

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1034

Page 1, line 1, after "enact" insert "a new section to chapter 59-08 and"

Page 1, line 5, remove "and"

Page 1, line 6, after "38-13-01" insert ", and subsection 2 of section 59-08-01" and after "chapters" insert "30.1-32,"

Page 1, line 7, remove "59-04.2,"

Page 8, after line 22, insert:

"SECTION 13. AMENDMENT. Subsection 2 of section 59-08-01 is amended and reenacted as follows:

2. "Self-settled special needs trust" means a trust created by an individual with a disability after August 10, 1993, which qualifies under 42 U.S.C. ~~4396p(d)(4)(A)~~ 1396p(d)(4).

SECTION 14. A new section to chapter 59-08 of the North Dakota Century Code is created and enacted as follows:

Conflicts with other chapters. If any provision of this chapter conflicts with chapter 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, or 59-19, the provision of this chapter takes precedence."

Page 8, line 26, replace "uniform trust code" with "North Dakota Uniform Trust Code"

Page 8, replace lines 27 through 30 with:

"59-09-02. (102) Scope.

1. Except as provided in subsection 2, chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 apply to express trusts, whether charitable or noncharitable and testamentary or inter vivos, and to trusts created pursuant to a statute or a judgment or decree that requires the trust to be administered in the manner of an express trust.
2. Chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 do not apply to:
 - a. A trust that is part of an employee benefit arrangement or an individual retirement account.
 - b. A trust account established under a qualified tuition savings program pursuant to section 6-09-38.
 - c. Trust accounts maintained on behalf of clients or customers by licensed service professionals, including trust accounts maintained by attorneys pursuant to the North Dakota Rules of Professional Conduct and by real estate brokers pursuant to chapter 43-23.

- d. An endowment care fund established by a cemetery authority pursuant to chapter 23-21.
- e. Funds maintained by public bodies as defined by chapter 1-07 or other governmental unit entities.
- f. Trust funds held for a single business transaction or an escrow arrangement.
- g. Trusts created by a depository agreement with a financial institution.
- h. An account maintained under the North Dakota Uniform Transfers to Minors Act as contained in chapter 47-24.1.
- i. A fund maintained pursuant to court order in conjunction with a bankruptcy proceeding or a business liquidation.
- j. A voting trust described in chapter 10-19.1.
- k. Funds maintained to manage proceeds from class actions.
- l. A trust created solely to secure the performance of an obligation.
- m. A trust created on behalf of a resident of a residential facility.
- n. A trust managed by a nonprofit association for disabled individuals under 42 U.S.C. 1396p(d)(4), as in effect on the effective date of chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 and under the rules adopted by the department of human services.
- o. A resulting or constructive trust."

Page 9, line 1, after the second boldfaced underscored period insert "Any term not specifically defined in this section has the meaning provided in title 30.1."

Page 9, replace lines 3 through 31 with:

- "1. "Action", with respect to an act of a trustee, includes a failure to act.
- 2. "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.
- 3. "Beneficiary" means a person that:
 - a. Has a present or future beneficial interest in a trust, vested or contingent; including the owner of an interest by assignment or transfer; or
 - b. In a capacity other than that of a trustee, holds a power of appointment over trust property.
- 4. "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in subsection 1 of section 59-12-05.
- 5. "Conservator" is as defined in section 30.1-01-06.

6. "Distributee" means any person who receives property of a trust from a trustee, other than as a creditor or purchaser.
7. "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.
8. "Guardian" is as defined in section 30.1-01-06.
9. "Internal Revenue Code" means the Internal Revenue Code of 1986, or corresponding future provisions of federal tax law.
10. "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.
11. "Jurisdiction", with respect to a geographic area, includes a state or country.
12. "Permissible distributee" means a beneficiary who is currently eligible to receive distributions of trust income or principal, whether the distribution is mandatory or discretionary.
13. "Power of withdrawal" means a presently excisable general power of appointment other than a power:
 - a. Excisable by a trustee and limited by an ascertainable standard; or
 - b. Excisable by another person only upon consent of the trustee or a person holding an adverse interest.
14. "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.
15. "Qualified beneficiary":
 - a. Means a beneficiary who, on the date the beneficiary's qualification is determined:
 - (1) Is a permissible distributee of trust income or principal;
 - (2) Would be a permissible distributee of trust income or principal if the interests of the distributees described in paragraph 1 terminated on that date without causing the trust to terminate; or
 - (3) Would be a permissible distributee of trust income or principal if the trust terminated on that date.
 - b. Does not include a contingent distributee or a contingent permissible distributee of trust income or principal whose interest in the trust is not reasonably expected to vest.
16. "Record" means information that is enshrined on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.
17. "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.
18. "Settlor" means a person, including a testator, that creates, or contributes property to a trust and if more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust

