

Trust Laws of South Dakota

Constitution and Legal System

The United States is a Federal Republic composed of 50 states, a Federal District, and territories and possessions, managed by a Federal government, with certain powers reserved to the states. South Dakota became the 40th state to join the United States in 1889. The legal system of the United States, including South Dakota, is based on English common law, and trust law is a matter of State law.

Applicable Trust Laws

South Dakota trust laws are set-forth in *Fiduciaries and Trusts*, South Dakota Codified Laws.¹

Trust Period

South Dakota has abolished the rule against perpetuities, and trusts can be of unlimited duration. Properly structured, assets can pass from generation to generation.

Reserved Powers

South Dakota does not have *per se* reserved powers legislation, but does authorize settlors to exercise broad control over certain types of trusts. The statute lists criteria that would be insufficient to cause a settlor to exercise “dominion and control”² over a South Dakota trust, which would cause the trust to fail, including the settlor serving as trustee, holding an unrestricted power to remove or replace trustees, receipt of loans from the trust without interest or security, power to substitute property of an equivalent value, etc. The settlor may also hold powers of revocation³ and powers of appointment.⁴ In addition, the settlor can act as the Investment Advisor and Distribution Advisor, and direct the trustee accordingly, etc.

Directed Trusts

Under the Directed trust statute,⁵ South Dakota law allows the appointment of Investment Trust Advisors,⁶ who act in a fiduciary capacity and have powers to direct the trustee as to investments. Distribution Advisors⁷ may also be appointed, who act in a fiduciary capacity and have powers to direct the trustee as to distributions. Protectors⁸ may also be appointed to exercise certain powers, but do not act in a fiduciary capacity unless the trust instrument provides otherwise. Family Advisors⁹ may also be appointed to advise or consult with fiduciaries, but do not act in a fiduciary capacity.

Discretionary Interest Statute

Under the Discretionary Interest statute,¹⁰ a beneficiary’s discretionary interest is not a property interest or an enforceable right, and is but a mere expectancy. Creditors may not force trustees to make a distribution regarding a discretionary interest.

¹ Title 55, Fiduciaries and Trusts, Chapters 1-19, South Dakota Codified Laws (SDCL)

² Chapter 55-1-32 SDCL

³ Chapter 55-3-6 SDCL

⁴ Chapter 55-1-12 SDCL

⁵ Chapter 55-1B SDCL

⁶ Id., 55-1B-10

⁷ Id., 55-1B-11

⁸ Id., 55-1B-6

⁹ Id., 55-1B-12

¹⁰ Chapter 55-1-43, SDCL.

Spendthrift Provisions

A declaration in a trust that the interest of beneficiary shall be held subject to a spendthrift trust is sufficient to prohibit voluntarily or involuntary alienation of a beneficial interest by a beneficiary. If the trust contains a spendthrift provision, no creditor may reach present or future mandatory distributions from the trust at the trust level.¹¹

Disclosure of Information to Beneficiaries

South Dakota's "quiet" trust statute authorizes the restriction of the disclosure of information to beneficiaries.

Private Trust Companies (PTCs)

South Dakota PTC legislation authorizes private trust companies to provide trust services to a family group, but not offer services to the public. PTCs must be licensed, but the regime is more streamlined than for public trust companies, requiring 1 incorporator and not 3, requiring 3 board members instead of 5, and not requiring majority presence of board members at quarterly meetings, etc.

Purpose Trusts

Purpose trusts¹² are authorized in South Dakota for any lawful purpose, and typically have purposes and not beneficiaries. They can be charitable and non-charitable. Non-charitable purpose trusts are typically used to hold shares of private trust companies, operating companies, etc. Upon termination of a purpose trust, the trustee shall distribute any remaining trust property as directed in the governing instrument.¹³

Hybrid purpose trusts¹⁴ can have both purposes and beneficiaries. Where the interests of the purposes and beneficiaries are concurrent, the trustees must maintain separate shares for the purposes and the beneficiaries,¹⁵ and may be liable to beneficiaries for failing to do so.

