

State of South Dakota

EIGHTY-EIGHTH SESSION
LEGISLATIVE ASSEMBLY, 2013

472U0281

HOUSE JUDICIARY ENGROSSED NO. **HB 1096** 01/25/2013

Introduced by: Representatives Gosch, Feinstein, and Lust and Senators Rave and Brown

1 FOR AN ACT ENTITLED, An Act to transfer on death deeds for real property.

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

3 Section 1. Terms used in this Act mean:

4 (1) "Beneficiary," any person that receives property under a transfer on death deed;

5 (2) "Designated beneficiary," any person designated to receive property in a transfer on
6 death deed;

7 (3) "Joint owner," any person who owns property concurrently with one or more other
8 persons with a right of survivorship. The term includes a joint tenant, owner of
9 community property with a right of survivorship, and tenant by the entirety. The term
10 does not include a tenant in common or owner of the community property without
11 a right of survivorship;

12 (4) "Person," any individual, corporation, business trust, estate, trust, partnership, limited
13 liability company, association, joint venture, public corporation, government or
14 governmental subdivision, agency, or instrumentality, or any other legal or
15 commercial entity;



1 (5) "Property," an interest in real property located in this state which is transferable on
2 the death of the owner;

3 (6) "Transfer on death deed," any deed authorized under this Act;

4 (7) "Transferor," any person who makes a transfer on death deed.

5 Section 2. The provisions of this Act do not affect any method of transferring property
6 otherwise permitted under the laws of this state.

7 Section 3. Property may be transferred to one or more beneficiaries effective at the
8 transferor's death by a transfer on death deed.

9 Section 4. A transfer on death deed is revocable even if the deed or another instrument
10 contains a contrary provision.

11 Section 5. A transfer on death deed is nontestamentary.

12 Section 6. The capacity required to make or revoke a transfer on death deed is the same as
13 the capacity required to make a will.

14 Section 7. A transfer on death deed must:

15 (1) Contain the essential elements and formalities of a properly recordable inter vivos
16 deed;

17 (2) State that the transfer to the designated beneficiary is to occur at the transferor's
18 death;

19 (3) State the language of conveyance as required by the standards of title; and

20 (4) Be recorded in the public records before the transferor's death in the office of the
21 register of deeds in a county where at least a part of the property is located.

22 Section 8. A transfer on death deed is effective without notice or delivery to or acceptance
23 by the designated beneficiary or consideration.

24 Section 9. Subject to section 10 of this Act, an instrument is effective to revoke a recorded

1 transfer on death deed only if the instrument:

2 (1) Is:

3 (a) A transfer on death deed that revokes the deed expressly or by inconsistency;

4 (b) An instrument of revocation that expressly revokes the deed; or

5 (c) An inter vivos deed that expressly revokes the transfer on death deed; and

6 (2) Is acknowledged by the transferor after the acknowledgment of the deed being
7 revoked and recorded in the public records in the office of the register of deeds in a
8 county where at least part of the property is located before the transferor's death.

9 Section 10. If the property is owned by joint tenants and if the revocation is not executed by
10 all the owners, the revocation is not effective unless executed by the last surviving joint owner.

11 Section 11. After a transfer on death deed is recorded, it may not be revoked by a revocatory
12 act on the deed. Such an act includes burning, tearing, canceling, obliterating, or destroying the
13 deed or any part of the deed.

14 Section 12. Nothing in sections 9 to 11, inclusive, of this Act, limits the effect of an inter
15 vivos transfer of the property.

16 Section 13. During a transferor's life, a transfer on death deed does not:

17 (1) Affect an interest or right of the transferor or any other owner, including the right to
18 transfer or encumber the property;

19 (2) Affect an interest or right of a designated beneficiary, even if the designated
20 beneficiary has actual or constructive notice of the deed;

21 (3) Affect an interest or right of a secured or unsecured creditor or future creditor of the
22 transferor, even if the creditor has actual or constructive notice of the deed;

23 (4) Affect the transferor's or designated beneficiary's eligibility for any form of public
24 assistance;

1 (5) Create a legal or equitable interest in favor of the designated beneficiary; or

2 (6) Subject the property to claims or process of a creditor of the designated beneficiary.