property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

19. "Signed" means:
- a. That the signature of a person, which may be a facsimile affixed, engraved, printed, placed, stamped with indelible ink, transmitted by a facsimile telecommunication or electronically, or in any other manner reproduced on the record, is place on a record or instrument with the present intention to authenticate the record or instrument.
 - b. With respect to a record or instrument required by this chapter to be filed with the clerk of court, that:
 - (1) The record or instrument has been signed by a person authorized to do so by this chapter or by the trust instrument; and
 - (2) The signature and the record or instrument are communicated by a method or medium acceptable to the clerk of court.
20. "Special needs trust" means special needs trust as defined in section 59-08-01.
21. "Spendthrift provision" means a term of a trust which restrains either the voluntary or involuntary or both the voluntary and involuntary transfer of a beneficiary's interest and does not include or prevent a disclaimer of an interest of a beneficiary.
22. "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.
23. "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.
24. "Trust instrument" means a record signed by the settlor that contains terms of the trust, including any amendments to the record and any modifications permitted by court order or by binding nonjudicial settlement agreement.
25. "Trustee" includes an original, additional, and successor trustee, and a cotrustee, whether or not appointed or confirmed by a court."

Page 10, remove lines 1 through 20

Page 17, line 20, after "attorney" insert "or" and after "having" insert "other"

Page 20, line 3, after "trust" insert "or the attorney general"

Page 20, after line 4, insert:

- "4. Chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 do not impair the rights and powers of the attorney general with respect to any trust.
5. In all cases of charitable trusts, the attorney general and the state's attorney of the county in which the trust is located are interested persons with respect to the trust estate."

Page 25, line 1, after "a" insert "self-settled" and after "trust" insert "or a third-party special needs trust under chapter 59-08 nor to any trust"

Page 25, line 2, replace "42 U.S.C. 1396p(d)(4)(A) if the application of" with "42 U.S.C. 1396p(d)."

Page 25, remove lines 3 through 7

Page 25, after line 30, insert:

- "5. If the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim if the beneficiary was not acting as trustee or cotrustee."

Page 28, line 16, remove "and the settlor has capacity to revoke the trust"

Page 28, line 24, replace "may" with "shall"

Page 28, line 25, replace "at" with "immediately before"

Page 28, line 30, replace "at" with "immediately before"

Page 29, after line 7, insert:

- "4. This section does not impose a duty upon the trustee to give notice under this section unless the notice is expressly required in the trust agreement."

Page 29, line 18, replace "reject" with "decline"

Page 29, line 20, replace "rejected" with "declined"

Page 29, line 23, replace "rejection" with "declination"

Page 30, line 3, replace "regulated financial service institution qualified to do trust business" with "bank or trust company qualified to act as a trustee"

Page 30, line 19, replace "not delegate to a cotrustee the performance of a function the settlor" with "delegate to a cotrustee the performance of any function other than a function that the terms of the trust expressly require to be performed by the trustees jointly"

Page 30, line 20, remove "reasonably expected the trustees to perform jointly"

Page 31, line 1, replace "rejects" with "declines"

Page 31, line 2, after "identified" insert ", cannot be located,"

Page 31, line 10, after "trust" insert "or appointed under the terms of the trust"

Page 31, line 16, after "trust" insert "or appointed under the terms of the trust"

Page 31, line 25, replace "upon at least thirty days' notice to the qualified beneficiaries," with ":

- a. Upon at least thirty days' notice to the settlor, if living, to all cotrustees, and the qualified beneficiaries, except those qualified beneficiaries under a revocable trust that the settlor has the capacity to revoke; or
- b. With the approval of the court."

Page 31, remove line 26

Page 32, after line 24, insert:

- "3. Title to all trust property must be owned by and vested in any successor trustee without any conveyance, transfer, or assignment by the prior trustee."

Page 33, line 9, after the underscored period insert "The lien under this subsection does not apply to a common or collective fund that is exempt under 26 U.S.C. 584."

