers may perform in the exercise of those trust powers.

16 Section 2. That § 51A-6A-64 be amended to read as follows:

17 51A-6A-64. Any trust company qualified to act as a fiduciary in this state may establish
18 common trust funds or collective investment funds for the purpose of furnishing investments
19 to itself as fiduciary, or to itself and others, as co-fiduciaries. Any trust company qualified to act
20 as fiduciary in this state may, as such fiduciary or co-fiduciary, invest funds that it lawfully
21 holds for investment in the common trust funds or collective investment funds, if the investment
22 is not prohibited by the instrument, judgment, decree, or order creating the fiduciary
23 relationship. Any common trust fund or collective investment funds shall be established and
24 maintained according to the provisions of §§ ~~55-6-2 to 55-6-7, inclusive~~ chapter 55-6.

1 Section 3. That § 51A-6A-32 be amended to read as follows:

2 51A-6A-32. If upon the examination of any trust company, the ~~commission~~ director
3 considers it necessary, the director may examine the fiduciary affairs of any officer or employee
4 of any trust company; and upon similar determination ~~by the commission~~, the director may
5 examine any investment company or holding company or corporation ~~which~~ that is affiliated
6 with any trust company as to matters relevant to the safety and soundness of the trust company;
7 ~~such determination being.~~ Determinations by the director pursuant to this section are subject to
8 review by the commission pursuant to chapter 1-26.

9 Section 4. That § 55-4-31 be amended to read as follows:

10 55-4-31. A trustee is not liable to a beneficiary, as defined under this title or Title 29A, for
11 breach of trust from any or all of the duties, restrictions, and liabilities which would otherwise
12 be imposed on the trustee ~~by this chapter~~, except as to the duties, restrictions, and liabilities
13 imposed by §§ 55-4-10 to 55-4-12, inclusive, if the beneficiary consented to the conduct
14 constituting the breach, released the trustee from liability for the breach, or ratified the
15 transaction constituting the breach, unless:

16 (1) The consent, release, or ratifications of the beneficiary were induced by improper
17 conduct of the trustee; or

18 (2) At the time of the consent, release, or ratification, the beneficiary did not have
19 knowledge of the beneficiary's rights or of the material facts relating to the breach.

20 Any such beneficiary may release the trustee from liability to such beneficiary for past
21 violations of any of the provisions of this chapter. No consideration is required for the consent,
22 release, or ratification to be valid.

23 Section 5. That § 55-5-17 be amended to read as follows:

24 55-5-17. (a) Unless otherwise required by the terms of the trust instrument or court order,

1 no trustee of a trust, with respect to acquiring, retaining, or disposing of a contract of insurance
2 or holding one or more insurance contracts upon the life of the settlor, or the lives of the settlor
3 and the settlor's spouse, has the following duties:

- 4 (1) To determine whether any such contract is or remains a proper investment;
- 5 (2) To investigate the financial strength or changes in the financial strength of the life
6 insurance company;
- 7 (3) To make a determination of whether to exercise any policy options available under
8 any such contract;
- 9 (4) To make a determination of whether to diversify any such contract relative to one
10 another or to other assets, if any, administered by the trustee; ~~or~~
- 11 (5) To inquire about changes in the health or financial condition of the insured or
12 insured's relative to any such contract; or
- 13 (6) To vote, or give proxies to vote, on corporate matters.

14 A trustee of a revocable or an irrevocable trust, or of either a directed trust pursuant
15 to chapter 55-1B or a delegated trust pursuant to § 55-5-16, is not liable to the
16 beneficiaries of the trust or to any other party for any loss arising from the absence
17 of those duties upon the trustee.

18 (b) The trustee of a trust described under subsection (a) of this section which was established
19 prior to the effective date of this section, shall notify the settlor in writing that, unless the settlor
20 provides written notice to the contrary to the trustee within sixty days of the trustee's notice, the
21 provisions of subsection (a) of this section shall apply to the trust. Subsection (a) of this section
22 does not apply if, within sixty days of the trustee's notice, the settlor notifies the trustee that
23 subsection (a) does not apply.

