

Sixty-fifth
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1228

Introduced by

Representative K. Koppelman

Senator Armstrong

1 A BILL for an Act to create and enact sections 59-04.2-03.1 and 59-09-04.1, chapter 59-10.1,
2 section 59-14-05, and chapters 59-16.1, 59-16.2, and 59-16.3 of the North Dakota Century
3 Code, relating to actions to contest the validity of a trust, trust decanting, and directed trustees;
4 to amend and reenact sections 47-02-27.4, 59-04.2-03, and 59-16-13 of the North Dakota
5 Century Code, relating to exclusions from the rule against perpetuities and a trustee's duty to
6 inform; to repeal sections 59-14-01, 59-14-04, and 59-16-08 of the North Dakota Century Code,
7 relating to the capacity of a settlor of a revocable trust, actions contesting the validity of a trust,
8 and powers to direct a trustee; and to provide for retroactive application.

9 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

10 **SECTION 1. AMENDMENT.** Section 47-02-27.4 of the North Dakota Century Code is
11 amended and reenacted as follows:

12 **47-02-27.4. Exclusions from statutory rule against perpetuities.**

13 Section 47-02-27.1 does not apply to:

- 14 1. A contingent property interest or a power of appointment arising out of a nondonative
15 transfer, except a contingent property interest or a power of appointment arising out of
16 a premarital or postmarital agreement, a separation or divorce settlement, a spouse's
17 election, a similar arrangement arising out of a prospective, existing, or previous
18 marital relationship between the parties, a contract to make or not to revoke a will or
19 trust, a contract to exercise or not to exercise a power of appointment, a transfer in
20 satisfaction of a duty of support, or a reciprocal transfer.
- 21 2. A fiduciary's power relating to the administration or management of assets, including
22 the power of a fiduciary to sell, lease, or mortgage property, and the power of a
23 fiduciary to determine principal and income.
- 24 3. A power to appoint a fiduciary.

- 1 4. A discretionary power of a trustee to distribute principal before termination of a trust to
- 2 a beneficiary having an indefeasibly vested interest in the income and principal.
- 3 5. A contingent property interest held by a charity, government, or governmental agency
- 4 or subdivision, if the contingent property interest is preceded by an interest held by
- 5 another charity, government, or governmental agency or subdivision.
- 6 6. A property interest, power of appointment, or arrangement that was not subject to the
- 7 common-law rule against perpetuities or excluded by another statute of this state.
- 8 7. Except to the extent otherwise provided in the governing instrument of a business
- 9 trust, a business trust has perpetual existence, and a business trust may not be
- 10 terminated or revoked by a beneficial owner or other person except in accordance with
- 11 the terms of its governing instrument. A business trust, whether domestic or foreign,
- 12 may not own any interest in real property within this state.

13 **SECTION 2. AMENDMENT.** Section 59-04.2-03 of the North Dakota Century Code is
14 amended and reenacted as follows:

15 **59-04.2-03. (104) Trustee's power to adjust.**

- 16 1. A trustee may adjust between principal and income to the extent the trustee considers
- 17 necessary if the trustee invests and manages trust assets as a prudent investor, the
- 18 terms of the trust describe the amount that may or must be distributed to a beneficiary
- 19 by referring to the trust's income, and the trustee determines, after applying the rules
- 20 in subsection 1 of section 59-04.2-02 that the trustee is unable to comply with
- 21 subsection 1 of section 59-04.2-02.
- 22 a. The discretionary power of a trustee to adjust under this section may not be
- 23 interpreted to include an obligation to evaluate a trust for possible adjustment
- 24 between principal and income.
- 25 b. A trustee's inaction is presumed to be a good faith determination not to exercise
- 26 the power to adjust.
- 27 2. In deciding whether and to what extent to exercise the power conferred by
- 28 subsection 1, a trustee may consider all factors relevant to the trust and its
- 29 beneficiaries, including the following factors to the extent relevant:
- 30 a. The nature, purpose, size, and expected duration of the trust;
- 31 b. The intent of the settlor;

- 1 c. The identity and circumstances of the beneficiaries;
- 2 d. The needs for liquidity, regularity of income, and preservation and appreciation of
- 3 capital;
- 4 e. The assets held in the trust, the extent to which they consist of financial assets,
- 5 interests in closely held enterprises, tangible and intangible personal property, or
- 6 real property; the extent to which an asset is used by a beneficiary; and whether
- 7 an asset was purchased by the trustee or received from the settlor;
- 8 f. The net amount allocated to income under the other sections of this chapter and
- 9 the increase or decrease in the value of the principal assets, which the trustee
- 10 may estimate as to assets for which market values are not readily available;
- 11 g. Whether and to what extent the terms of the trust give the trustee the power to
- 12 invade principal or accumulate income or prohibit the trustee from invading
- 13 principal or accumulating income, and the extent to which the trustee has
- 14 exercised a power from time to time to invade principal or accumulate income;
- 15 h. The actual and anticipated effect of economic conditions on principal and income
- 16 and effects of inflation and deflation; and
- 17 i. The anticipated tax consequences of an adjustment.
- 18 3. A trustee may not make an adjustment:
- 19 a. That diminishes the income interest in a trust that requires all of the income to be
- 20 paid at least annually to a spouse and for which an estate tax or gift tax marital
- 21 deduction would be allowed, in whole or in part, if the trustee did not have the
- 22 power to make the adjustment;
- 23 b. That reduces the actuarial value of the income interest in a trust to which a
- 24 person transfers property with the intent to qualify for a gift tax exclusion;
- 25 c. That changes the amount payable to a beneficiary as a fixed annuity or a fixed
- 26 fraction of the value of the trust assets;
- 27 d. From an amount that is permanently set aside for charitable purposes under a
- 28 will or the terms of a trust unless both income and principal are so set aside;
- 29 e. If possessing or exercising the power to make an adjustment causes an
- 30 individual to be treated as the owner of all or part of the trust for income tax

purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

f. If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

g. If the trustee is a beneficiary of the trust; or

h. If the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

4. If subdivisions e, f, g, or h of subsection 3 apply to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

5. A trustee may release the entire power conferred by subsection 1 or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subdivision a through f, or h of subsection 3 or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection 3. The release may be permanent or for a specified period, including a period measured by the life of an individual.

6. Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection 1.

SECTION 3. Section 59-04.2-03.1 of the North Dakota Century Code is created and enacted as follows:

59-04.2-03.1. Judicial control of discretionary power.

1. The court may not order a fiduciary to change a decision to exercise or not to exercise a discretionary power conferred by this ~~section~~chapter unless the court determines

1 that the decision was not made in good faith or was an abuse of the fiduciary's
2 discretion. A fiduciary's decision is not an abuse of discretion merely because the court
3 would have exercised the power in a different manner or would not have exercised the
4 power.