Page 37, line 15, after "upon" insert "written", remove "of a beneficiary", and remove "to the beneficiary"

Page 37, line 16, after "instrument" insert ":

- a. To a qualified beneficiary of a revocable trust; and
- b. To a beneficiary of a trust that is not revocable"

Page 38, after line 8, insert:

- "8. The duties of a trustee specified in this section are not subject to section 59-14-03.
9. Subsections 3 and 4 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."

Page 38, line 13, remove "terms and" and remove "and the interests of the beneficiaries"

Page 38, line 15, replace ", a" with ":

a. A"

Page 38, line 18, replace "relating to the trustee's" with "; and

b. A"

Page 38, remove lines 19 and 20

Page 38, line 21, remove "corresponding future provisions of federal tax law, and a"

Page 38, line 28, replace "a" with ";

a. A"

Page 38, line 30, remove "of 1986, or corresponding future provisions"

Page 38, line 31, remove "of federal tax law," and replace the first "any" with:

"b. Any"

Page 39, line 1, replace "a" with:

"c. A"

Page 39, line 3, remove "of 1986, or corresponding future provisions of federal tax law"

Page 39, line 6, remove "competent" and after "owner" insert ", who is not an incapacitated person,"

Page 39, line 17, replace "trust money in an account in a regulated financial service institution" with "or invest trust money in a regulated financial institution, including one operated by the trustee or an affiliate of the trustee"

Page 39, line 18, after "security" insert "from any financial institution, including a financial institution that is serving as a trustee or one of its affiliates"

Page 40, line 16, remove "arising from the administration of"

Page 40, line 17, remove "the trust"

Page 40, line 18, after "Abandon" insert ", distribute,"

Page 42, after line 11, insert:

26. Purchase and pay from trust principal the premiums on life insurance.

27. Allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence or amortization, or for depletion in mineral or timber properties.

28. a. With respect to the administration of trust assets as one or more trusts to:

- (1) Receive and administer additional property as part of the trust estate or as a separate trust having terms identical to the terms of the existing trust;
 - (2) Sever any trust estate on a fractional basis, before or after a trust is funded, into two or more separate trusts for any reason;
 - (3) Segregate by allocation to a separate account or trust a specific amount or gift made from any trust to reflect a partial disclaimer, to reflect or result in differences in federal tax attributes, to satisfy any federal tax requirements or elections, or to reduce potential generation, skipping transfer tax liability, in a manner consistent with the rules governing disclaimers, such federal tax attributes, such requirements or elections, or any applicable tax rules or regulations, and any income earned on a segregated amount or gift after segregation occurs passes to the designated taker of such amount or gift; and
 - (4) Consolidate two or more trusts having substantially similar terms into a single trust.
- b. In managing, investing, administering, and distributing the trust property of any separate account or trust and in making applicable tax elections, consider the differences in federal tax attributes and all other factors the trustee believes pertinent and may make disproportionate distributions from the separate trusts created. A separate account or trust created by severance or segregation must be treated as a separate trust for all purposes from and after the date on which the severance or segregation is effective. The trustee shall hold such separate account or trust on terms and conditions that are substantially equivalent to the terms of the trust from which it was severed or segregated so that the aggregate interests of each beneficiary in the several trusts are substantially equivalent to the beneficiary's interests in the trust before severance or segregation; provided, however, that any terms of the trust before severance that would affect qualification of the trust for any federal tax deduction, exclusion, election, exemption, or other special federal tax status must remain identical in each of the separate trusts created.
29. Employ persons, including attorneys, auditors, investment advisors or agents, to advise or assist the trustee in the performance of administrative duties. A trustee may act based on the recommendations of professionals without independently investigating the recommendations.
30. Deal with the personal representative, trustee, or other representative of any other trust or estate in which a beneficiary of the trust estate has an interest, notwithstanding the fact that the trustee is a personal representative, trustee, or other representative of the other trust or estate."

Page 42, line 12, replace "26." with "31."

Page 42, line 17, after "beneficiaries" insert ", and the attorney general in the case of a charitable trust," and after "beneficiary" insert ", or the attorney general in the case of a charitable trust,"

Page 42, line 18, after "beneficiary" insert ", or the attorney general in the case of a charitable trust,"

Page 42, line 20, after "beneficiary" insert ", or the attorney general in the case of a charitable trust,"

Page 43, line 3, after "in" insert "sections 59-16-02, 59-16-03, 59-16-05, 59-16-06, and 59-16-07 and in"

Page 44, line 16, remove "**of this chapter**"

Page 44, line 18, after "under" insert "sections 59-16-02, 59-16-03, 59-16-05, 59-16-06, and 59-16-07 and under"

Page 45, line 22, remove "A trustee is accountable to an"

Page 45, remove line 23

Page 45, line 24, remove "trust, even absent a breach of trust."