24 Section 6. That § 21-22-1 be amended to read as follows:

1 21-22-1. Terms used in this chapter mean:

2 (1) "Beneficiary," any person in any manner interested in the trust, including a creditor
3 or claimant with any rights or claimed rights against the trust estate;

4 (2) "Court trust," any trust which is established or confirmed by the judgment, decree,
5 or order of any court of record of this state or any foreign jurisdiction, or one which
6 is established or confirmed by a personal representative's instrument of distribution
7 or a personal representative's deed of distribution;

8 (3) "Fiduciary," a trustee, custodian, trust advisor, trust protector, or trust committee, as
9 named in the governing instrument or order of court, regardless of whether such
10 person is acting in a fiduciary or nonfiduciary capacity;

11 (4) "Other trust," any trust which is not a court trust;

12 ~~(4)~~(5) "Supervision," the supervision of the circuit court over the administration of a trust
13 as provided in this chapter;

14 ~~(5)~~(6) "Trustee," the trustee or trustees of any trust which may be supervised under this
15 chapter.

16 Section 7. That § 21-22-3 be amended to read as follows:

17 21-22-3. Within thirty days after entering upon his or her duties, any trustee under a court
18 trust shall, if a resident of this state or if any of the trust estate has its situs in this state, file in
19 the office of the clerk of the circuit court of the county specified in § 21-22-5 an inventory of
20 all the trust estate, a copy of ~~the~~ any personal representative's instrument of distribution, a copy
21 of any recorded personal representative's deed of distribution, a duly certified copy of any other
22 court order or clerk's statement establishing or confirming the trust, a ~~certified~~ true and correct
23 copy of the ~~original~~ governing instrument and all amendments and modifications made thereto,
24 if any, on which the trust is based, a statement showing the names, residences and post office

1 addresses of all persons, including conservators or other trustees interested in the trust, so far
2 as known to the trustee, and the ages of such of them as are minors. Such inventory shall show
3 a list and description of all the trust property, an estimate by the trustee of the value of each
4 item, the encumbrances, if any, on each item, and all claims against the trust estate with the
5 amount of each claim and the name and post office address of the claimant. Such inventory and
6 such statement shall be duly verified by the trustee.

7 Section 8. That § 21-22-7 be amended to read as follows:

8 21-22-7. At any time after the filing of the papers required by §§ 21-22-3 and 21-22-4 ~~the~~
9 ~~trustee~~ a fiduciary or any beneficiary under such court trust, if ~~he~~ the fiduciary or beneficiary
10 considers court supervision unnecessary or impractical and involving unnecessary burden and
11 expense, may petition the court to dispense with ~~such~~ the supervision. Upon ~~such~~ the petition
12 being filed, the court ~~must~~ shall fix the time and place for hearing, ~~unless the conditions of § 21-~~
13 ~~22-21 have been met,~~ and cause notice thereof to be given as provided by this chapter. Upon
14 ~~such~~ the hearing ~~such~~ the supervision ~~shall~~ may not be dispensed with if any ~~trustee~~ fiduciary
15 or any beneficiary with a substantial interest in the trust objects to dispensing therewith. If there
16 is no ~~such~~ objection and the court is satisfied that ~~such~~ supervision is impractical or unnecessary
17 and would involve unnecessary burden and expense, an order may be entered dispensing with
18 ~~such~~ the supervision.

19 Section 9. That § 21-22-8 be amended to read as follows:

20 21-22-8. At any time during the existence of the trust, after supervision has been dispensed
21 with pursuant to § 21-22-7, any ~~trustee~~ fiduciary or beneficiary may petition for a resumption
22 of ~~such~~ the supervision in which event the court ~~must~~ shall, upon notice as provided in this
23 chapter, conduct a hearing and ~~such~~ the supervision shall be resumed unless good cause to the
24 contrary is shown.