3 Section 14. Except as otherwise provided in the transfer on death deed, or §§ 29A-2-603 and
4 29A-2-701, inclusive, § 29A-2-802, or § 29A-2-803, survival and simultaneous death, and
5 elective share, if applicable to nonprobate transfers, upon the death of the transferor, the
6 following provisions apply to the property that is the subject of a transfer on death deed and
7 owned by the transferor at death:

8 (1) Subject to subdivision (2), the interest in the property is transferred to the designated
9 beneficiary, or if necessary, to the contingent beneficiary in accordance with the
10 deed;

11 (2) The interest of a designated beneficiary is contingent on the designated beneficiary
12 surviving the transferor. The interests of any designated or contingent beneficiary
13 who fails to survive the transferor lapses;

14 (3) Subject to subdivision (4), concurrent interests are transferred to the beneficiaries in
15 equal and undivided shares with no right of survivorship; and

16 (4) If the transferor has identified two or more designated beneficiaries to receive
17 concurrent interests in the property, the share of one which lapses or fails for any
18 reason is transferred to the other, or to the others in proportion to the interest of each
19 in the remaining part of the property held concurrently.

20 Section 15. Subject to chapter 43-28, a beneficiary takes the property subject to all
21 conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to
22 which the property is subject at the transferor's death. For purposes of this section and chapter
23 43-28, the recording of the transfer on death deed is deemed to have occurred at the transferor's
24 death.

1 Section 16. If an interest in property is owned as joint tenants, a transfer on death deed
2 executed by all of the owners that conveys an interest in property to one or more grantee
3 beneficiaries transfers the interest to the grantee beneficiary or beneficiaries effective only after
4 the death of the last surviving grantor owner. If the last surviving joint tenant owner did not
5 execute the transfer on death deed, the deed is ineffective to transfer any interest and the deed
6 is void. An estate in joint tenancy is not severed or affected by the subsequent execution of a
7 transfer on death deed and the right of a surviving joint tenant owner who did not execute the
8 transfer on death deed prevails over a grantee beneficiary named in a transfer on death deed
9 unless the deed specifically states that it severs the joint tenancy ownership.

10 Section 17. A transfer on death deed transfers property without covenant or warranty of title
11 even if the deed contains a contrary provision.

12 Section 18. A beneficiary may disclaim all or part of the beneficiary's interest as provided
13 by § 29A-2-801.

14 Section 19. If the other assets of the estate of the deceased owner are insufficient to pay all
15 claims against the deceased owner's estate and the statutory allowances to the deceased owner's
16 surviving spouse and children, a transfer resulting from a beneficiary designation is not effective
17 against the estate of a deceased owner to the extent needed to pay all claims against the deceased
18 owner's estate and statutory allowances to the deceased owner's surviving spouse and children.

19 Section 20. Any designated beneficiary who receives property through a beneficiary deed
20 upon death of the owner is liable to account to the personal representative of the deceased
21 owner's estate for a proportionate share of the fair market value of the equity in the interest
22 received to the extent necessary to discharge the claims and allowances described in section 19
23 of this Act remaining unpaid after application of the deceased owner's estate. For the purposes
24 of this section, the fair market value shall be determined as of the date of death of the owner.

1 For the purposes of this section, the designated beneficiary's proportionate share is the
2 proportionate share of all nonprobate transfers recovered by the personal representative for the
3 payment of the claims and allowances.

