

# State of South Dakota

SEVENTY-FIFTH SESSION  
LEGISLATIVE ASSEMBLY, 2000

400D0621

## SENATE BILL NO. 174

Introduced by: Senators Everist, Olson, and Whiting and Representatives Michels, Hunt, and Wilson

1 FOR AN ACT ENTITLED, An Act to revise certain provisions regarding the administration of  
2 trusts and estates.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That § 55-4-30 be amended to read as follows:

5 55-4-30. The settlor of any trust affected by this chapter may, by provision in the instrument  
6 creating the trust if the trust was created by a writing, or by oral statement to the trustee at the  
7 time of the creation of the trust if the trust was created orally, or by an amendment of the trust  
8 if the settlor reserved the power to amend the trust, relieve ~~his~~ the trustee from any or all of the  
9 duties, restrictions, and liabilities which would otherwise be imposed upon ~~him~~ the trustee by this  
10 chapter; or alter or deny to ~~his~~ the trustee any or all of the privileges and powers conferred upon  
11 the trustee by this chapter; or add duties, restrictions, liabilities, privileges, or powers, to those  
12 imposed or granted by this chapter; ~~but. However,~~ no act of the settlor ~~shall relieve~~ relieves a  
13 trustee from the duties, restrictions, and liabilities imposed upon ~~him~~ the trustee by §§ 55-4-10  
14 to ~~55-4-13~~ 55-4-12, inclusive.

15 Section 2. That § 55-4-31 be amended to read as follows:

16 55-4-31. Any beneficiary of a trust affected by this chapter may, if of full legal capacity and

1 acting upon full information, by written instrument delivered to the trustee relieve the trustee as  
2 to such beneficiary from any or all of the duties, restrictions, and liabilities which would  
3 otherwise be imposed on the trustee by this chapter, except as to the duties, restrictions, and  
4 liabilities imposed by §§ 55-4-10 to ~~55-4-13~~ 55-4-12, inclusive. Any such beneficiary may release  
5 the trustee from liability to such beneficiary for past violations of any of the provisions of this  
6 chapter.

7 Section 3. That chapter 21-22 be amended by adding thereto a NEW SECTION to read as  
8 follows:

9 An accounting by a trustee of a court supervised trust and the final approval thereof by a  
10 court is conclusive against all persons in any way interested in the trust, and the trustee, absent  
11 fraud, intentional misrepresentation, or material omission, shall be released and discharged from  
12 any and all liability as to all matters set forth in the accounting. For purposes of this section, the  
13 term, accounting, means any annual, interim, or final report or other statement provided by a  
14 trustee reflecting all transactions, receipts, and disbursements during the reporting period and  
15 a list of assets as of the end of the period covered by the report or statement.

16 Section 4. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as  
17 follows:

18 Unless the terms of the trust refer to this section and provide otherwise, a power exercisable  
19 by or attributable to a person, other than the settlor, in such person's capacity as a trustee to  
20 make discretionary distribution of either principal or income:

- 21 (1) To or for the benefit of himself or herself shall be exercisable by the person only for  
22 the person's health, education, maintenance, and support in the person's accustomed  
23 manner of living; or
- 24 (2) To or for the benefit of others, may not be exercisable to discharge any of the person's  
25 own legal obligations.

1 Section 5. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as  
2 follows:

3 The reference to trustee in section 4 of this Act includes any person who is deemed to have  
4 any power of a trustee, whether because such person has the right to remove or replace any  
5 trustee, or because a reciprocal trust or power doctrine applies, or otherwise.

6 Section 6. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as  
7 follows:

8 The provisions of sections 4 and 5 of this Act apply to any trust established before or after  
9 July 1, 2000.

10 Section 7. That chapter 55-4 be amended by adding thereto a NEW SECTION to read as  
11 follows:

12 The provisions of sections 4, 5, and 6 of this Act do not apply to a decedent's or settlor's  
13 spouse who is the trustee of a testamentary trust or an inter vivos trust for which a marital  
14 deduction is allowable.

15 Section 8. The grantor or a trustee of a trust, at any time after execution or creation of a  
16 trust, may execute a certificate of trust that sets forth less than all of the provisions of a trust  
17 instrument and any amendments to the instrument. The certificate of trust may be used for  
18 purposes of selling, conveying, pledging, mortgaging, leasing, or transferring title to any interest  
19 in real or personal property. The certificate of trust shall include:

- 20 (1) The name of the trust, if one is given;
- 21 (2) The date of the trust instrument;
- 22 (3) The name of each grantor;
- 23 (4) The name of each original trustee;
- 24 (5) The name and address of each trustee empowered to act under the trust instrument  
25 at the time of execution of the certificate;

1 (6) The following statement: "The trustees are authorized by the instrument to sell,  
2 convey, pledge, mortgage, lease, or transfer title to any interest in real or personal  
3 property, except as limited by the following: (if none, so indicate)";

4 (7) Any other trust provisions the grantors or trustees include; and

5 (8) A statement as to whether the trust instrument has terminated or been revoked.