1 Section 10. That § 21-22-9 be amended to read as follows:

2 21-22-9. Any ~~trustee~~ fiduciary or beneficiary of any other trust may, if the trustee is a
3 resident of this state or if any of the trust estate has its situs in this state, at any time petition the
4 circuit court, the county where such petition is to be filed to be determined the same as in the
5 case of a court trust, to exercise supervision. Upon ~~such~~ the petition being filed, the court ~~must~~
6 shall fix a time and place for hearing thereon, unless the conditions of § 21-22-21 have been
7 met, cause notice to be given as provided by this chapter, and, upon such hearing ~~shall~~, enter an
8 order assuming supervision unless good cause to the contrary is shown. Thereupon the trustee
9 shall within thirty days, file the information required pursuant to § 21-22-3 by a trustee under
10 a court trust, and, at all times thereafter, the court shall have the same powers as over a court
11 trust. If the petition for court supervision includes the information required pursuant to § 21-22-
12 3, the ~~trustee~~ fiduciary or beneficiary may, in the same petition, request court action as to any
13 matter relevant to the administration of the trust, including the termination of court supervision.
14 Upon the hearing on the petition, the court shall enter an order assuming supervision unless
15 good cause to the contrary is shown and further shall make such order or give such directions
16 to the ~~trustee~~ fiduciary as the court shall determine.

17 Section 11. That § 21-22-10 be amended to read as follows:

18 21-22-10. Unless the trustee is exempted by the terms of the instrument creating the trust
19 from furnishing a bond or unless ~~such~~ the instrument itself provides the amount and condition
20 of such bond, the trustee ~~must~~ shall, upon commencement of court supervision, petition the
21 court to fix the amount and conditions of ~~his~~ bond unless the conditions of § 21-22-21 have
22 been met. The court shall then fix a time and place for hearing and direct notice thereof to be
23 given as provided in this chapter. ~~Such~~ The bond shall be conditioned that the trustee will
24 faithfully perform ~~his~~ the trustee's trust and duly account for all money and property received,

1 and the amount of the bond shall be fixed by the court in a sum which in the opinion of the court
2 shall be sufficient to protect the interest of the beneficiaries. ~~Such~~ The bond must shall be either
3 with a corporate surety or with at least two personal sureties to be approved by the court who
4 are residents and freeholders of this state and who together are worth in excess of all their
5 liabilities and property exempt from execution, at least the amount of the bond. ~~Such bond must~~
6 ~~be filed by the trustee~~ The trustee shall file the bond within ten days after entry of the order
7 requiring that the ~~same~~ bond be filed. ~~Whenever~~ If it appears that the proper administration of
8 the trust requires that a new bond be given, the court may require such new bond.

9 Section 12. That § 21-22-13 be amended to read as follows:

10 21-22-13. Any ~~trustee~~ fiduciary or beneficiary of any trust under court supervision may at
11 any time petition the court for its action as to any matter relevant to the administration of the
12 trust, including particularly the requiring of special reports from ~~the trustee~~ a fiduciary, the
13 exercise of any discretion vested in ~~the trustee~~ a fiduciary, and as to any matter as to which
14 courts of equity have heretofore exercised jurisdiction over ~~trustees~~ fiduciaries. Upon the filing
15 of ~~such~~ the petition the court shall fix a time and place for hearing unless the conditions of § 21-
16 22-21 have been met and cause notice to be given as required by this chapter. Upon ~~such~~ the
17 hearing the court shall make such order or give such directions to the trustee as the court shall
18 determine.

19 Section 13. That § 21-22-18 be amended to read as follows:

20 21-22-18. The notice provided by § 21-22-17 shall be served upon ~~trustees~~ fiduciaries,
21 beneficiaries, and attorneys of record, either personally ~~or~~, by mail; addressed to each at his or
22 her last known post office address as shown by the records and files in the proceeding, or
23 electronically in accordance with § 15-6-5(d) and applicable local rules, at least fourteen days
24 prior to the hearing unless the court for good cause shown directs a shorter period.