4 Section 21. No proceeding to assert the liability may be commenced unless the surviving
5 spouse, a creditor, or a child or a person acting for a child of the deceased owner sends a written
6 demand to the personal representative at the last known address of the personal representative
7 or files the demand with the clerk of the court in which the probate is pending. A creditor or
8 claimant against the deceased owner's estate may file a petition to open an estate for the
9 deceased owner and may be appointed as personal representative of the estate of the deceased
10 owner pursuant to § 29A-3-301 for the purpose of providing the written demand required by this
11 section. The proceeding shall be commenced within six months after the death of the deceased
12 owner.

13 A designated beneficiary against whom a proceeding to account is brought may join as a
14 party to the proceeding a surviving party or beneficiary of any other beneficiary designation or
15 other account of the owner.

16 Assets recovered by the personal representative shall be administered as part of the
17 decedent's estate.

18 Nothing in section 20 of this Act may be construed to limit the rights of creditors under
19 other laws of this state.

20 Section 22. A purchaser for value of property or a lender who acquires a security interest in
21 the property from a beneficiary of a nonprobate transfer after the death of the owner, in good
22 faith, takes the property free of any claims of or liability to the owner's estate, creditors of the
23 owner's estate, persons claiming rights as beneficiaries under the nonprobate transfer, or heirs
24 of the owner's estate, in absence of actual knowledge that the transfer was improper or that the

1 information in an affidavit of confirmation, if any, provided pursuant to section 24 of this Act
2 is not true; and, a purchaser or lender for value has no duty to verify sworn information relating
3 to the nonprobate transfer.

4 Section 23. No attorney in fact, custodian, conservator, or other agent may make, revoke,
5 or change a beneficiary designation unless the document establishing the agent's right to act, or
6 a court order expressly authorizes such action and such action complies with the terms of the
7 governing instrument, the rules of the transferring entity and applicable law.

8 However, this section does not prohibit the authorized withdrawal, sale, pledge, or other
9 present transfer of the property by an attorney in fact, custodian, conservator, or other agent
10 notwithstanding the fact that the effect of the transaction may be to extinguish a beneficiary's
11 right to receive a transfer of the property at the death of the owner.

12 Section 24. The transfer of a deceased owner's property or interest in property shall be
13 recorded by presenting to the county auditor of the county in which a portion of the property is
14 located and filing with the register of deeds of that county, an affidavit of confirmation executed
15 by any transfer on death beneficiary to whom the transfer is made. The affidavit of confirmation
16 shall be verified before a person authorized to administer oaths and shall be accompanied by a
17 certified copy of the death certificate for the deceased owner or owners. The affidavit of
18 confirmation shall contain:

- 19 (1) The name and address of each transfer on death beneficiary who survived the
20 deceased owner or that is in existence on the date of death of the deceased owner. If
21 the named beneficiary is deceased, the name and address of the contingent
22 beneficiary or persons who take under the anti-lapse statutes shall be included. If a
23 named beneficiary was designated as a transfer on death beneficiary solely in that
24 person's capacity as a trustee of a trust and that trustee subsequently has been

1 replaced by a successor trustee, the affidavit of confirmation shall include the name
2 and address of the successor trustee and shall be accompanied by proof of acceptance
3 by the successor trustee;

4 (2) The date of death of the deceased owner or owners;

5 (3) A legal description of the subject property or interest in property;

6 (4) The name of each transfer on death beneficiary who has not survived the deceased
7 owner or that is not in existence on the date of death of the deceased owner.

8 The affidavit of confirmation shall be accompanied by a certified copy of the death
9 certificate for each transfer on death beneficiary who has not survived the deceased owner.

10 Section 25. The register of deeds shall make an index reference in the record of deeds to any
11 affidavit of confirmation filed with the register of deeds pursuant to section 24 of this Act.

12 Section 26. Any person who knowingly makes any false statement in an affidavit of
13 confirmation is guilty of falsification pursuant to § 22-11-23.