5 2. The decisions to which subsection 1 applies include:

- 6 a. A decision under subsection 1 of section 59-04.2-03 as to whether and to what
7 extent an amount should be transferred from principal to income or from income
8 to principal.
9 b. A decision regarding the factors that are relevant to the trust and its beneficiaries,
10 the extent to which the factors are relevant, and the weight, if any, to be given to
11 those factors, in deciding whether and to what extent to exercise the
12 discretionary power conferred by subsection 1 of section 59-04.2-03.

13 3. If the court determines a fiduciary has abused the fiduciary's discretion, the court may
14 place the income and remainder beneficiaries in the positions they would have
15 occupied if the discretion had not been abused, according to the following rules:

- 16 a. To the extent the abuse of discretion has resulted in no distribution to a
17 beneficiary or in a distribution that is too small, the court shall order the fiduciary
18 to distribute from the trust to the beneficiary an amount that the court determines
19 will restore the beneficiary, in whole or in part, to the beneficiary's appropriate
20 position.
21 b. To the extent the abuse of discretion has resulted in a distribution to a beneficiary
22 which is too large, the court shall place the beneficiaries, the trust, or both, in
23 whole or in part, in their appropriate positions by ordering the fiduciary to withhold
24 an amount from one or more future distributions to the beneficiary who received
25 the distribution that was too large or ordering that beneficiary to return some or all
26 of the distribution to the trust.
27 c. To the extent the court is unable, after applying subdivisions a and b to place the
28 beneficiaries, the trust, or both, in the positions they would have occupied if the
29 discretion had not been abused, the court may order the fiduciary to pay an
30 appropriate amount from its own funds to one or more of the beneficiaries or the
31 trust or both.

1 4. Upon petition by the fiduciary, the court having jurisdiction over a trust or estate shall
2 determine whether a proposed exercise or nonexercise by the fiduciary of a
3 discretionary power conferred by this chapter will result in an abuse of the fiduciary's
4 discretion. If the petition describes the proposed exercise or nonexercise of the power
5 and contains sufficient information to inform the beneficiaries of the reasons for the
6 proposal, the facts upon which the fiduciary relies, and an explanation of how the
7 income and remainder beneficiaries will be affected by the proposed exercise or
8 nonexercise of the power, then a beneficiary who challenges the proposed exercise or
9 nonexercise has the burden of establishing that it will result in an abuse of discretion.

10 **SECTION 4.** Section 59-09-04.1 of the North Dakota Century Code is created and enacted
11 as follows:

12 **59-09-04.1. Settlor's capacity.**

13 The capacity required of a settlor is the same as that required to make a will and is required
14 to create, amend, revoke, or add property to a trust, to direct the actions of the trustee where
15 permitted, and to exercise powers and rights, if any, reserved or granted to the settlor under the
16 terms of the trust or applicable law.

17 **SECTION 5.** Chapter 59-10.1 of the North Dakota Century Code is created and enacted as
18 follows:

19 **59-10.1-01. Declaratory judgment.**

20 A person seeking to challenge the validity of a trust instrument or amendment may institute
21 a proceeding under this chapter for a declaratory judgment of invalidity.

22 **59-10.1-02. Parties - Process.**

23 A settlor who is not a plaintiff, a beneficiary named in the trust, and a settlor's present
24 intestate successors must be included as parties to the proceeding. For the purposes of this
25 chapter, a beneficiary named in the trust and the settlor's present intestate successors are
26 deemed to possess inchoate property rights. Service of process upon the parties to the
27 proceeding must be made in accordance with rule 4 of the North Dakota Rules of Civil
28 Procedure.

29 **59-10.1-03. Limitation of action.**

30 A proceeding under this chapter may not be commenced later than the earliest of the
31 following:

1. One hundred twenty days after the date the trustee notified the individual contesting the trust of the trust's existence or amendment. The notice must include the trustee's name and address and a copy of the trust instrument with amendments, if any, and must inform the recipient of the time allowed under this section for initiating a proceeding to contest the trust. A trustee may not have any liability under the governing instrument, to a third party, for failure to provide a notice under this subsection. Service of this notice is presumed to have been received upon delivery of the notice to the last known address of the individual to whom the notice is addressed;
2. Three years after the settlor's death;
3. If the trust was revocable immediately before the settlor's death and the trust was specifically referred to in the settlor's last will, then the time in which a petition for review of a will could be filed under state law; or
4. The date an individual's right to contest was precluded by adjudication, consent, or other limitation.

59-10.1-04. Findings.

If the court finds the settlor has executed the trust instrument and had the requisite capacity, the court shall declare the trust to be valid. An adjudication that a trust is valid is binding on the parties. If the court finds a trust or amendment to be invalid, the challenged trust or amendment is ineffective as of a date and to the extent determined by the court.

59-10.1-05. Distributions by trustee - Return of distribution determined to be invalid.

1. The trustee may proceed to distribute the trust property in accordance with the terms of the trust. This distribution may be made without liability unless the trustee has actual knowledge of a pending proceeding to contest the validity of the trust, or is notified by a potential contestant of a possible contest, followed by service of process upon the trustee for that proceeding within thirty days of the notification of a possible contest.
2. The court may order the revocation of a distribution made under the authority of a trust or amendment that is subsequently determined to be invalid and may order the recipient of an invalid distribution to return the distribution.

SECTION 6. Section 59-14-05 of the North Dakota Century Code is created and enacted as follows:

1 **59-14-05. Settlor's powers to direct.**

2 While a trust is revocable, the trustee may follow a direction of the settlor which is contrary
3 to the terms of the trust.

4 **SECTION 7. AMENDMENT.** Section 59-16-13 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **59-16-13. (813) Duty to inform and report.**

7 1. Subject to section 59-14-03, while a trust is revocable or to the extent that trust
8 property in an irrevocable trust is subject to a power of withdrawal, or to the extent that
9 the qualified beneficiary of an irrevocable trust is then unknown because a person
10 holds a power to change the qualified beneficiary, the duty of the trustee as set forth in
11 subsection 2, to inform and report are owed exclusively:

- 12 a. To the settlor, while a trust is revocable;
- 13 b. To the holder of the power of withdrawal to the extent the trust property is subject
- 14 to the power during the period in which the power may be executed; and
- 15 c. To the holder of the power to change the qualified beneficiary of an irrevocable
- 16 trust during the period in which the power may be exercised; and
- 17 d. To a qualified beneficiary when the qualified beneficiary is required by law or
- 18 regulation to provide that information to determine eligibility for benefits or to
- 19 verify continued eligibility for benefits under title 50.

20 2. With respect to trust property in an irrevocable trust which is not subject to a power of

21 withdrawal and which is not subject to a power to change the qualified beneficiary:

- 22 a. A trustee shall keep the qualified beneficiaries of the trust reasonably informed
- 23 about the administration of the trust and of the material facts necessary for them
- 24 to protect their interests. Unless unreasonable under the circumstances, a trustee
- 25 shall promptly respond to a beneficiary's request for information related to the
- 26 administration of the trust.
- 27 b. A trustee upon written request shall promptly furnish to a qualified beneficiary a
- 28 copy of the portion of the trust instrument which relates to the interest of a
- 29 qualified beneficiary.