Page 45, line 27, replace "**(1004) Attorney's fees and costs.** In a judicial proceeding involving the" with "**Reserved.**"

Page 45, remove lines 28 through 30

Page 46, line 4, after "beneficiary" insert "in the report or in a separate notice accompanying the report"

Page 46, line 24, remove "the interests"

Page 46, line 25, remove "of the beneficiaries or"

Page 46, line 27, replace "An" with "Unless the settlor was represented by an attorney not employed by the trustee with respect to the trust containing the exculpatory term, an"

Page 47, line 6, after "beneficiary" insert "lacked capacity or"

Page 47, line 11, after the underscored period insert "The addition of the phrase "trustee" or "as trustee" or a similar designation to the signature of a trustee on a written contract is considered prima facie evidence of a disclosure of a fiduciary capacity."

Page 47, after line 19, insert:

- "4. Whenever a trust instrument reserves to the settlor, or vests in an advisory or investment committee, or in any other person, including one or more cotrustees to the exclusion of the trustee or to the exclusion of one or more of several trustees, authority to direct the making or retention of any investment, the excluded trustee or trustees are not liable, either individually or as a fiduciary, for any loss resulting from the making or retention of any investment pursuant to such direction.
5. In the absence of actual knowledge or information that would cause a reasonable trustee to inquire further, a trustee may not be held liable for failure to take necessary steps to compel the redress of any breach of trust or fiduciary duty by any predecessor personal representative, trustee, or other fiduciary. This section may not be construed to limit the fiduciary

liability of any trustee for the acts or omissions of the trustee with respect to the trust estate."

Page 47, line 25, replace "in the contract or in a statement previously filed under title 45" with ":

- a. In the contract;
- b. In a registration of the partnership as a limited liability partnership filed pursuant to chapter 45-22 in which the trustee is listed as a managing partner; or
- c. In a certificate of limited liability limited partnership filed pursuant to chapter 45-23 in which the trustee is listed as a general partner"

Page 48, line 24, replace "Instead of furnishing a copy of the trust instrument to a person other than a" with "Unless otherwise required by chapter 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, or 59-19"

Page 48, line 25, remove "beneficiary"

Page 48, line 26, after the second "the" insert "effective", after "date" insert "of", and remove "was"

Page 48, line 27, remove "executed", after the first underscored comma insert "the name of the trust, if a name is given,", and replace the second "the" with "each"

Page 48, line 28, after the first "the" insert "applicable" and after the second "trustee" insert ", which may make reference to the powers set forth in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19"

Page 48, line 29, after the underscored comma insert "and"

Page 49, line 1, remove ", the trust's taxpayer"

Page 49, line 2, remove "identification number, and the manner of taking title to trust property"

Page 50, replace lines 5 through 27 with:

- "1. Except as otherwise provided in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19, effective August 1, 2007, these chapters:
 - a. Apply to all trusts created after July 31, 2007; and
 - b. Apply to all judicial proceedings concerning trusts which are commenced after July 31, 2007.
2. Except as otherwise provided in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19, from August 1, 2007, through July 31, 2009:
 - a. A trust created before August 1, 2007, may elect to be subject to chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16,

59-17, 59-18, and 59-19; however, that trust must be in compliance with those chapters by August 1, 2009;

- b. Any rule of construction or presumption provided in chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 applies to trust instruments executed before August 1, 2009, unless there is a clear indication of a contrary intent in the terms of the trust;
 - c. Chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19 do not apply to judicial proceedings concerning trusts which are commenced before that date unless the court finds that application of a particular provision of these chapters would not substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of these chapters applies and the superseded law does not apply; and
 - d. An act done before August 1, 2009, is not affected by chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19.
3. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before August 1, 2007, for those trusts that are subject to subsection 1, or before August 1, 2009, for those trusts that are subject to subsection 2, that statute continues to apply to the right even if it has been repealed or superseded."

Page 52, line 16, after "Chapters" insert "30.1-32,"

Page 52, line 17, remove "59-04.2,"

Renumber accordingly