
DIVISION OF BANKING

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MEMORANDUM

NUMBER: 20-021

DATE: June 30, 2017

TO: SOUTH DAKOTA TRUST COMPANIES AND BANK TRUST DEPARTMENTS

FROM: BRET AFDAHL, Director

RE: NEW TRUST LEGISLATION

The following is a summary of House Bills 1046 (HB 1046) and 1051 (HB 1051) which were introduced on behalf of the Governor's Task Force on Trust Administration Review and Reform and signed into law by Governor Dennis Daugaard. This year, the work product of the Trust Task Force was split into two separate bills to separate several items with a common purpose into separate bills. The amendments to existing law and new laws established in HB 1046 and HB 1051 will become effective on July 1, 2017. I would encourage you to review these bills in detail at your convenience at the following links:

<http://sdlegislature.gov/docs/legsession/2017/Bills/HB1046ENR.pdf>, and
<http://sdlegislature.gov/docs/legsession/2017/Bills/HB1051ENR.pdf>.

If you would like additional information regarding these bills, or if you have any questions, please do not hesitate to contact the South Dakota Division of Banking (Division) at 605-773-3421.

HB 1046

Sections 1-3 – For Trust Companies Only

The following provisions of HB 1046 amend Chapter 51A-6A and were adopted to make the following changes:

- Section 1 deletes unnecessary language.
- Section 2 clarifies existing law to require trust company applicants to pay for the publication of notice required as part of the process of being approved to conduct business in South Dakota. The entire application fee paid by trust company applicants goes to the general fund and therefore cannot be used by the Division to offset the cost of publication.
- Section 3 clarifies the criteria for naming a trust company to include a requirement for each trust company to include the word "trust" in its name. Other businesses are generally prohibited from using the word "trust" in their name since it could create

confusion. This provision will help clarify this prohibition/requirement for those companies with trust powers.

Sections 4-30 – For Trust Companies and Bank Trust Departments

The following provisions of HB 1046 are technical amendments to Title 55 and Chapter 21-22, and were adopted to make the following changes:

- Section 4 deletes a cross-reference to chapter 43-10, which is repealed by Section 26 of this bill. A full explanation for this repeal is included below under Sections 28 & 29.
- Section 5 deletes a cross-reference to chapter 43-10 and requires express trusts dealing with real property to be in writing. This requirement is one of two concepts from chapter 43-10 that are being carried forward.
- Section 6 creates a new section to protect third-party purchasers from implied trusts they are unaware of at the time of a purchase. This protection is the other concept from chapter 43-10 being carried forward.
- Section 7 creates a new section to clarify that South Dakota has not adopted the Uniform Trust Code requirement of exclusive benefit. This distinction will allow grantors to prohibit their assets from being invested in morally objectionable businesses as they see fit without the risk of future beneficiaries arguing beneficiary interests were harmed by such grantor decisions/directives.
- Sections 8-11 create a voluntary process for the registration of trusts and a sample form. For various reasons, individuals from all over the world are looking to bring their trusts to the United States. Some foreign jurisdictions require evidence that a trust will be subject to another jurisdiction before it can be transferred. Section 8 requires information from the trustee in this state looking to register a trust. Section 9 requires the trustee to acknowledge its trusteeship and to submit to the court in South Dakota for any proceedings related to the trust. Section 10 deals with confidentiality and provides a process to cancel the registration, and Section 11 provides a sample form that can be used for this registration process.
- Section 12 creates a new section that allows a trustee to appoint a co-trustee unless prohibited by the governing document.
- Sections 13 and 14 create a process to better equip trustees to defend illiquid trusts against various actions. Current law does not require trustees to defend against actions and claims, but if they chose to do so with an illiquid trust, the trustee would be forced to expend their own funds or their company's funds. This section creates a process for the grantor or beneficiaries to provide additional security to indemnify the trustee for defending the trust.
- Section 15 clarifies directed trusts created prior to July 1, 1997, are afforded the protections of chapter 55-1B. South Dakota adopted directed trusts in 1997, but other jurisdictions recognized this concept prior to South Dakota. This amendment will clarify that the provisions of South Dakota law apply to directed trusts administered in South Dakota that were created prior to July 1, 1997.