- 1 c. A trustee within sixty days after accepting a trusteeship shall notify the qualified
2 beneficiaries of the acceptance and of the trustee's name, address, and
3 telephone number.
- 4 d. A trustee shall notify the qualified beneficiaries of the trust existence, of the
5 identity of the settlor, of the right to request a copy of the trust instrument, and of
6 the right of the trustee's report as provided in subdivision f within sixty days after
7 the date the trustee acquires knowledge:
- 8 (1) Of the creation of an irrevocable trust; or
9 (2) That a formerly revocable trust has become irrevocable.
- 10 e. A trustee shall notify the qualified beneficiaries of any change in the method or
11 rate of the trustee's compensation.
- 12 f. A trustee shall send to the distributees or permissible distributees of trust income
13 or principal, and to other qualified beneficiaries who request it, at least annually
14 and at the termination of the trust, a report of the trust property, liabilities,
15 receipts, and disbursements, including the source and amount of the trustee's
16 compensation, a listing of the trust assets and, if feasible, their respective market
17 values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a
18 report must be sent to the qualified beneficiaries by the former trustee. A personal
19 representative, conservator, or guardian may send the qualified beneficiaries a
20 report on behalf of a deceased or incapacitated trustee.
- 21 g. A beneficiary may waive the right to a trustee's report or other information
22 otherwise required to be furnished under this section. A beneficiary, with respect
23 to future reports and other information, may withdraw a waiver previously given.
- 24 h. Subdivisions c and d do not apply to a trustee that accepts a trusteeship before
25 August 1, 2007, to an irrevocable trust created before August 1, 2007, or to a
26 revocable trust that becomes irrevocable before August 1, 2007.

27 **SECTION 8.** Chapter 59-16.1 of the North Dakota Century Code is created and enacted as
28 follows:

29 **59-16.1-01. Consistency with power of attorney provisions.**

30 The provisions of this chapter relating to power of attorney are subject to other provisions of
31 law.

59-16.1-02. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Appointed trust" means an irrevocable trust which receives principal from an invaded trust under this chapter, including a trust created by the settlor of the invaded trust, under the terms of the invaded trust or any other trust instrument, or by the trustees, acting in that capacity, of the invaded trust. For purposes of creating another trust, a requirement that a trust instrument be signed by the settlor is deemed satisfied by the signature of the trustee of the appointed trust.
2. "Authorized trustee" means, as to an invaded trust, a trustee with authority to pay trust principal to or for one or more current beneficiaries other than a trustee who is the settlor, or a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee, other than by the exercise of a power of appointment held in a nonfiduciary capacity.
3. "Current beneficiary" or "beneficiaries" means individual, or as to a class, an individual who is or will become members of that class, to whom the trustees may distribute principal at the time of the exercise of the power, provided that the interest of a beneficiary to whom income, but not principal, may be distributed at the discretion of the trustee of the invaded trust, may be continued in the appointed trust.
4. "Invade" means the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.
5. "Invaded trust" means an existing irrevocable inter vivos or testamentary trust whose principal is appointed under this chapter.
6. "Person or persons interested in the invaded trust" means all qualified beneficiaries as defined in subsection 16 of section 59-09-06.
7. "Principal" includes the income of the trust at the time of the exercise of the power which is not currently required to be distributed, including accrued and accumulated income.
8. "Unlimited discretion" means the unlimited power to distribute principal. A power to distribute principal which includes words, such as best interests, welfare, comfort, or happiness may not be considered a limitation of the power to distribute principal.

1 **59-16.1-03. Power of appointment.**

2 An exercise of a power of appointment is not void if the exercise is:

- 3 1. More extensive than was authorized, but is valid to the extent authorized by the
4 instrument creating its power; or
5 2. Less extensive than authorized by the instrument creating the power, unless the donor
6 has manifested a contrary intention.

7 **59-16.1-04. Authorized trustee with unlimited discretion.**

- 8 1. An authorized trustee with unlimited discretion to invade trust principal may appoint
9 part or all of the principal to a trustee of an appointed trust for, and only for the benefit
10 of, one, more than one, or all of the current beneficiaries of the invaded trust, to the
11 exclusion of any one or more of the current beneficiaries. The successor and
12 remainder beneficiaries of the appointed trust may be none, one, more than one, or all
13 of the successor and remainder beneficiaries of the invaded trust.
14 2. An authorized trustee exercising the power under subsection 1 of section 59-16.1-04
15 may grant a discretionary power of appointment in the appointed trust to one or more
16 of the current beneficiaries of the invaded trust, provided that the beneficiary granted a
17 power to appoint may receive principal outright under the terms of the invaded trust.
18 3. If the authorized trustee grants a power of appointment, the class of permissible
19 appointees in favor of whom the beneficiary may exercise the power of appointment
20 granted in the appointed trust may be broader or otherwise different from the current,
21 successor, and remainder beneficiaries of the invaded trust.
22 4. If the beneficiary or beneficiaries of the invaded trust are described by a class, the
23 beneficiary or beneficiaries of the appointed trust may include present or future
24 members of the class.

25 **59-16.1-05. Authorized trustee without unlimited discretion.**

- 26 1. An authorized trustee with the power to invade trust principal but without unlimited
27 discretion may appoint part or all of the principal of the trust to a trustee of an
28 appointed trust, provided that the current beneficiaries of the appointed trust must be
29 the same as the current beneficiaries of the invaded trust and the successor and
30 remainder beneficiaries must be the same as the successor and remainder
31 beneficiaries of the invaded trust.

2. If the authorized trustee exercises the power under this section, the appointed trust must include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.

3. If the authorized trustee exercises the power under this section to extend the term of the appointed trust beyond the term of the invaded trust, then for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, then the appointed trust, in addition to the language required to be included in the appointed trust pursuant to subsection 2 of section 59-16.1-05, also may include language providing the trustee with unlimited discretion to invade the principal of the appointed trust during this extended term.

4. If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust shall include present or future members of the class.

5. If the authorized trustee exercises the power under this section and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant the power of appointment in the appointed trust and the class of permissible appointees must be the same as in the invaded trust.

59-16.1-06. Special power of appointment.

An exercise of the power to invade trust principal under this chapter is considered to be the exercise of a special power of appointment.

59-16.1-07. Term of appointed trust.

The appointed trust to which an authorized trustee appoints the assets of the invaded trust may have a term that is longer than the term set forth in the invaded trust, including, a term measured by the lifetime of a current beneficiary.

59-16.1-08. Unlimited discretion governs.

