



South Dakota Trust Law Update – 2024 Edition

Patrick G. Goetzinger – patrick@gpna.com¹

October 2024

2024 STATUTORY UPDATES

South Dakota's 99th legislative session in 2024 posted the passage of only one trust law-related bill, HB 1117, which became effective July 1, 2024. HB 1117 repealed SDCL 55-11-9 and removed a reporting requirement for funeral homes and cemeteries regarding prearranged funeral trusts.

Neither the Governor's Trust Task Force nor the South Dakota Division of Banking introduced legislation affecting South Dakota trusts or trust companies.

CASE LAW SUMMARY

While nothing of significance happened on the legislative front, the South Dakota Supreme Court issued several important opinions regarding trust law in the past three years.

The Emerging Law on Awarding Attorney Fees

Two important decisions were handed down by the South Dakota Supreme Court regarding the award of attorney fees to counsel for trustees and beneficiaries of trusts governed by South Dakota law. The first case is *Endres v Endres*, 2022 S.D. 80, N.W.2d 139. The second case is *Matter of Fred Petersen Land Trust*, 2023 S.D. 44, 995 N.W.2d 84.

In *Endres*, the Endres Family Trust was placed under court supervision at the request of Terry, who was both a beneficiary and co-trustee. Extensive litigation and wrangling over the Trust ensued from 2017 until a global settlement was agreed to in 2020. However, the global settlement did not resolve the issue of awarding attorney fees to Terry's counsel, which the settlement preserved as an issue to be decided by the circuit court judge.

¹ Patrick G. Goetzinger is a partner in the Rapid City law firm Gunderson, Palmer, Nelson & Ashmore, LLP where he leads the firm's Business and Estate Planning Group. Pat served on the American Bar Association Board of Governors. He is past President of the South Dakota State Bar Association and the South Dakota Bar Foundation; a Fellow in the American College of Trust and Estate Counsel (past South Dakota State Chair); and a Fellow in the American College of Real Estate Lawyers. He is listed among the Best Lawyers in America, Great Plains Super Lawyers, Chambers USA's High Net Worth rankings, and America's Leading Lawyers for Business in Corporate/Commercial Law and Real Estate Law, and Private Wealth Law. Pat received the 2022 Marshall M.

McKusick Award, given annually to an outstanding member of the South Dakota Bar for contributions to the legal profession.

In both his capacity as a co-trustee under SDCL 55-3-13 and beneficiary under SDCL 15-17-38, Terry moved for the trust to pay the sum of \$389,121.12 in attorney fees, expenses, sales tax, and interest. The circuit court judge denied Terry's request. The South Dakota Supreme Court reversed and remanded.

The Supreme Court held Terry, in his capacity as a co-trustee, was entitled to attorney fees under SDCL 55-3-13 because his actions "were productive of an actual benefit to the Trust." Notably, the Court awarded attorney fees to Terry even though his actions were ultra vires, not authorized by the trust and did not meet the standards for taking action as set forth in the trust. The Court cited several actions taken by Terry in his capacity as a co-trustee that produced actual economic benefit to the trust. Examples included obtaining increased rents on farm ground and additional CRP benefits.

The Supreme Court remanded the case back to the circuit court to determine a reasonable fee amount. In a footnote, the court gave guidance on determining a reasonable fee amount.

Because the Court found a basis for awarding attorney fees under SDCL 55-3-13, it did not address whether Terry was entitled to attorney fees in his capacity as a beneficiary under SDCL 15-17-38.

In *Petersen*, the Supreme Court wrestled with the issue of whether the benefit to the trust had to be an economic benefit. Sally was a beneficiary of the trust. In 2019, Sally filed a petition to place the trust under court supervision and reform the trust to correct a scrivener's error that deprived her of a 20-acre parcel of land and a homestead owned by the trust. It was uncontested that Sally was to receive the land and homestead, which was erroneously omitted from the trust, but other disputes between the family members provided ample fodder to prolong the litigation.