- Section 16 clarifies an individual may serve as a trust advisor and trust protector at the same time to provide greater flexibility to grantors and estate planners in the event of a death, resignation, or removal.
- Section 17 clarifies how and when a grantor, trust advisor, or trust protector may restrict the flow of information to a beneficiary or beneficiaries. For various reasons, certain grantors do not want a beneficiary or class of beneficiaries to know of the existence of a trust or certain details about a trust. An example is a grantor may not want a minor beneficiary to know he or she is named in a trust containing a large sum of money.
- Section 18 changes the current process of modifying, or decanting, an existing trust into a new trust to take into account new tax law or other changes without the need to retitle all trust assets. Under current law, when a new trust is created and assets from the old trust are transferred or decanted into the new trust, all assets must be retitled. In some cases, this process is costly and time consuming with little direct benefit to the trust beneficiaries.
- Section 19 clarifies court affirmation of a non-judicial modification or termination of a trust is a voluntary option and not a requirement.
- Section 20 modifies the current prohibition on trustee loans to trust beneficiaries if provided for in the governing instrument, a court order, consent of all qualified beneficiaries, or by instruction of a trust protector.
- Section 21 provides trustees, grantors, and other the option of seeking court approval of the validity of a trust prior to the death of the settlor. This concept already exists in chapter 21-22 for court supervised trusts, and the goal is to head off costly litigation from beneficiaries, especially in the situation of an unequal distribution plan by a settlor.
- Section 22 seeks to clarify the statute of limitations in our asset protection chapter, 55-16, governs situations of fraudulent transfers to South Dakota trusts, and not the statute of limitation in another state. This clarification is intended to aid courts from other states that are asked to review transfers and seek to understand the standard that applies to trusts situated in South Dakota.
- Section 23 clarifies the definition of “beneficiary” for purposes of chapter 21-22. This definition is important for purposes of who can bring a trust into court for a challenge or court supervision.
- Section 24 clarifies that the court file related to litigation of a court supervised trust is provided confidential treatment similar to other trust related documents listed in this section.
- Section 25 seeks to clarify the standard for filing claims or objecting to a final accounting of a trust. The additional language will make clear the final accounting in a court supervised trust is conclusive after approved by a court, even if it was not contested prior to approval.
- Section 26 seeks to preserve certain limitations on information sharing provided to parties in certain trust matters while still applying the rules of civil procedure to this chapter.
- Section 27 clarifies South Dakota law governs the actions of South Dakota trustees as they relate to assets held in trusts situated and administered in South Dakota. Trustees in

South Dakota interact with individuals from other jurisdictions through the process of creating and administering trusts in South Dakota and this language is intended to clarify South Dakota law governs those situations.

- Sections 28 and 29 repeal chapter 43-10, which addresses real property trusts. This chapter was adopted by the Dakota Territory in 1877 and was codified and recodified upon and after statehood. With the exception of one section being repealed in 2007, this chapter was untouched since adoption except for codification in 1877 and recodifications in 1903, 1919, and 1939. This chapter has been largely forgotten by practitioners and is ambiguous and contrary in some places to current trust law in South Dakota. Two concepts from this chapter are being carried forward in other sections in this bill: Section 5 will amend existing trust law to require express trusts relating to real property be in writing, and Section 6 will protect third-party purchasers from the existence of an express trust of which they are not aware.
- Section 30 repeals a cross reference to a section in chapter 43-10.

HB 1051

HB 1051 creates a new chapter in the code to establish a comprehensive framework for virtual representation. This concept deals with providing notice to beneficiaries, some of which may not be known or born at the time of notice, but still must be provided notice of amendments to the trust.

HB 1051 also amends various provisions in Chapter 21-22, Title 29A, and Title 55 to reference the newly created framework and deletes other sections of law that are no longer necessary. This bill does not expand or depart from existing notice provisions, but instead seeks to clarify and to put into one place a comprehensive framework for notice.

The concept of virtual representation addresses various notices related to trusts. Notice related to trusts is more complicated in South Dakota because certain trusts can last for a very long time, hundreds of years in some cases. Notice is required to all beneficiaries for modifications proposed to be made to a trust to correct mistakes, clarify ambiguities, etc. All beneficiaries are required to be notified, even if not all beneficiaries are known or born at the time of notice. Virtual representation is a framework to provide representation and notice to those beneficiaries not yet known or born at the time of notice.

Two common situations of virtual representation:

- Minor beneficiaries can be represented by their parents without the cost and delay of the court appointing guardians or guardian ad litem; and
- Trust beneficiaries can act on behalf of other more remote beneficiaries when their interests are aligned and there is no conflict of interest.

Sections 1-26

Create a new chapter in the code to establish a comprehensive framework for virtual representation.

Sections 27-35 & 37

Update cross-references in existing law.

Section 36

Repeals sections SDCL 55-3-31 through SDCL 55-3-38.