If an authorized trustee has unlimited discretion to invade the principal of a trust, and the same trustee or another trustee has the power to invade principal under the trust instrument and the power is not subject to unlimited discretion, then the authorized trustee having unlimited discretion may exercise the power of appointment under section 59-16.1-04.

1 **59-16.1-09. Current need to invade principal.**

2 An authorized trustee may exercise the power to appoint in favor of an appointed trust
3 under sections 59-6.1-04 and 59-16.1-05 whether or not there is a current need to invade
4 principal under the terms of the invaded trust.

5 **59-16.1-10. Fiduciary duty.**

6 An authorized trustee exercising the power under this chapter has a fiduciary duty to
7 exercise the power in the best interests of one or more proper objects of the exercise of the
8 power and as a prudent person would exercise the power under the prevailing circumstances.

9 **59-16.1-11. Subsequently discovered assets.**

10 Unless the authorized trustee provides otherwise:

- 11 1. The appointment of all the assets comprising the principal of the invaded trust to an
12 appointed trust must include subsequently discovered assets of the invaded trust and
13 undistributed principal of the invaded trust acquired after the appointment to the
14 appointed trust; and
- 15 2. The appointment of part but not all of the assets comprising the principal of the
16 invaded trust to an appointed trust may not include subsequently discovered assets
17 belonging to the invaded trust and principal paid to or acquired by the invaded trust
18 after the appointment to the appointed trust. These assets must remain the assets of
19 the invaded trust.

20 **59-16.1-12. Requirements for exercise of power to appoint - Notice.**

- 21 1. The exercise of the power to appoint to an appointed trust under sections 59-16.1-04
22 and 59-16.1-05 must be evidenced by a written instrument that is signed, dated, and
23 acknowledged by the authorized trustee. The exercise of the power is effective sixty
24 days after the date of delivery of notice as specified in subsection 3, unless each
25 individual entitled to notice agrees in writing to an earlier effective date or waives in
26 writing the right to object to the exercise of the power.
- 27 2. An authorized trustee may exercise the power authorized by under sections
28 59-16.1-04 and 59-16.1-05 without the consent of the settlor or the person interested
29 in the invaded trust and without court approval, provided that the authorized trustee
30 may seek court approval for the exercise with notice to all persons interested in the
31 invaded trust.

- 1 3. A copy of the instrument exercising the power, a copy of the appointed trust, and a
2 copy of the invaded trust must be delivered to:
 - 3 a. A person having the right, pursuant to the terms of the invaded trust, to remove or
4 replace the authorized trustee exercising the power under sections 59-16.1-04
5 and 59-16.1-05; and
 - 6 b. A person interested in the invaded trust.
- 7 4. Notice of an exercise of the power must be given in the same manner as provided in
8 section 59-09-09.
- 9 5. The instrument exercising the power shall state whether the appointment is of all the
10 assets comprising the principal of the invaded trust or only a part of the assets
11 comprising the principal of the invaded trust and, if a part, the approximate percentage
12 of the value of the principal of the invaded trust that is subject to the appointment.
- 13 6. An individual entitled to notice may object to the authorized trustee's exercise of the
14 power under this section by serving a written notice of objection upon the authorized
15 trustee prior to the effective date of the exercise of the power. The failure to object
16 does not constitute consent.
- 17 7. If the authorized trustee does not receive a written objection to the proposed exercise
18 from an individual entitled to notice within the applicable period, the authorized trustee
19 is not liable to a person who received or was deemed to have received the required
20 notice in that person's personal, representative, or represented capacities for the
21 exercise of the power.
- 22 8. If the authorized trustee receives a written objection within the applicable period, either
23 the authorized trustee or an individual entitled to notice may petition the court to have
24 the proposed exercise of a power performed as proposed, performed with
25 modifications, or denied. In a proceeding, an individual objecting to the proposed
26 exercise has the burden of proof as to whether the authorized trustee's proposed
27 exercise should not be performed.
 - 28 a. A person who has not objected is not estopped from opposing the proposed
29 exercise in the proceeding.
 - 30 b. If the authorized trustee decides not to implement the proposed exercise, the
31 trustee shall notify all persons entitled to notice of the decision not to exercise the

1 power and the reason for the decision, and the authorized trustee's decision not
2 to implement the proposed exercise does not give rise to liability to an individual
3 interested in the invaded trust.

4 c. A person entitled to notice may petition the court to have the exercise of a power
5 performed and has the burden of proof as to whether it should be performed.

6 9. A copy of the instrument exercising the power and a copy of each of the invaded trust
7 and the appointed trust must be filed with records of the appointed trust and the
8 invaded trust.

9 **59-16.1-13. Rights of trustee.**

10 This section does not abridge the right of a trustee to appoint property in further trust that
11 arises under the terms of the governing instrument of a trust or under any other provision of law
12 or under common law, or as directed by a court having jurisdiction over the trust.

13 **59-16.1-14. No duty to exercise a power to invade.**

14 This chapter does not create a duty to exercise a power to invade principal and inference of
15 impropriety may not be made as a result of an authorized trustee not exercising the power
16 conferred under sections 59-16.1-04 and 59-16.1-05.

17 **59-16.1-15. Power clarified.**

18 A power authorized under sections 59-16.1-04 and 59-16.1-05 may be exercised subject to
19 the provisions of section 59-16.1-10, unless expressly prohibited by the terms of the governing
20 instrument or by the provisions of section 59-16.1-10, but a general prohibition of the
21 amendment or revocation of the invaded trust or a provision that constituting a spendthrift
22 clause does not preclude the exercise of a power under sections 59-16.1-04 and 59-16.1-05.

23 **59-16.1-16. Prohibitions.**

24 An authorized trustee may exercise a power authorized by this chapter to appoint a trust
25 that is a supplemental needs trust that conforms to chapter 59-08. However, an authorized
26 trustee may not exercise a power authorized by this chapter to effect the following:

27 1. To reduce, limit, or modify any beneficiary's current right to:

28 a. A mandatory distribution of income or principal;

29 b. A mandatory annuity or unitrust interest;

30 c. A current right to withdraw a percentage of the value of the trust; or

31 d. A current right to withdraw a specified dollar amount;

2. Notwithstanding subsection 2 of section 59-18-08, to decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence, and prudence;
3. To alter or eliminate a provision granting another individual the right to remove or replace the authorized trustee exercising the power under sections 59-16.1-04 or 59-16.1-05, unless notice has been provided to the persons under subsection 3 of section 59-16.1-12, or approval is granted by a court having jurisdiction over the trust;
4. To make a binding and conclusive fixation of the value of an asset for purposes of distribution, allocation, or otherwise;
5. To extend the term of the appointed trust beyond a permissible period of the rule against perpetuities of the invaded trust, and an exercise of the power that extends the term of the appointed trust beyond the permissible period of the rule against perpetuities of the invaded trust voids the entire exercise of the power; or
6. To jeopardize:
 - a. The deduction or exclusion originally claimed with respect to a contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the Internal Revenue Code; the marital deduction under section 2056(a) or 2523(a) of the Internal Revenue Code; or the charitable deduction under section 170(a), 642(c), 2055(a), or 2522(a) of the Internal Revenue Code.
 - b. The qualification of a transfer as a direct skip under section 2642(c) of the Internal Revenue Code; or
 - c. Any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the Internal Revenue Code.