6 The certificate of trust shall be upon the representation of the grantors or trustees that the  
7 statements contained in the certificate of trust are true and correct and that there are no other  
8 provisions in the trust instrument or amendments to it that limit the powers of the trustees to sell,  
9 convey, pledge, mortgage, lease, or transfer title to interests in real or personal property. The  
10 signature of the grantors or trustees shall be under oath before a notary public or other official  
11 authorized to administer oaths.

12 Section 9. A certificate of trust executed under section 8 of this Act may be recorded in the  
13 Office of the Register of Deeds with respect to land described in the certificate of trust or any  
14 attachment to it. If it is recorded or filed in an county where real property is situated, or in the  
15 case of personal property, if it is presented to a third party, the certificate of trust serves to  
16 document the existence of the trust, the identity of the trustees, the powers of the trustees and  
17 any limitations on those powers, and other matters the certificate of trust sets out, as though the  
18 full trust instrument had been recorded, filed, or presented. Until amended or revoked under  
19 section 10 of this Act, or until the full trust instrument is recorded, filed, or presented, a  
20 certificate of trust is prima facie proof as to the matters contained in it and any party may rely  
21 upon the continued effectiveness of the certificate.

22 Section 10. Amendment or revocation of a certificate of trust may be made only by a written  
23 instrument executed by the grantor or a trustee of a trust. Amendment or revocation of a  
24 certificate of trust is not effective as to a party unless that party has actual notice of the  
25 amendment or revocation.

1 For purposes of this section, actual notice means that a written instrument of amendment or  
 2 revocation has been received by the party or, in the case of real property, that either a written  
 3 instrument or amendment or revocation has been received by the party or that a written  
 4 instrument of amendment or revocation containing the legal description of the real property has  
 5 been recorded in the Office of the Register of Deeds where the real property is situated.

6 Section 11. Sections 8 to 10, inclusive, of this Act are effective July 1, 2000, but apply to  
 7 trust instruments whenever created or executed.

8 Section 12. An affidavit of a trustee or of trustees of an inter vivos trust in support of a real  
 9 property transaction may be substantially in the following form:

10 STATE OF SOUTH DAKOTA ) AFFIDAVIT OF TRUSTEE  
 11

12 \_\_\_\_\_, being first duly sworn on oath, says that:

13 1. Affiant is the trustee (one of the trustees) named in that certain Certificate of Trust (or  
 14 Trust Instrument)

15 filed for record \_\_\_\_\_, as Document No. \_\_\_\_\_ (or in Book \_\_\_\_\_ of  
 16 \_\_\_\_\_, Page \_\_\_\_\_) in the Office of the Register of Deeds of \_\_\_\_\_  
 17 County, South Dakota.

18 - OR -

19 to which this Affidavit is attached,  
 20 executed by Affiant or another trustee or the grantor of the trust described in the Certificate of  
 21 Trust (or set forth in the Trust Instrument), and which relates to real property in \_\_\_\_\_  
 22 County, South Dakota, legally described as follows:

23 \_\_\_\_\_  
 24 \_\_\_\_\_  
 25 \_\_\_\_\_

1 \_\_\_\_\_

2 (If more space is needed, continue on back or on attachment.)

3 2. The name(s) and address(es) of the trustee(s) empowered by the Trust Instrument to act  
4 at the time of the execution of this Affidavit are as follows:

5 \_\_\_\_\_

6 \_\_\_\_\_

7 \_\_\_\_\_

8 3. The trustee(s) who have excuted that certain instrument relating to the real property  
9 described above between \_\_\_\_\_, as trustee(s) and \_\_\_\_\_, dated  
10 \_\_\_\_\_:

11 (a) are empowered by the provisions of the trust to sell, convey, pledge, mortgage, lease,  
12 or transfer title to any interest in real property held in trust; and

13 (b) are the requisite number of trustees required by the provisions of the trust to execute  
14 and deliver such an instrument.

15 4. The Trust has not terminated and has not been revoked.

16 - OR -

17 4. The Trust has terminated (or has been revoked). The execution and delivery of the  
18 instrument described in paragraph 3 has been made pursuant to the provisions of the Trust.