1 Section 14. That § 21-22-22 be amended to read as follows:

2 21-22-22. At all hearings the court shall take testimony in the same manner as at hearings
3 on other proceedings and shall examine all reports and accounts filed, regardless of whether or
4 not objections are made thereto, and shall also consider and pass upon all acts of ~~the trustee a~~
5 fiduciary, regardless of whether any question is raised with reference thereto.

6 Section 15. That § 21-22-26 be amended to read as follows:

7 21-22-26. Any ~~trustee~~ fiduciary who fails or neglects to comply with the provisions of this
8 chapter ~~shall be is~~ subject to removal by the court and ~~shall be is~~ liable to any beneficiary for
9 all damages sustained by ~~such the~~ beneficiary resulting from such noncompliance and shall also
10 forfeit all right to compensation as ~~such trustee the~~ fiduciary during the period of such
11 noncompliance unless it is shown, to the satisfaction of the court fixing such compensation, that
12 such failure to comply was inadvertent and not intentional and was with reasonable excuse and
13 that the ~~trustee~~ fiduciary has performed his or her duties diligently, faithfully, and efficiently.
14 Failure or neglect as to such compliance ~~shall~~ does not invalidate any act of the ~~trustee~~ fiduciary.

15 Section 16. That § 21-22-28 be amended to read as follows:

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

1 Section 17. That § 55-1B-10 be amended to read as follows:

2 55-1B-10. The powers and discretions of an investment trust advisor shall be provided in
3 the trust instrument and may be exercised or not exercised, in the best interests of the trust, in
4 the sole and absolute discretion of the investment trust advisor and are binding on any other
5 person and any other interested party, fiduciary, and excluded fiduciary. Unless the terms of the
6 governing instrument provide otherwise, the investment trust advisor has the power to perform
7 the following:

- 8 (1) Direct the trustee with respect to the retention, purchase, sale, ~~or encumbrance of~~
9 ~~trust property~~ exchange, tender, or other transaction affecting the ownership thereof
10 or rights therein of trust investments. These powers include the pledge or
11 encumbrance of trust property, lending of trust assets, either secured or unsecured,
12 at terms defined by the investment trust advisor to any party including beneficiaries
13 of the trust and the investment and reinvestment of principal and income of the trust;
- 14 (2) Vote proxies for securities held in trust;
- 15 (3) Select one or more investment advisers, managers, or counselors, including the
16 trustee, and delegate to them any of its powers; ~~and~~
- 17 (4) Direct the trustee with respect to any additional powers and discretions over
18 investment and management of trust assets provided in the governing instrument;
- 19 (5) Direct the trustee as to the value of nonpublicly traded trust investments; and
- 20 (6) Direct the trustee as to any investment or management power referenced in chapter
21 55-1A.

22 Section 18. That § 55-3-13 be amended to read as follows:

23 55-3-13. A trustee is entitled to the repayment, out of the trust property, of all expenses
24 actually and properly incurred by ~~him~~ the trustee in the performance of his or her trust. ~~He~~ The

1 trustee is entitled to the repayment of even unlawful expenditures, if ~~they~~ the expenditures were
2 productive of actual benefit to the estate. Expenses in performance of the trust include those
3 expenses actually and properly incurred in the exercise of the trustee's powers as described in
4 the governing instrument, in any applicable court order, or in chapter 55-1A.