59-16.1-17. Compensation - Commissions.

1. For the purposes of this section, unless a court otherwise directs:
 - a. An authorized trustee may not exercise a power authorized under sections 59-16.1-04 and 59-16.1-05 to change the provisions regarding the determination of the compensation of a trustee. The commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the

trustees of the appointed trust during the term of the appointed trust and must be determined in the same manner as in the invaded trust.

b. A trustee may not receive a paying commission or other compensation for appointing of property from the invaded trust to an appointed trust under sections 59-16.1-04 and 59-16.1-05.

SECTION 9. Chapter 59-16.2 of the North Dakota Century Code is created and enacted as follows:

59-16.2-01. Consistency with power of attorney provisions.

The provisions of this chapter relating to power of attorney are subject to other provisions of law.

59-16.2-02. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Directing party" means an investment trust advisor, distribution trust advisor, or trust protector as provided in this chapter.
2. "Distribution trust advisor" means one or more persons given authority by the governing instrument to direct, consent to, veto, or otherwise exercise all or a portion of the distribution powers and discretion of the trust, including authority to make discretionary distributions of income or principal.
3. "Excluded fiduciary" means a fiduciary that by the governing instrument is directed to act in accordance with the exercise of specified powers by a directing party, in which case the specified powers must be deemed granted not to the fiduciary but to the directing party and the fiduciary must be deemed excluded from exercising the specified powers.
 - a. If a governing instrument provides a fiduciary as to one or more specified matters is to act, omit action, or make decisions only with the consent of a directing party, the fiduciary is an excluded fiduciary with respect to those matters.
 - b. A person may be an excluded fiduciary even if the person participated in:
 - (1) The exercise of a power described in section 59-09-11 relating to nonjudicial settlement agreements;
 - (2) A power described in chapter 59-16.1 relating to decanting;
 - (3) A permitted trustee amendment; or

(4) A similar power that invokes the provisions of this chapter with respect to any new or existing trust.

4. "Fiduciary" means any person expressly given one or more fiduciary duties by the governing instrument, including a trustee.

5. "Governing instrument" means the instrument stating the terms of a trust, including a court order, or nonjudicial settlement agreement establishing, construing, or modifying the terms of the trust in accordance with section 59-09-11, chapter 59-16.1, or other applicable law.

6. "Investment trust advisor" means one or more persons given authority by the governing instrument to direct, consent to, or veto the exercise of all or a portion of the investment powers of the trust.

7. "Power" means authority to take or withhold an action or decision, including an expressly specified power, the implied power necessary to exercise a specified power, and authority inherent in a general grant of discretion.

8. "Trust protector" means one or more persons given one or more of the powers specified in section 59-16.2-05, whether or not designated with the title of trust protector by the governing instrument.

59-16.2-03. Designation and powers of investment trust advisor.

1. An investment trust advisor may be designated in the governing instrument of a trust. The powers of an investment trust advisor may be exercised or not exercised in the sole and absolute discretion of the investment trust advisor, and are binding on all other persons, including each beneficiary, each fiduciary, each excluded fiduciary, and any other party having an interest in the trust.

2. The governing instrument may use the title "investment trust advisor" or a similar name or description demonstrating the intent to provide for the office and function of an investment trust advisor.

3. Unless the terms of the governing instrument provide otherwise, the investment trust advisor has the authority to:

a. Direct the trustee with respect to the retention, purchase, transfer, assignment, sale, or encumbrance of trust property and the investment and reinvestment of principal and income of the trust;

- 1 b. Direct the trustee with respect to all management, control, and voting powers
2 related directly or indirectly to trust assets, including voting proxies for securities
3 held in trust;
4 c. Select and determine reasonable compensation of one or more advisors,
5 managers, consultants, or counselors, including the trustee, and to delegate to
6 them any of the powers of the investment trust advisor in accordance with section
7 59-16-07; and
8 d. Determine the frequency and methodology for valuing an asset for which there is
9 no readily available market value.

10 **59-16.2-04. Designation and powers of distribution trust advisor.**

- 11 1. A distribution trust advisor may be designated in the governing instrument of a trust.
12 The powers of a distribution trust advisor may be exercised or not exercised in the
13 sole and absolute discretion of the distribution trust advisor, and are binding on all
14 other persons, including each beneficiary, each fiduciary, each excluded fiduciary, and
15 any other person having an interest in the trust.
16 2. The governing instrument may use the title "distribution trust advisor" or a similar
17 name or description demonstrating the intent to provide for the office and function of a
18 distribution trust advisor.
19 3. Unless the terms of the governing instrument provide otherwise, the distribution trust
20 advisor may direct the trustee with regard to all decisions relating directly or indirectly
21 to discretionary distributions to or for one or more beneficiaries.

22 **59-16.2-05. Designation and powers of trust protector.**

- 23 1. A trust protector may be designated in the governing instrument of a trust.
24 2. The powers of a trust protector may be exercised or not exercised in the sole and
25 absolute discretion of the trust protector, and are binding on all other persons,
26 including a beneficiary, an investment trust advisor, a distribution trust advisor, a
27 fiduciary, an excluded fiduciary, and any other person having an interest in the trust.
28 3. The governing instrument may use the title "trust protector" or a similar name or
29 description demonstrating the intent to provide for the office and function of a trust
30 protector.

- 1 4. The powers granted to a trust protector by the governing instrument may include
2 authority to do one or more of the following:
- 3 a. Modify or amend the governing instrument to achieve favorable tax status or
4 respond to changes in the Internal Revenue Code, federal laws, state laws, or
5 the rulings and regulations under those laws;
- 6 b. Increase, decrease, or modify the interests of a beneficiary or beneficiaries of the
7 trust;
- 8 c. Modify the terms of a power of appointment granted by the trust provided, the
9 modification or amendment does not grant a beneficial interest to any individual,
10 class of individuals, or other parties not specifically provided for under the trust
11 instrument;
- 12 d. Remove, or appoint, a trustee, investment trust advisor, distribution trust advisor,
13 another directing party, investment committee member, or distribution committee
14 member, including designation of a plan of succession for future holders of that
15 office;
- 16 e. Terminate the trust, including determination of how the trustee is to distribute the
17 trust property to be consistent with the purposes of the trust;
- 18 f. Change the situs of the trust, the governing law of the trust, or both;
- 19 g. Appoint one or more successor trust protectors, including designation of a plan of
20 succession for future trust protectors;
- 21 h. Interpret terms of the trust instrument at the request of the trustee;
- 22 i. Advise the trustee on matters concerning a beneficiary;
- 23 j. Amend or modify the governing instrument to take advantage of laws governing:
24 (1) Restraints on alienation;
25 (2) Distribution of trust property; or
26 (3) Improvement of the administration of the trust;
- 27 k. Veto or direct trust distributions; or
- 28 l. Provide direction regarding notification of qualified beneficiaries.
- 29 5. If a charity is a qualified beneficiary of the trust, a trust protector shall give notice to the
30 attorney general at least sixty days before taking any action authorized under

subdivisions b through f of subsection 4. The attorney general may waive this notice requirement.

