

TRUSTS, USES, AND POWERS

CHAPTER 586

SENATE BILL NO. 2073

(Judiciary Committee)

(At the request of the Commission on Uniform State Laws)

AN ACT to amend and reenact sections 59-04.2-17 and 59-04.2-28 of the North Dakota Century Code, relating to payments under the Uniform Principal and Income Act.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 59-04.2-17 of the North Dakota Century Code is amended and reenacted as follows:

59-04.2-17. (409) Deferred compensation, annuities, and similar payments.

1. In this section, "payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer; ~~including~~. For purposes of subsections 4, 5, 6, and 7, the term includes any payment from a separate fund, regardless of the reason for the payment. In this section, "separate fund" includes a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.
2. To the extent that a payment is characterized as interest ~~or~~, a dividend, or a payment made in lieu of interest or a dividend, a trustee shall allocate it the payment to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.
3. If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten percent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.
4. ~~If, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a payment to income than provided for by this section;~~

the trustee shall allocate to income the additional amount necessary to obtain the marital deduction. Except as otherwise provided in subsection 5, subsections 6 and 7 apply, and subsections 2 and 3 do not apply, in determining the allocation of a payment made from a separate fund to a trust to which an election to qualify for marital deduction under section 2056(b)(7) of the Internal Revenue Code of 1986, as amended, has been made or to a trust that qualified for the marital deduction under section 2056(b)(5) of the Internal Revenue Code of 1986, as amended.

5. Subsections 4, 6, and 7 do not apply if and to the extent that the series of payments would, without application of subsection 4, qualify for the marital deduction under section 2056(b)(7)(C) of the Internal Revenue Code of 1986, as amended.
6. A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to this chapter. Upon request of the surviving spouse, the trustee shall demand of the persons administering the separate fund that this internal income be distributed to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and distribute that amount to the surviving spouse. The trustee shall allocate the balance to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.
7. If a trustee cannot determine the internal income of a separate fund but can determine the value of a separate fund, the internal income of the separate fund is deemed to equal four percent of the fund's value, according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the fund's value, the internal income of the fund is deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under section 7520 of the Internal Revenue Code of 1986, as amended, for the month preceding the accounting period for which the computation is made.
8. This section does not apply to ~~payments~~ a payment to which section 59-04.2-18 applies.

SECTION 2. AMENDMENT. Section 59-04.2-28 of the North Dakota Century Code is amended and reenacted as follows:

59-04.2-28. (505) Income taxes.

1. A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.
2. A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.
3. A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid ~~proportionately~~:

- a. From income to the extent that receipts from the entity are allocated to income;:
 - b. From principal to the extent that:
 - (1) ~~Receipts~~ receipts from the entity are allocated only to principal; ~~and~~
 - (2) ~~The trust's share of the entity's taxable income exceeds the total receipts described in subdivision a and paragraph 4 of this subdivision.~~
 - c. Proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and
 - d. From principal to the extent that the tax exceeds the total receipts from the entity.
4. For purposes of this section, receipts allocated to principal or income must be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax. After applying subsections 1 through 3, the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

Approved March 19, 2009

Filed March 19, 2009

CHAPTER 587**HOUSE BILL NO. 1458**

(Representative Klemin)
(Senator Hogue)

AN ACT to create and enact a new subsection to section 59-09-03 and a new section to chapter 59-18 of the North Dakota Century Code, relating to the definition of irrevocable in reference to a trust and a presumption against eligibility for assistance programs for certain transactions; and to amend and reenact sections 59-16-13 and 59-17-06 of the North Dakota Century Code, relating to the duty of a trustee to inform beneficiaries and the settlor.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new subsection to section 59-09-03 of the North Dakota Century Code is created and enacted as follows:

"Irrevocable" means if used in reference to a trust, a trust that is not revocable, including a formerly revocable trust that has become irrevocable, whether by the death of a settlor or otherwise.

SECTION 2. AMENDMENT. Section 59-16-13 of the North Dakota Century Code is amended and reenacted as follows:

59-16-13. (813) Duty to inform and report.