5 Section 19. That § 55-1A-9.1 be amended to read as follows:

6 55-1A-9.1. (a) As used in this section:

7 (1) "Investment" means any security as defined in § 2(a)(1) of the Securities Act of 1933,
8 any contract of sale of a commodity for future delivery within the meaning of § 2(I)
9 of the Commodity Exchange Act, or any other asset permitted for trustee accounts
10 pursuant to the terms of this title or by the terms of the governing instrument,
11 including by way of illustration and not limitation, individual portfolios of
12 investment holdings, shares or interests in a private investment fund (including a
13 private investment fund organized as a limited partnership, limited liability company,
14 trust or other form, a statutory or common law business trust, or a real estate
15 investment trust), joint venture or other general or limited partnership, or an open-end
16 or closed-end management type investment company or investment trust registered,
17 unregistered, or exempt from registration under the Investment Company Act of
18 1940;

19 (2) "Affiliate" means any corporation or other entity that directly or indirectly through
20 one or more intermediaries controls, is controlled by or is under common control
21 with the trustee;

22 (3) "Affiliated investment" means an investment for which the trustee or an affiliate of
23 the trustee acts as investment adviser, sponsor, administrator, distributor, placement
24 agent, underwriter, broker, custodian, transfer agent, registrar or in any other capacity

1 for which it receives or has received a fee or commission from such investment or
2 an investment acquired or disposed of in a transaction for which the trustee or an
3 affiliate of the trustee receives or has received a fee or commission;

4 (4) "Fee or commission" means compensation paid to a trustee or an affiliate thereof on
5 account of its services to or on behalf of an investment, including by way of
6 illustration and not limitation, advisory fees, management fees, brokerage fees,
7 service fees, special performance fees, profit allocations, and expense
8 reimbursements.

9 (b) In the absence of an express prohibition in the trust instrument, a trustee may purchase,
10 sell, hold or otherwise deal with an affiliate or an interest in an affiliated investment and, upon
11 satisfaction of the conditions stated in subsection (c) of this section, such trustee may receive
12 trustee compensation from such account at the same rate as the trustee would otherwise be
13 entitled to be compensated.

14 (c) A trustee seeking compensation pursuant to subsection (b) of this section shall disclose
15 to all qualified beneficiaries, as defined in § 55-2-13, all fees, commissions, compensation or
16 other benefits and profits paid or to be paid by the account, or received or to be received by an
17 affiliate arising from such affiliated investment. The disclosure required under this subsection
18 may be given either in a copy of the prospectus or any other disclosure document prepared for
19 the affiliated investment under federal or state securities laws or in a written summary that
20 includes all fees, commissions, compensation or other benefits and profits received or to be
21 received by the trustee or any affiliate of the trustee and an explanation of the manner in which
22 such fees, commissions, compensation or other benefits and profits are calculated (either as a
23 percentage of the assets invested or by some other method). Such disclosure shall be made at
24 least annually unless there has been no increase in the rate at which such fees or commissions

1 are calculated since the most recent disclosure. Notwithstanding the foregoing provisions of this
2 subsection, no such disclosure is required if the governing instrument or a court order expressly
3 authorizes the trustee to invest the trust account in affiliated investments or otherwise deal with
4 an affiliate or an interest in an affiliated investment.

5 (d) A trustee that has complied with subsection (c) of this section (whether by making the
6 applicable disclosure or by relying on the terms of a governing instrument or court order) shall
7 have full authority to administer an affiliated investment (including the authority to vote proxies
8 thereon) without regard to the affiliation between the trustee and the investment.

9 Section 20. That § 55-16-15 be amended to read as follows:

10 55-16-15. (1) Notwithstanding the provisions of §§ 55-16-9 to 55-16-14, inclusive, but
11 subject to subdivision (2) of this section, this chapter does not apply in any respect to any person
12 to whom at the time of transfer the transferor is indebted on account of an agreement or order
13 of court for the payment of support or alimony in favor of the transferor's spouse, former spouse,
14 or children, or for a division or distribution of property in favor of the transferor's spouse or
15 former spouse, to the extent of the debt. This

16 (2) If the transferor is married at the time of the transfer, the provisions of §§ 55-16-9 to
17 55-16-14, inclusive, and this chapter apply to:

18 (a) Any of the transferor's separate property transferred to the trust; and

19 (b) Any marital property transferred to the trust if the spouse or former spouse
20 was provided with notice in the form set forth in subdivision (3) of this
21 section, or executed a written consent to the transfer after being provided the
22 information set forth in the notice.