59-16.2-06. Duty and liability of directing party.

1. A directing party is a fiduciary of the trust subject to the same duties and standards applicable to a trustee of a trust as provided by applicable law unless the governing instrument provides otherwise. However, the governing instrument may not relieve or exonerate a directing party from the duty to act or withhold acting as the directing party in good faith reasonably believes is in the best interests of the trust.
2. Each directing party must keep the excluded fiduciary and any other directing party reasonably informed regarding the administration of the trust with respect to any specific duty or function being performed by the directing party to the extent the duty or function would normally be performed by the excluded fiduciary or to the extent providing the information to the excluded fiduciary or other directing party is reasonably necessary for the excluded fiduciary or other directing party to perform its duties. The directing party shall provide the information reasonably requested by the excluded fiduciary or other directing party.
3. Neither the performance nor the failure to perform of a directing party's duty to inform as provided in this section affects the limitation on the liability of the excluded fiduciary as provided in this section.
4. The directing party may be made a party to an action or proceeding if issues relate to a decision or action of the directing party, even if investment advisory agreements or other related agreement provide otherwise.

59-16.2-07. Duty and liability of excluded fiduciary.

1. The excluded fiduciary shall act in accordance with the governing instrument and comply with the directing party's exercise of the powers granted to the directing party by the governing instrument.
2. Unless otherwise provided in the governing instrument, an excluded fiduciary has no duty to monitor, review, inquire, investigate, recommend, evaluate, or warn with respect to a directing party's exercise of or failure to exercise any power granted to the directing party by the governing instrument, including, any power related to the

1 acquisition, disposition, retention, management, or valuation of any asset or
2 investment.

3 3. Except as otherwise provided in this chapter or the governing instrument, an excluded
4 fiduciary is not liable, either individually or as a fiduciary, for an action, inaction,
5 consent, or failure to consent by a directing party, including:

6 a. If a governing instrument provides an excluded fiduciary is to follow the direction
7 of a directing party and the excluded fiduciary acts in accordance with this
8 direction, except in cases of willful misconduct on the part of the excluded
9 fiduciary in complying with the direction of the directing party, the excluded
10 fiduciary is not liable for any loss resulting directly or indirectly from following the
11 direction, including compliance regarding the valuation of assets for which there
12 is no readily available market value.

13 b. If a governing instrument provides an excluded fiduciary is to act or omit to act
14 only with the consent of a directing party, except in cases of willful misconduct on
15 the part of the excluded fiduciary, the excluded fiduciary is not liable for any loss
16 resulting directly or indirectly from an act taken or omitted as a result of the
17 directing party's failure to provide consent after having been requested to do so
18 by the excluded fiduciary.

19 c. If a governing instrument so provides, or if for any reason, an excluded fiduciary
20 is required to assume the role or responsibilities of a directing party, or if the
21 excluded fiduciary appoints a directing party or successor to a directing party,
22 except in cases of willful misconduct on the part of the excluded fiduciary, the
23 excluded fiduciary is not liable for any loss resulting directly or indirectly from its
24 actions in carrying out the roles and responsibilities of the directing party.

25 4. An excluded fiduciary does not have an obligation to review or evaluate a direction
26 from a distribution trust advisor nor to perform investment or suitability reviews,
27 inquiries, or investigations, nor to make recommendations or evaluations with respect
28 to investments to the extent the directing party, custodial account owner, or authorized
29 designee of a custodial account owner had authority to direct the acquisition,
30 disposition, or retention of the investment. If the excluded fiduciary offers
31 communication to the directing party or an investment person selected by the

1 investment trust advisor, the action may not be deemed to constitute an undertaking
2 by the excluded fiduciary to monitor or otherwise participate in actions within the scope
3 of the advisor's authority or to constitute a duty to do so.

4 5. An excluded fiduciary does not have a duty to communicate with, warn, or apprise a
5 beneficiary or third party concerning instances in which the excluded fiduciary would or
6 may have exercised the excluded fiduciary's own discretion in a manner different from
7 the manner directed by the directing party.

8 6. Absent a contrary provision in the governing instrument, the actions of the excluded
9 fiduciary, including any communications with the directing party or others, or carrying
10 out, recording, or reporting actions taken at the directing party's direction pertaining to
11 matters within the scope of authority of the directing party, must be deemed to be
12 administrative actions taken by the excluded fiduciary solely to allow the excluded
13 fiduciary to perform those duties assigned to the excluded fiduciary under the
14 governing instrument. These administrative actions may not be deemed to constitute
15 an undertaking by the excluded fiduciary to monitor, participate, or otherwise take a
16 fiduciary responsibility for actions within the scope of authority of the directing party.

17 7. An excluded fiduciary may obtain and act upon an opinion of counsel on a matter
18 relevant to this section.

19 **59-16.2-08. Application.**

20 This chapter applies to:

21 1. Existing and future trusts that appoint or provide for a directing party including a party
22 granted power or authority effectively comparable in substance to that of a directing
23 party as provided in this chapter; or

24 2. An existing or future trusts that:

25 a. Are modified in accordance with applicable law or the terms of the governing
26 instrument to appoint or provide for a directing party; or

27 b. Are modified to appoint or provide for a directing party, including a party granted
28 power or authority effectively comparable in substance to that of a directing party,
29 in accordance with a court order, or a nonjudicial settlement agreement whether
30 the order or agreement specifies this chapter governs the responsibilities,

actions, and liabilities of persons designated as a directing party or excluded
fiduciary.

SECTION 10. Chapter 59-16.3 of the North Dakota Century Code is created and enacted
as follows:

59-16.3-01. Definitions.

For purposes of this Actchapter, unless the context otherwise requires:

1. "Disinterested person" means a person who is not a related or subordinate party, as defined in section 672(c) of the Internal Revenue Code [26 U.S.C. 1, et seq.], with respect to the person then acting as trustee of the trust and excludes the settlor of the trust and any interested trustee.
2. "Income trust" means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions, or in amounts, or proportions determined by the trustee. However, a trust that otherwise is an income trust may not qualify if it is subject to taxation under section 2001 or section 2501 of the Internal Revenue Code, until the expiration of the period for filing the return therefor.
3. "Interested distributee" means a person to whom distributions of income or principal can currently be made who has the power to remove the existing trustee and designate as successor a person who may be a related or subordinate party, as defined in section 672(c) of the Internal Revenue Code, with respect to such distributee.
4. "Interested trustee" means:
 - a. Any individual trustee to whom the net income or principal of the trust can currently be distributed or would be distributed if the trust were then to terminate and be distributed; and
 - b. An individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust.
5. "Total return unitrust" means an income trust that has been converted under and meets the provisions of this chapter.