19 5. There has been no amendment to the Trust which limits the power of trustee(s) to execute  
20 and deliver the instrument described in paragraph 3.

21 6. The Trust is not supervised by any court.

22 - OR -

23 6. The Trust is supervised by the \_\_\_\_\_ Court of \_\_\_\_\_ County.  
24 \_\_\_\_\_ All necessary approval has been obtained from the court for the trustee(s) to  
25 execute and deliver the instrument described in paragraph 3.

1 7. Affiant does not have actual knowledge of any facts indicating that the Trust is invalid.

2 \_\_\_\_\_

3 \_\_\_\_\_, Affiant

4 Subscribed and sworn to before me

5 this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

6 \_\_\_\_\_

7 Notary Stamp or Seal Signature of

8 Notary Public or Other Official

9 This instrument was drafted by:

10 \_\_\_\_\_

11 \_\_\_\_\_

12 \_\_\_\_\_

13 Section 13. An affidavit of a trustee or of trustees of a testamentary trust in support of a  
14 real property transaction may be substantially in the following form:

15 STATE OF SOUTH DAKOTA )

16 COUNTY OF \_\_\_\_\_ ) :SS AFFIDAVIT OF TRUSTEE

17

18 \_\_\_\_\_, being first duly sworn on oath, says that:

19 1. The \_\_\_\_\_ Trust was created by the Last Will and Testament of  
20 \_\_\_\_\_, Decedent, dated \_\_\_\_\_. Decedent died on \_\_\_\_\_.

21 Affiant as trustee of the Trust, acquired by instrument or decree dated \_\_\_\_\_, filed

22 in the Office of the Register of Deeds, \_\_\_\_\_ County, South Dakota, as Document

23 No. \_\_\_\_\_, an interest in real property in \_\_\_\_\_, County, South Dakota,

24 legally described as follows:

25 \_\_\_\_\_

1 \_\_\_\_\_  
 2 \_\_\_\_\_  
 3 \_\_\_\_\_

4 (If more space is needed, continue on back or on attachment.)

5 2. The name(s) and address(es) of the trustee(s) empowered by the terms of the decedent's  
 6 will to act at the time of the execution of this Affidavit are as follows:

7 \_\_\_\_\_  
 8 \_\_\_\_\_  
 9 \_\_\_\_\_

10 3. The trustee(s) who have executed that certain instrument relating to the real property  
 11 described above between \_\_\_\_\_, as trustee(s) and \_\_\_\_\_, dated  
 12 \_\_\_\_\_:

13 (a) are empowered by the provisions of the trust under decedent's will to sell, convey,  
 14 pledge, mortgage, lease, or transfer title to any interest in real property held in trust;  
 15 and

16 (b) are the requisite number of trustees required by the provisions of the will to execute  
 17 and deliver such an instrument.

18 4. The Trust has not terminated and has not been revoked.

19 - OR -

20 4. The Trust has terminated (or has been revoked). The execution and delivery of the  
 21 instrument described in paragraph 3 has been made pursuant to the provisions of the Trust.

22 5. There has been no amendment to the Trust which limits the power of the trustee(s) to  
 23 execute and deliver the instrument described in paragraph 3.

24 6. The Trust is not supervised by any court.

25 - OR -



1 to sell, convey, pledge, mortgage, lease, or transfer title to the real property described  
2 in the affidavit or attachment to the affidavit, if any;

3 (5) The requisite number of trustees have executed and delivered the instrument of  
4 conveyance described in the affidavit; and

5 (6) Any necessary court approval of the transaction has been obtained.

6 The proof is conclusive as to any party relying on the affidavit, except a party dealing directly  
7 with the trustee or trustees who has actual knowledge of facts to the contrary.

8 Section 15. An affidavit of trustee or trustees under section 12 or section 13 of this Act may  
9 be recorded in the Office of the Register of Deeds for any county, or in the certificate of trust  
10 or trust instrument referred to in the affidavit, and may be recorded or filed as a separate  
11 document or combined with or attached to an original or certified copy of a certificate of trust  
12 or trust instrument, and recorded or filed as one document.

13 Section 16. That § 55-1A-3 be amended to read as follows:

14 55-1A-3. The entirety of all the powers described in §§ ~~55-1A-5 to 55-1A-36, inclusive,~~ this  
15 chapter may be incorporated in any instrument or agreement by specific reference to this section,  
16 or shall be incorporated if the instrument or agreement expressly makes reference to the trustee  
17 being granted powers set forth under a trustees' or fiduciaries' powers act and does not expressly  
18 limit those powers.