23 (3) For purposes of the application of this section, a notice of transfer of property to a
24 trust subject to this chapter:

1 (a) Shall also contain the following language, in capital letters, at or near the top
2 of the notice:

3 YOUR SPOUSE IS CREATING A PERMANENT TRUST INTO WHICH
4 PROPERTY IS BEING TRANSFERRED.

5 YOUR RIGHTS TO THIS PROPERTY MAY BE AFFECTED DURING
6 YOUR MARRIAGE, UPON DIVORCE (INCLUDING THE PAYMENT OF
7 CHILD SUPPORT OR ALIMONY OR A DIVISION OR DISTRIBUTION
8 OF PROPERTY IN A DIVORCE), OR AT THE DEATH OF YOUR
9 SPOUSE.

10 YOU HAVE A VERY LIMITED PERIOD OF TIME TO OBJECT TO THE
11 TRANSFER OF PROPERTY INTO THIS TRUST.

12 YOU MAY, UPON REQUEST TO THE TRUSTEE AT THE ADDRESS
13 BELOW, BE FURNISHED A COPY OF THE TRUST DOCUMENT.

14 IF YOU HAVE ANY QUESTIONS, YOU SHOULD IMMEDIATELY SEEK
15 INDEPENDENT LEGAL ADVICE.

16 IF YOU FAIL TO OBJECT WITHIN THE REQUIRED TIME PERIOD,
17 YOU WILL HAVE CONSENTED TO THE TRANSFER OF PROPERTY
18 INTO THIS TRUST.

19 (b) Shall contain a description of the property being transferred to the trust and the
20 name of the trust;

21 (c) May require that any person who is eligible to receive information pursuant
22 to this section be bound by the duty of confidentiality that binds the trustee
23 before receiving such information from the trustee; and

24 (d) Shall be provided by the transferor, the transferor's agent, the trustee, or other

1 fiduciary of the trust.

2 (4) If a notice is provided under this section before the property is transferred, the period
3 to commence an action under § 55-16-10 shall commence running on the date of the
4 transfer. If a notice is provided after the date the property is transferred, the period
5 to commence an action pursuant to § 55-16-10 commences running on the date the
6 notice is provided. In no event may the period to commence an action to challenge
7 a transfer under this section and § 55-16-10 exceed the period set forth in § 54-8A-9.

8 (5) The exception contained in subdivision (1) of this section does not apply to any claim
9 for forced heirship or legitime.

10 (6) Subdivisions (2) to (4), inclusive, of this section apply to any transfer made after
11 June 30, 2014.

12 Section 21. That § 55-16-9 be amended to read as follows:

13 55-16-9. Notwithstanding any other provision of law, including chapter 54-8A, no action
14 of any kind, including an action to enforce a ~~judgement~~ judgment entered by a court or other
15 body having adjudicative authority, may be brought at law or in equity for an attachment or
16 other provisional remedy against property that is the subject of a qualified disposition or for
17 avoidance of a qualified disposition unless the settlor's transfer of property was made with the
18 intent to defraud that specific creditor. In the event of any conflict between any provision of this
19 chapter and any provision of chapter 54-8A or any other provision of law similar to any
20 provision of chapter 54-8A, the provisions of this chapter control and prevail.