- 1 6. "Trustee" means all persons acting as trustee of the trust, except where expressly
2 noted otherwise, whether acting in their discretion, or on the direction of one or more
3 persons acting in a fiduciary capacity.
- 4 7. "Settlor" means an individual who created an inter vivos or a testamentary trust.
- 5 8. "Unitrust" means a trust, the terms of which require or permit distribution of a unitrust
6 amount, without regard to whether the trust has been converted to a unitrust in
7 accordance with this chapter, or whether the trust is established by express terms of
8 the governing instrument.
- 9 9. "Unitrust amount" means an amount equal to a percentage of a unitrust's assets that
10 may, or are required, to be distributed to one or more beneficiaries annually in
11 accordance with the terms of the unitrust. The unitrust amount may be determined by
12 reference to the net fair market value of the unitrust's assets as of a particular date
13 each year, or as an average determined on a multiple year basis.
- 14 10. "Current valuation year" means the accounting period of the trust for which the unitrust
15 amount is being determined.
- 16 11. "Prior valuation year" means each of the two accounting periods of the trust
17 immediately preceding the current valuation year.

18 **59-16.3-02. Trustee's authority to convert income trust - Conditions.**

19 A trustee, other than an interested trustee, or if two or more persons are acting as trustee, a
20 majority of the trustees who are not an interested trustee, and without the approval of a court,
21 may convert an income trust to a total return unitrust, reconvert a total return unitrust to an
22 income trust, or change the percentage used to calculate the unitrust amount and the method
23 used to determine the fair market value of the trust if:

- 24 1. The trustee adopts a written policy for the trust providing:
- 25 a. In the case of a trust being administered as an income trust, that future
26 distributions from the trust will be unitrust amounts rather than net income;
- 27 b. In the case of a trust being administered as a total return unitrust, that future
28 distributions from the trust will be net income rather than unitrust amounts; or
- 29 c. That the percentage used to calculate the unitrust amount or the method used to
30 determine the fair market value of the trust will be changed as stated in the policy.

- 1 2. The trustee sends written notice of its intention to take that action, along with copies of
2 the written policy and this chapter, to:
 - 3 a. The settlor if living;
 - 4 b. All living individuals who are currently receiving, or eligible to receive,
5 distributions of income of the trust;
 - 6 c. All living individuals who would receive principal of the trust if the trust were to
7 terminate at the time of the giving of such notice, or if the trust does not provide
8 for its termination, all living individuals who would receive, or be eligible to
9 receive, distributions of income or principal of the trust if the persons identified in
10 subdivision b were deceased; and
 - 11 d. All individuals acting as adviser or protector of the trust.
- 12 3. At least one person receiving notice under subdivision b and c of subsection 2, to the
13 best information and belief of the trustee, is legally competent;
- 14 4. No individual receiving the notice objects, by written instrument delivered to the
15 trustee, to the proposed action of the trustee within sixty days of receipt of notice.
- 16 5. In deciding whether, and to what extent, to exercise the power conferred under this
17 chapter, a trustee may consider all factors relevant to the trust and its beneficiaries,
18 including the following factors to the extent relevant:
 - 19 a. The size, nature, purpose, and expected duration of the trust;
 - 20 b. The intent of the settlor;
 - 21 c. The identity and circumstances of the beneficiaries;
 - 22 d. The needs for liquidity, regularity of income, and preservation and appreciation of
23 capital;
 - 24 e. The assets held in the trust;
 - 25 (1) The extent to which they consist of financial assets, interests in closely held
26 enterprises, tangible and intangible personal property, or real property;
 - 27 (2) The extent to which an asset is used by a beneficiary; and
 - 28 (3) Whether an asset was purchased by the trustee or received from the settlor;
 - 29 f. The net amount allocated to income under the other sections of this chapter and
30 the increase or decrease in the value of the principal assets, which the trustee
31 may estimate as to assets for which market values are not readily available;

- 1 g. Whether and to what extent the terms of the trust give the trustee the power to
2 invade principal or accumulate income, or prohibit the trustee from invading
3 principal or accumulating income, and the extent to which the trustee has
4 exercised a power from time to time to invade principal or accumulate income;
5 h. The actual and anticipated effect of economic conditions on principal and income
6 and effects of inflation and deflation; and
7 i. The anticipated tax consequences.

8 **59-16.3-03. Interested trustee's authority over actions enumerated in chapter 59-16.3.**

9 If there is not a trustee of the trust other than an interested trustee, the interested trustee, or
10 if two or more persons are acting as trustee and are interested trustees, a majority of those
11 interested trustees, without the approval of a court, may take such action as provided in so long
12 as the trustee appoints a disinterested person who, in its sole discretion, but acting in a fiduciary
13 capacity, determines for the trustee:

- 14 1. The percentage to be used to calculate the unitrust amount;
15 2. The method to be used in determining the fair market value of the trust; and
16 3. Which assets, if any, are to be excluded in determining the unitrust amount; and
17 4. Complies with subsections 1 through 4 of section 59-16.3-02.

18 **59-16.3-04. Trustee may petition court - Appointment of disinterested person.**

19 If a trustee desires to convert an income trust to a total return unitrust, reconvert a total
20 return unitrust to an income trust, or change the percentage used to calculate the unitrust
21 amount and the method used to determine the fair market value of the trust, but does not have
22 the ability to, or elects not to do it under sections 59-16.3-02 and 59-16.3-03, or if the trustee
23 receives a written objection within the applicable period, the trustee may petition the court for
24 such order as the trustee deems appropriate. If there is only one trustee of such trust and the
25 trustee is an interested trustee, or if there are two or more trustees of such trust and a majority
26 of them are interested trustees, the court, or on the petition of the trustee or trustees, or any
27 person interested in the trust, may appoint a disinterested person who, acting in a fiduciary
28 capacity, shall present the information to the court as is necessary to enable the court to make
29 its determination.

1 **59-16.3-05. Annual valuation of trust required.**

2 The fair market value of the trust must be determined at least annually, using the valuation
3 date, or dates, or averages of valuation dates as are deemed appropriate. Assets for which a
4 fair market value cannot be readily ascertained must be valued using valuation methods that
5 are deemed reasonable and appropriate. If all income received with respect to the assets is
6 distributed to the extent distributable in accordance with the terms of the governing instrument,
7 assets may be excluded from valuation.