19 Section 17. That § 51A-11-6 be amended to read as follows:

20 51A-11-6. Joint leaseholds in and to a safe deposit box may be created by contract with two  
21 or more persons, including minors, named as lessees. The terms of the contract may provide that  
22 any one or more of the lessees, or the survivor or survivors of the lessee or lessees shall have  
23 access and entry to the safe deposit box and the right to remove the contents from the box  
24 whether the other lessee or lessees be living, incompetent, or dead, and in case of such removal  
25 the lessor ~~shall~~ is not be liable for the removal ~~thereof~~. The existence of a joint leasehold

1 agreement in and to a safe deposit box shall in no way affect a determination as to what persons  
2 hold title to the contents of such box. ~~Nothing in this section shall change the requirement that~~  
3 ~~the county treasurer be present when such box is opened, as provided in §§ 10-41-47 to~~  
4 ~~10-41-49, inclusive.~~

5 Section 18. That § 51A-11-7 be amended to read as follows:

6 51A-11-7. If only one lessee is named in the lease agreement covering a safe deposit box  
7 rental and such lessee shall die, his the safe deposit box may be opened at any time thereafter and  
8 all contents may be delivered, without inventory, to the personal representative or special  
9 administrator of a deceased lessee, and without liability to the lessor.

10 In the alternative, after the lessee's death, the safe deposit box may be opened at any time,  
11 in the presence of those persons presenting the key thereto and claiming to be interested in the  
12 contents thereof, by two employees of the lessor, one of whom shall be an officer of the lessor;  
13 ~~and such.~~ The employees may remove all instruments of a testamentary nature and personally  
14 deliver or forward them by registered or certified mail to the probate court having apparent  
15 jurisdiction, ~~and such.~~ The employees ~~in their discretion~~ may deliver life insurance policies ~~therein~~  
16 contained in the box to the beneficiary named in ~~such~~ the policies. Any and all other contents of  
17 ~~such~~ the box so opened shall be kept and retained by the lessor and shall be delivered only to the  
18 parties legally entitled to the same.

19 If no person presents the key to ~~said~~ the safe deposit box within six months after the death  
20 of the lessee, the lessor, by two employees, one of whom shall be an officer of said lessor, may  
21 open the box by forcible entry and remove the contents and deliver the same to the probate  
22 court, subject to the payment of rentals, of expenses, and the repairs.

23 This section ~~shall apply when~~ applies if all of the lessees under a joint leasehold agreement  
24 are deceased.

25 ~~Nothing in this section shall change the requirement that the county treasurer be present~~

1 ~~when such box is opened, as provided in §§ 10-41-47 to 10-41-49, inclusive.~~

2 Section 19. That § 21-22-2 be amended to read as follows:

3 21-22-2. This chapter applies to all trusts if any part of the trust estate has its situs within this  
4 state or if the trustee or a beneficiary resides in this state, except as otherwise specifically  
5 provided by statute or rule of court, the intent being to exclude therefrom such trusts as a  
6 statutory assignment for the benefit of creditors, probate administrations, conservatorships, and  
7 all other trusts as to which specific provision is made for court supervision. The provisions of  
8 §§ 55-3-24 to 55-3-44, inclusive, are applicable to actions or proceedings relating to trusts  
9 supervised or administered under this chapter.

10 Section 20. That § 29A-5-103 be amended to read as follows:

11 29A-5-103. This chapter applies to all guardianships and conservatorships in this state,  
12 including guardianships created prior to July 1, 1993. Unless otherwise modified or terminated,  
13 all guardianships created prior to July 1, 1993, shall remain in full force and effect and all  
14 guardians shall retain their assigned powers and duties with respect to either financial or personal  
15 decision making except to the extent that the powers and duties under this chapter are broader  
16 or more clearly expressed. The provisions of this chapter concerning the filing of reports by  
17 guardians and the filing of accountings by conservators may not be retroactively applied and  
18 prior law shall control as to whether a report or accounting will be required for any period prior  
19 to July 1, 1993. The provisions of §§ 55-3-24 to 55-3-44, inclusive, are applicable to actions or  
20 proceedings relating to guardianships and conservatorships supervised or administered under this  
21 chapter.

22 Section 21. That chapter 29A-1 be amended by adding thereto a NEW SECTION to read  
23 as follows:

24 The provisions of §§ 55-3-24 to 55-3-44, inclusive, are applicable to actions or proceedings  
25 relating to estates supervised or administered under Title 29A.