21 Section 22. That § 55-16-2 be amended to read as follows:

22 55-16-2. For the purposes of this chapter, a trust instrument, is an instrument appointing a
23 qualified person or qualified persons for the property that is the subject of a disposition, which
24 instrument:

- 1 (1) Expressly incorporates the law of this state to govern the validity, construction, and
2 administration of the trust;
- 3 (2) Is irrevocable, but a trust instrument may not be deemed revocable on account of its
4 inclusion of one or more of the following:
 - 5 (a) A transferor's power to veto a distribution from the trust;
 - 6 (b) An inter vivos power of appointment, other than an inter vivos power to
7 appoint to the transferor, the transferor's creditors, the transferor's estate, or the
8 creditors of the transferor's estate, ~~exercisable by will or other written~~
9 ~~instrument of the transferor effective only upon the transferor's death;~~
 - 10 (c) A testamentary power of appointment;
 - 11 (d) The transferor's potential or actual receipt of income, including rights to such
12 income retained in the trust instrument;
 - 13 (e) The transferor's potential or actual receipt of income or principal from a
14 charitable remainder unitrust or charitable remainder annuity trust as such
15 terms are defined in § 664 of the Internal Revenue Code of 1986, 26 U.S.C.
16 § 664, as of January 1, 2009;
 - 17 (f) The transferor's receipt each year of a percentage of the value as determined
18 from time to time pursuant to the trust instrument, but not exceeding the
19 amount that may be defined as income under § 643(b) of the Internal Revenue
20 Code of 1986, 26 U.S.C. § 643(b), as of January 1, 2009;
 - 21 (g) The transferor's potential or actual receipt or use of principal if the potential
22 or actual receipt or use of principal would be the result of a qualified person,
23 including a qualified person acting at the direction of a trust advisor described
24 in this section, acting either in the qualified person's sole discretion or

- 1 pursuant to an ascertainable standard contained in the trust instrument;
- 2 (h) The transferor's right to remove a trustee, protector, or trust advisor and to
- 3 appoint a new trustee, protector, or trust advisor, other than a trustee who is
- 4 a related or subordinate party with respect to the transferor within the meaning
- 5 of § 672(c) of the Internal Revenue Code of 1986, 26 U.S.C. § 672(c), as of
- 6 January 1, 2009;
- 7 (i) The transferor's potential or actual use of real property held under a qualified
- 8 personal residence trust within the meaning of such term as described in the
- 9 regulations promulgated under § 2702(c) of the Internal Revenue Code of
- 10 1986, 26 U.S.C. § 2702(c), as of January 1, 2009;
- 11 (j) A pour back provision that pours back to the transferor's will or revocable trust
- 12 all or part of the trust assets;
- 13 (k) The transferor's potential or actual receipt of income or principal to pay, in
- 14 whole or in part, income taxes due on income of the trust if the potential or
- 15 actual receipt of income or principal is pursuant to a provision in the trust
- 16 instrument that expressly provides for the payment of the taxes and if the
- 17 potential or actual receipt of income or principal would be the result of a
- 18 qualified person's acting in the qualified person's discretion or pursuant to a
- 19 mandatory direction in the trust instrument or acting at the direction of an
- 20 advisor described in § 55-16-4; or
- 21 (l) The ability, whether pursuant to discretion, direction, or the grantor's exercise
- 22 of a testamentary power of appointment, of a qualified person to pay, after the
- 23 death of the transferor, all or any part of the debts of the transferor outstanding
- 24 at the time of the transferor's death, the expenses of administering the

1 transferor's estate, or any estate or inheritance tax imposed on or with respect
2 to the transferor's estate; and

3 (3) Provides that the interest of the transferor or other beneficiary in the trust property
4 or the income from the trust property may not be transferred, assigned, pledged, or
5 mortgaged, whether voluntarily or involuntarily, before the qualified person actually
6 distributes the property or income from the property to the beneficiary, and such
7 provision of the trust instrument shall be deemed to be a restriction on the transfer
8 of the transferor's beneficial interest in the trust that is enforceable under applicable
9 nonbankruptcy law within the meaning of § 541(c)(2) of the Bankruptcy Code, 11
10 U.S.C. § 541(c)(2), as of January 1, 2009.

11 A disposition by a trustee that is not a qualified person to a trustee that is a qualified person
12 may not be treated as other than a qualified disposition solely because the trust instrument fails
13 to meet the requirements of subdivision (1) of this section.