The circuit court granted Sally's motion to reform the trust. Sally then moved for an award of attorney fees and expenses from the trust pursuant to SDCL 15-17-38, which authorizes a court to "award attorney fees from trusts administered through the court." Sally requested the sum of \$290,066.32.

The circuit court judge denied Sally's request because her actions did not provide an economic benefit to the trust. The South Dakota Supreme Court reversed the circuit court decision and remanded the case for further proceedings.

The Supreme Court stated, "The issue we confront here is whether the benefit necessary for an award of attorney fees from a trust under SDCL 15-17-38 must be economic. On this narrow question, we hold the benefit need not be economic and may include reforming a trust instrument to correspond with the intent of the settlor."

The court also stated, "...the plain fact that fees are authorized does not make a fee award a *fait accompli*... Whether to exercise its discretion to award attorney fees and, if so, in what amount are beyond the issues presented here, and we remand the case for the court to consider these questions."

Notice

Claims contesting the validity of a trust are barred one year after the settlor's death, regardless of when the injury arose or when the person received notice according to the Supreme Court's decision in *Matter of Shirley A. Hickey Living Trust*, 2022 S.D. 53, 979 N.W.2d 558. *Hickey* has a complicated procedural history involving an intensely litigated trust and estate. Shirley Hickey's living trust became irrevocable upon her passing on September 12, 2019, and a bank was appointed as the sole trustee. The trustee sent letters to the beneficiaries providing notice of the 60-day limitation period to challenge the validity of the trust under SDCL 55-4-57(a).

Shirley had 8 children. One child, Bradley, timely filed a petition to challenge the validity of the trust. The other children filed a petition challenging the validity of the trust well after the 60-day period. The petition filed by the other children was dismissed as untimely under SDCL 55-4-57(a).

The Court stated SDCL 55-4-57(a) is a statute of repose which bars claims contesting the validity of trusts one year after the settlor's death, regardless of when the injury arose or when the person received notice. The Court further stated, "With the expiration of the period of repose, the putative cause of action evanesced; life cannot thereafter be breathed back into it." *See also Wintersteen*, 2018 S.D. 12 and *Briggs*, 2017 S.D. 40. Accordingly, equitable tolling may not be invoked to alleviate a claimant from a loss of his right to proceed with a claim. A statute of repose cannot be tolled for any reason. The purpose of the statute is "to facilitate the expeditious administration of trusts by limiting the time period to commence a trust contest."

However, because of the procedural posture of this case and the application of other rules of civil procedure found in SDCL 15-6-24(a)(2), the other children may be permitted to intervene on Bradley's petition to invalidate the trust. Intervention is a different remedy than the rule set forth in SDCL 55-4-57(a). The case was sent back to circuit court for further proceedings on the intervention theory.

Spendthrift Clause

In *Plains Commerce Bank, Inc. v. Beck*, 2023 S.D. 8, 986 N.W.2d 519, (2023), the South Dakota Supreme Court enforced a spendthrift clause of an irrevocable trust despite the written consent of all beneficiaries to authorize action in conflict with the trust's spendthrift clause. A trustee who was also a beneficiary of an irrevocable trust that contained a spendthrift clause obtained the consent of all beneficiaries for him to encumber trust land with a mortgage to secure the trustee's personal agriculture loan with Plains Commerce Bank. When the trustee/beneficiary defaulted on the loan, the bank commenced a mortgage foreclosure action seeking to liquidate the trust land. One of the other beneficiaries objected to the bank's foreclosure action against the trust land – even though the beneficiary initially consented to the mortgage.

The Court rejected the bank's attempt to enforce the mortgage and foreclose on the trust land citing the trust's spendthrift clause, which could not be altered by a mere consent of all beneficiaries. The Court stated, "Importantly, to allow, as [bank] suggests, written permission in a document outside the [trust] to override the spendthrift provision would eviscerate the 'formidable barriers' the Legislature has placed between creditor claims and trust funds protected by a spendthrift provision." The Court upheld the spendthrift clause over the written consent of all the beneficiaries. That's a big deal. This decision builds on the *Cameron Cleopatra Gift Trust*, 2019 S.D. 35, landmark ruling enforcing another spendthrift clause in a third party beneficiary trust.