Special Purpose Entities

South Dakota allows the creation of special purpose entities¹⁶ to act as Protector, Investment Advisor or Distribution Advisor. These entities must be properly structured to avoid US estate tax inclusion issues.

Firewall Provisions

The South Dakota *firewall* legislation contains a governing law provision¹⁷ requiring all matters concerning the validity, construction, and administration of trusts with South Dakota governing law clause, are to be determined by South Dakota law, including the capacity of the settlor, the powers of the trustees, etc. The *firewall* legislation also contains a broad foreign law exclusion provision that precludes foreign law from invalidating trusts governed under South Dakota law where the law of a foreign country does not recognize trusts, or the

¹¹ Id., 55-1-41

¹² Id., 55-1-20

¹³ Id., 55-1-21.8

¹⁴ Id., 55-1-22

¹⁵ Id., 55-1-22.1

¹⁶ Chapter 51A-6A-66 SDCL

¹⁷ Chapter 55-3-40 SDCL

trust defeats rights conferred by the law of a foreign country on any person by reason of a *personal relationship* to the settlor or *heirship*, or the trust contravenes any foreign rule of law or judicial order giving effect to such rights.¹⁸ Judgements by Federal or State courts are entitled to recognition under the Full Faith and Credit Clause of the US Constitution.¹⁹ However, the Full Faith and Credit Clause notwithstanding, the South Dakota Supreme Court recently ruled in *Cleopatra Cameron*,²⁰ that enforcement of a foreign judgment against a South Dakota trust in violation of the trust's Spendthrift clause will be denied where it violates South Dakota law and policy.

Asset Protection

The *asset protection* laws of South Dakota are codified under *Qualified Dispositions in Trust*,²¹ which sets out the statutory requirements for a qualifying asset protection trust, as well as the fraudulent transfer rules. The trustee must be a qualifying South Dakota trustee, the trust must have an express South Dakota governing law clause, the trust must be irrevocable, and, the trust must have a *spendthrift* clause.²² The statute authorizes the settlor to hold powers to veto distributions, limited powers of appointment, testamentary powers of appointment, retain certain rights to income, receive of distributions at the discretion of the trustee, powers to remove and appoint trustees, protectors or investment advisors, powers to serve as an investment advisor, etc.²³

The creditor must show that the transfer was made with the intent to defraud that specific creditor²⁴ by "clear and convincing" evidence.²⁵ For pre-existing creditors, the claim must be brought within the later of 2 years after the transfer or 6 months after the transfer is or reasonably could have been discovered.²⁶ For creditors whose claims arise after the transfer into trust, the claim must be brought within 2 years after the transfer.²⁷ A qualified disposition may be avoided only to the extent of the debt.²⁸ Certain classes of creditors, known as "exception creditors" with pre-existing claims prior to the date of transfer (child support, alimony, division of marital property, etc.), may reach assets held in trusts created under the asset protection statute.²⁹ However, claims related to *forced heirship* or *legitime* are excluded.³⁰

Licensing and Supervision

State Chartered trust companies are subject to licensing and prudential supervision by the South Dakota Division of Banking.

¹⁸ Id., 55-3-46

¹⁹ Chapter 15-16A-1 SDCL

²⁰ *Cleopatra Cameron Gift Trust*, 2019 SD 35 (2019)

²¹ Chapter 55-16, *Qualified Dispositions in Trust*, South Dakota Codified Laws (SDCL)

²² Id., 55-16-2

²³ Id., 55-16-2(2)

²⁴ Id., 55-16-9

²⁵ Id., 55-16-10(3)

²⁶ Id., 55-16-10(1)

²⁷ Id., 55-16-10(2)

²⁸ Id., 55-16-16

²⁹ Id., 55-16-15(1)

³⁰ Id., 55-16-15(5)