1. Subject to section 59-14-03, while a trust is revocable or to the extent that trust property in a irrevocable trust is subject to a power of withdrawal, the duty of the trustee to inform and report are owed exclusively:
 - a. To the settlor, while a trust is revocable;
 - b. To the holder of the power of withdrawal to the extent the trust property is subject to the power during the period in which the power may be executed; and
 - c. To a qualified beneficiary when the qualified beneficiary is required by law or regulation to provide that information to determine eligibility for benefits or to verify continued eligibility for benefits under title 50.
2. With respect to trust property in an irrevocable trust which is not subject to a power of withdrawal:
 - a. A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

2. b. A trustee upon written request shall promptly furnish to a qualified beneficiary a copy of the portion of the trust instrument:
- a. ~~To which relates to the interest of~~ a qualified beneficiary of a ~~revocable trust; and~~
 - b. ~~To a beneficiary of a trust that is not revocable.~~
3. c. A trustee within sixty days after accepting a trusteeship shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number.
4. A trustee within sixty days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlers, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in subsection 6.
- d. A trustee shall notify the qualified beneficiaries of the trust existence, of the identity of the settlor, of the right to request a copy of the trust instrument, and of the right of the trustee's report as provided in subdivision f within sixty days after the date the trustee acquires knowledge:
 - (1) Of the creation of an irrevocable trust; or
 - (2) That a formerly revocable trust has become irrevocable.
5. e. A trustee shall notify the qualified beneficiaries ~~in advance~~ of any change in the method or rate of the trustee's compensation.
6. f. A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified ~~or nonqualified~~ beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, conservator, or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.
7. g. A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.
8. ~~The duties of a trustee specified in this section are not subject to section 59-14-03.~~
9. h. ~~Subsections 3 Subdivisions c and 4 d~~ do not apply to a trustee that accepts a trusteeship before August 1, 2007, to an irrevocable trust

created before August 1, 2007, or to a revocable trust that becomes irrevocable before August 1, 2007.

SECTION 3. AMENDMENT. Section 59-17-06 of the North Dakota Century Code is amended and reenacted as follows:

59-17-06. Language invoking standard. The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted ~~under sections 59-16-02, 59-16-03, 59-16-05, 59-16-06, and 59-16-07~~ and under this chapter: "investments permissible by law for investment of trust funds", "legal investments", "authorized investments", "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital", "prudent man rule", "prudent trustee rule", "prudent person rule", and "prudent investor rule".

SECTION 4. A new section to chapter 59-18 of the North Dakota Century Code is created and enacted as follows:

Presumption against trustee. A transaction between a trustee and the trust's beneficiary during the existence of the trust or while the influence acquired by the trustee remains by which the trustee obtains any advantage from the trust's beneficiary is presumed to be entered by the trust's beneficiary without sufficient consideration and under undue influence. This presumption is a rebuttable presumption.

Approved April 21, 2009
Filed April 22, 2009

CHAPTER 588**HOUSE BILL NO. 1300**

(Representative Keiser)

AN ACT to amend and reenact subsection 1 of section 59-12-11 of the North Dakota Century Code, relating to modification of irrevocable trusts.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 1 of section 59-12-11 of the North Dakota Century Code is amended and reenacted as follows:

1. A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust. An irrevocable trust that is modified under this subsection continues to be irrevocable.

Approved March 24, 2009

Filed March 24, 2009

CHAPTER 589**HOUSE BILL NO. 1074**

(Government and Veterans Affairs Committee)
(At the request of the Commission on Uniform State Laws)

AN ACT to adopt the Uniform Prudent Management of Institutional Funds Act; and to repeal chapter 15-67 of the North Dakota Century Code, relating to the Uniform Management of Institutional Funds Act; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**SECTION 1. Definitions.** In this chapter:

1. "Charitable purpose" means the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, or any other purpose the achievement of which is beneficial to the community.
2. "Endowment fund" means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.
3. "Gift instrument" means a record, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.
4. "Institution" means:
 - a. A person, other than an individual, organized and operated exclusively for charitable purposes;
 - b. A government or governmental entity, to the extent that it holds funds exclusively for a charitable purpose; or
 - c. A trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.
5. "Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term does not include:
 - a. Program-related assets;
 - b. A fund held for an institution by a trustee that is not an institution;
 - c. A fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund; or
 - d. Perpetual trust funds established by article IX of the Constitution of North Dakota.

6. "Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.
7. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

SECTION 2. Standard of conduct in managing and investing institutional fund.

1. Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.
2. In addition to complying with the duty of loyalty imposed by law other than this chapter, each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.
3. In managing and investing an institutional fund, an institution:
 - a. May incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution; and
 - b. Shall make a reasonable effort to verify facts relevant to the management and investment of the fund.
4. An institution may pool two or more institutional funds for purposes of management and investment.
5. Except as otherwise provided by a gift instrument, the following rules apply:
 - a. In managing and investing an institutional fund, the following factors, if relevant, must be considered:
 - (1) General economic conditions;
 - (2) The possible effect of inflation or deflation;
 - (3) The expected tax consequences, if any, of investment decisions or strategies;
 - (4) The role that each investment or course of action plays within the overall investment portfolio of the fund;
 - (5) The expected total return from income and the appreciation of investments;
 - (6) Other resources of the institution;

- (7) The needs of the institution and the fund to make distributions and to preserve capital; and
 - (8) An asset's special relationship or special value, if any, to the charitable purposes of the institution.
- b. Management and investment decisions about an individual asset must be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.
 - c. Except as otherwise provided by law other than this chapter, an institution may invest in any kind of property or type of investment consistent with this section.
 - d. An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better-served without diversification.
 - e. Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this chapter.
 - f. A person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

SECTION 3. Appropriation for expenditure or accumulation of endowment fund - Rules of construction.

1. Subject to the intent of a donor, as expressed in the gift instrument and subject to subsection 4, an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:
 - a. The duration and preservation of the endowment fund;
 - b. The purposes of the institution and the endowment fund;
 - c. General economic conditions;
 - d. The possible effect of inflation or deflation;

- e. The expected total return from income and the appreciation of investments;
 - f. Other resources of the institution; and
 - g. The investment policy of the institution.
2. To limit the authority to appropriate for expenditure or accumulate under subsection 1, a gift instrument specifically must state the limitation.
 3. Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only "income", "interest", "dividends", or "rents, issues, or profits", or "to preserve the principal intact", or words of similar import create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund and do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection 1.
 4. The appropriation for expenditure in any year of an amount greater than seven percent of the fair market value of an endowment fund, calculated on the basis of market values determined at least quarterly and averaged over a period of not less than three years immediately preceding the year in which the appropriation for expenditure is made, creates a rebuttable presumption of imprudence. For an endowment fund in existence for fewer than three years, the fair market value of the endowment fund must be calculated for the period the endowment fund has been in existence. This subsection does not:
 - a. Apply to an appropriation for expenditure permitted under law other than this chapter or by the gift instrument; or
 - b. Create a presumption of prudence for an appropriation for expenditure of an amount less than or equal to seven percent of the fair market value of the endowment fund.

SECTION 4. Management and investment functions - Delegation.

1. Except as otherwise provided in a gift instrument or by law other than this chapter, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:
 - a. Selecting an agent;
 - b. Establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and
 - c. Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.

2. In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.
3. An institution that complies with subsection 1 is not liable for the decisions or actions of an agent to which the function was delegated.
4. By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.
5. An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law.

SECTION 5. Release or modification of restrictions on management, investment, or purpose.

1. If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.
2. The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall notify the attorney general of the application. The court shall provide the attorney general with the opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.
3. If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the attorney general of the application, and the court shall provide the attorney general with the opportunity to be heard.
4. If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, sixty days after notification to the attorney general, may release or modify the restriction, in whole or part, if:
 - a. The institutional fund subject to the restriction has a total value of less than twenty-five thousand dollars;
 - b. More than twenty years have elapsed since the fund was established; and

- c. The institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

SECTION 6. Compliance - Determination. Compliance with this chapter is determined in light of the facts and circumstances existing at the time a decision is made or at the time action is taken, and not by hindsight.

SECTION 7. Application to existing institutional funds. This chapter applies to institutional funds existing on or established after the effective date of this Act. As applied to institutional funds existing on the effective date of this Act, this chapter governs only decisions made or actions taken on or after that date.

SECTION 8. Relation to Electronic Signatures in Global and National Commerce Act. This chapter modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act [15 U.S.C. 7001 et seq.] but does not modify, limit, or supersede section 7001(a) of that Act, or authorize electronic delivery of any of the notices described in section 7003(b) of that Act.

SECTION 9. REPEAL. Chapter 15-67 of the North Dakota Century Code is repealed.

SECTION 10. EMERGENCY. This Act is declared to be an emergency measure.

Approved April 21, 2009
Filed April 22, 2009