Investment Decisions by the Trustee

The language of the trust can override the statutory Prudent Investor Rule, shielding the co-trustees from liability for low return investment so long as they do not act in bad faith or gross negligence according to *Redlin v. First Interstate Bank as Co-Tr. of Helene M. Redlin Tr.*, 2024 S.D. 5, N.W.3d 729. The trust was funded with over \$3 million in life insurance proceeds upon the death of the grantor. The co-trustees held the funds in a money market fund that paid only \$843 in interest over the 13-month period of administration of the trust in 2020 and 2021. One of the beneficiaries sued the co-trustees for failing to obtain a greater rate of return during the pendency of settling the trust. The claimant’s expert noted that if the \$3 million had been invested more aggressively, the trust assets could’ve grown by \$2.3 million. The claimant asserted the co-trustees breached their fiduciary duty by not investing the trust funds more aggressively.

The co-trustees defended themselves by pointing out the terms of the trust waived the Prudent Investor Rule and gave the co-trustees broad discretionary authority, including investments in a low interest-bearing account. The Court agreed.

The claimant further argued that even though the Prudent Investor Rule was waived by the terms of the trust, the co-trustees engaged in gross negligence or reckless misconduct by failing to obtain a greater rate of return. Even though South Dakota trust law provides for flexibility in drafting trusts (e.g., grantor sovereignty as supported by SDCL 55-5-12), SDCL 55-4-30 establishes a statutory floor for trustee liability beneath which the trust terms cannot go. The trust cannot relieve a trustee of liability for breach of trust committed in bad faith or as a result of gross negligence.

This argument presented the Court with a case of first impression on interpreting SDCL 55-5-12, which provides “[t]he provisions of this chapter may be expanded, restricted or otherwise altered by express provisions of the trust... The trustee is not liable to a beneficiary for the trustee’s reasonable and good faith reliance on those express provisions.” This statute focused the court’s attention on whether a trustee’s actions were based on a good faith, reasonable reliance on the trust.

The Court found that the co-trustees reasonably relied on the terms of the trust in placing assets into a low income producing money market account. On the record before the Court, this conservative investment approach did not arise to gross negligence or bad faith necessary to impose default liability under SDCL 55-4-30.

Family Law

In a highly contested divorce case, one of the many issues the South Dakota Supreme Court wrestled with was the husband’s interest as a discretionary beneficiary in a third party beneficiary trust in *Dunham v. Sabers*, 2022 S.D. 65, 981 N.W.2d 620. Under SDCL 55-1-30, a discretionary interest in a trust may not be considered in the division of marital property. However, the Court observed it is well-established that non-marital assets may be considered in determining a party’s financial condition. The Court found that the circuit court did not abuse its discretion when the judge considered the likelihood that the husband would receive distributions from a trust as a discretionary beneficiary to determine if he had the ability to fulfill his monetary obligations to satisfy the property division requirements established by the court’s order. The circuit court did not include the husband’s discretionary interest in the trust to calculate the marital estate and did not order the husband to use trust funds to satisfy his obligations.

TRUST COMPANY REFERENCE MATERIAL

It merits pointing out that the South Dakota Division of Banking has a robust and user-friendly trust company website available as a reference for trust officers, trust company executives and advisors. <https://dlr.sd.gov/banking/trusts/default.aspx>. Recent developments from the regulatory side and important announcements of the Division of Banking are available for review at this website. Of particular note for the past year are the Division's announcements and reference material regarding BSA, AML, FinCen, and CTA topics.



Patrick G. Goetzing
Senior Partner
(605) 342-1078
Patrick@gpna.com



GUNDERSON, PALMER,
NELSON, & ASHMORE, LLP
www.gpna.com