14 Section 27. The following form may be used to create a transfer on death deed. The
15 provisions of this Act govern the effect of this or any other instrument used to create a transfer
16 on death deed. The deed shall also contain the essential elements and formalities of a properly
17 recordable deed:

18 REVOCABLE TRANSFER ON DEATH DEED

19 **Notice to Owner:** This deed will transfer ownership of the property described below when you
20 die. You should carefully read all of the information on this form. You should consult a lawyer
21 before using this form.

22 *This form must be recorded with the Register of Deeds before your death or it will not be*
23 *effective. Any change to this deed must also be recorded to be effective.*

24 **Identifying Information**

1 Owner(s) of Property Who Join in This Deed:

2 _____

3 _____

4 Address:

5 Marital Status of Owner(s):

6 Legal Description of Property:

7 _____

8 _____

9 _____

10 **Beneficiary or Beneficiaries**

11 I revoke all my prior transfer on death deeds concerning the property, and name the following
12 beneficiary(ies) to receive the property (in equal shares, and as tenants in common, and not as
13 joint tenants with rights of survivorship, unless I say otherwise):

14 *Name and address of Primary Beneficiary(ies)*

15 _____

16 _____

17 *Name and address of Alternate Beneficiary(ies)*

18 _____

19 If no primary beneficiary survives me, I name the following alternate beneficiary(ies) to receive
20 the property (in equal shares, and as tenants in common, and not as joint tenants with rights of
21 survivorship, unless I say otherwise):

22 _____

23 _____

24 _____

1 **Transfer on Death**

2 *I hereby convey and transfer upon my death all my interests (whether now owned or hereafter*
3 *acquired) in the described property to the above listed beneficiary(ies).*

4 Before my death, I may revoke this deed.

5 Signature(s) of Owner(s) Who Join in this Deed

6 _____

7 (signature) (date)

8 _____

9 (signature) (date)

10 Acknowledgment

11 (acknowledgment)

12 Section 28. The following form may be used to create an affidavit of confirmation:

13 **AFFIDAVIT OF CONFIRMATION**

14 **AND SURVIVORSHIP FOR**

15 **TRANSFER ON DEATH DEED**

16 State of South Dakota

17 County of _____

18 I, _____, being first duly sworn on oath, state that to my personal
19 knowledge:

20 1. _____ ("Decedent") is the person named in the certified copy of the
21 Certificate of Death attached hereto.

22 2. On the date of death, Decedent was an owner of the property in _____

23 County, South Dakota, legally described as follows:

24 and decedent was the Grantor Owner in a transfer on death deed ("Deed") recorded on

1 _____, as in Book _____ of _____ Page _____, in the Office of the Register of Deeds of
2 _____ County, South Dakota.

3 3. The name(s) and address(es) of the Grantee Beneficiary(ies) named in the Deed who
4 survived the Decedent is(are): [insert name(s) and address(es) of the Grantee Beneficiary(ies)
5 who survived the Decedent, and if none, insert "NONE"].

6 4. [Where applicable] The name(s) and address(es) of the contingent beneficiary or person
7 who take under the anti-lapse statutes and who survived the Decedent.

8 5. The Grantee Beneficiary(ies) named in the Deed who did not survive the Decedent is(are):
9 [insert names of the Grantee Beneficiary(ies) who did not survive the Decedent, and if none,
10 insert "NONE"]. Certified copies of Certificate(s) of Death for any deceased Grantee
11 Beneficiary(ies) is(are) also attached hereto.

12 Affiant

13 Notary

14 Section 29. In applying and construing this Act, consideration shall be given to the need to
15 promote uniformity of the law with respect to its subject matter among the states that enact it.

16 Section 30. The provisions of this Act modify, limit, and supersede the federal Electronic
17 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but do not
18 modify, limit, or supersede Section 101(c) of that Act, 15 U.S.C. Section 7001(c), or authorize
19 electronic delivery of any of the notices described in Section 103(b) of that Act, 15 U.S.C.
20 Section 7003(b).

21 Section 31. The provisions of this Act apply to any deed executed and recorded after July 1,
22 2013.