8 **59-16.3-06. Calculation of unitrust amount.**

9 The unitrust amount is determined as follows:

- 10 1. For the first three accounting periods of the trust, the unitrust amount for a current
11 valuation year of the trust may not be less than three percent, or more than five
12 percent, by the election of the trustee, the disinterested person, or the court, of the net
13 fair market value of the assets held in the trust on the valuation date of the current
14 valuation year;
- 15 2. Beginning with the fourth accounting period of the trust, the unitrust amount for a
16 current valuation year of the trust may not be less than three percent, or more than
17 five percent, by the election of the trustee, the disinterested person, or the court, of the
18 average of the net fair market value of the assets held in the trust on the valuation
19 date of the current valuation year and the net fair market value of the assets held in
20 the trust on the valuation date of each prior valuation year;
- 21 3. The percentage that may be elected by the trustee, the disinterested person, or the
22 court in determining the unitrust amount must be a reasonable current return from the
23 trust, taking into account the intentions of the settlor as expressed in the governing
24 instrument. However, the election by the trustee, the disinterested person, or the court
25 in determining the unitrust amount may not be less than three percent, or more than
26 five percent;
- 27 4. The unitrust amount for the current valuation year must be proportionately reduced for
28 any distribution, in whole or in part, other than distributions of the unitrust amount, and
29 for any payments of expenses, including debts, disbursements, and taxes, from the
30 trust within a current valuation year which the trustee determines to be material and
31 substantial, and must be proportionately increased for the receipt, other than a receipt

1 that represents a return on investment, of any additional property into the trust within a
2 current valuation year;

3 5. In the case of a short accounting period, the trustee shall prorate the unitrust amount
4 on a daily basis;

5 6. If the net fair market value of an asset held in the trust has been incorrectly
6 determined either in a current valuation year or in a prior valuation year, the unitrust
7 amount must be increased in the case of an undervaluation, or be decreased in the
8 case of an overvaluation, by an amount equal to the difference between the unitrust
9 amount determined based on the correct valuation of the asset and the unitrust
10 amount originally determined;

11 7. In determining the net fair market value of the assets held in trust, the determination
12 may not include the value of residential property or tangible personal property that, as
13 of the first business day of the current valuation year, one or more income
14 beneficiaries of the trust have or had the right to occupy, or have or had the right to
15 possess or control, other than in a capacity as trustee, and instead the right of
16 occupancy or the right of possession or control must be deemed to be the unitrust
17 amount with respect to the residential property or the tangible personal property; or
18 any asset to be distributed outright to a beneficiary during the valuation period under
19 the terms of the trust and the return on investment on that asset, which return on
20 investment must be distributed to the beneficiary.

21 **59-16.3-07. Unitrust amount as net income.**

22 Following the conversion of an income trust to a total return unitrust, the trustee:

23 1. Shall treat the unitrust amount as net income of the trust for purposes of determining
24 the amount available, from time to time, for distributions from the trust;

25 2. May allocate to trust income for each taxable year of the trust:

26 a. Net short-term capital gain described in section 1222(5) of the Internal Revenue
27 Code for that year, but only to the extent the amounts so allocated together with
28 all other amounts allocate to trust income for that year does not exceed the
29 unitrust amount for that year; and

30 b. Net long-term capital gain described in section 1222(7) of the Internal Revenue
31 Code for that year, but only to the extent the amount so allocated together with all

1 other amounts, including amounts described in subdivision a, allocated to trust
2 income for that year does not exceed the unitrust amount for that year.

3 **59-16.3-08. Administration of total return unitrust authority - Authority of trustee.**

4 The trustee, in administering a total return unitrust, may determine:

- 5 1. The effective date of the conversion;
- 6 2. The timing of distributions;
- 7 3. Whether distributions are to be made in cash, in kind, or partly in cash and partly in
8 kind;
- 9 4. Which assets are to be excluded in determining the unitrust amount;
- 10 5. If the trust is reconverted to an income trust, the effective date of the reconversion;
11 and
- 12 6. Any other administrative issues as may be necessary or appropriate to carry out the
13 purposes of this chapter.

14 **59-16.3-09. Distributions of principal not affected by conversion.**

15 Conversion to a total return unitrust under this chapter does not affect any other provisions
16 of the governing instrument, if any, regarding distributions of principal.

17 **59-16.3-10. Spouse may compel reconversion to income trust for certain trusts -**

18 **Written instrument required.**

19 In the case of a trust for which a marital deduction has been taken for federal tax purpose
20 under sections 2056 and 2523 of the Internal Revenue Code, the spouse otherwise entitled to
21 receive the net income of the trust, by written instrument delivered to the trustee, may compel
22 the reconversion during the spouse's lifetime of the trust from a total return unitrust to an
23 income trust, notwithstanding contrary provisions in this chapter.

24 **59-16.3-11. Applicability of chapter.**

25 This chapter must be construed as pertaining to the administration of a trust and must be
26 available to a trust that is administered in the state under state law unless:

- 27 1. The governing instrument reflects an intention that the current beneficiary or
28 beneficiaries are to receive an amount other than a reasonable current return from the
29 trust;
- 30 2. One or more persons to whom the trustee could distribute income have a power of
31 withdrawal over the trust which is not subject to an ascertainable standard under

1 sections 2041 and 2514 of the Internal Revenue Code, or which can be exercised to
2 discharge a duty of support the person possesses; or

3 3. The governing instrument expressly prohibits use of this chapter by specific reference
4 to the chapter. A provision in the governing instrument that "the provisions of this
5 chapter, or any corresponding provision of future law, may not be used in the
6 administration of this trust" are sufficient to preclude use of this chapter.

7 **59-16.3-12. Trustee acting in good faith not liable - Remedy.**

8 A trustee or disinterested person who in good faith takes or fails to take any action under
9 this chapter is not liable to any person affected by that action or inaction, regardless of whether
10 person received written notice as provided in this chapter and regardless of whether person
11 was under a legal disability at the time of the delivery of the notice. The person's exclusive
12 remedy is to obtain an order of the court directing the trustee to convert an income trust to a
13 total return unitrust, to reconvert from a total return unitrust to an income trust, or to change the
14 percentage used to calculate the unitrust amount.

15 **59-16.3-13. No duty to act created.**

16 This chapter does not create a duty to take action under this chapter, and a trustee is not
17 liable for not considering whether to take action or for choosing not to take action.

18 **59-16.3-14. Chapter not applicable to charitable remainder unitrust.**

19 This chapter does not apply to a charitable remainder unitrust as defined by section 664(d)
20 of the Internal Revenue Code.

21 **SECTION 11. REPEAL.** Sections 59-14-01, 59-14-04, and 59-16-08 of the North Dakota
22 Century Code are repealed.

23 **SECTION 12. RETROACTIVE APPLICATION.** Section 8 of this Act is retroactive in
24 application to all trusts governed by the laws of this state, including a trust whose governing law
25 has been changed to the laws of this state.