



Who is Entitled to a Copy of the Trust and When

Presented by
Jayna M. Voss

Can this topic really take 45 minutes?

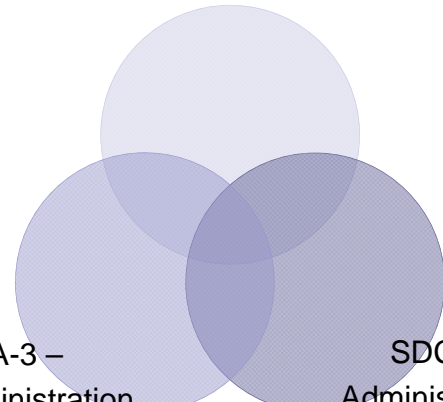
- At first glance, this topic seems fairly straightforward.
- However, it's not as simple as it seems.





Overview of South Dakota Laws

SDCL Title 55 – Fiduciaries & Trusts



SDCL Chapter 29A-3 –
Probate of Wills & Administration

SDCL Chapter 21-22 –
Administration of Trust Estates

The Starting Point: Title 55



- Title 55 is the place to start for general laws governing trusts.
- Specifically Chapters 55-1A, 55-2 & 55-3 set forth duties and liabilities of trustee and provide guidance on who should be given the trust.
- The 2010 South Dakota Legislature has clarified that Chapter 55-3 applies to all trusts – not just 3rd party trusts.

Overlap of Other Code Provisions

- SDCL Chapter 21-22 applies to all trusts if the situs is in South Dakota or beneficiary or trustee resides here. This Chapter essentially applies to trusts established by court order or any non-judicial trust where petition for court-supervision is filed.
- Chapter 29A-3 of the probate code contains provisions governing testamentary trusts.

Why use a Trust?

- Before discussing who is entitled to receive the trust, it is important to consider why a client chooses a trust.
- Understanding the benefits of a trust provides insight to the laws governing the distribution thereof.

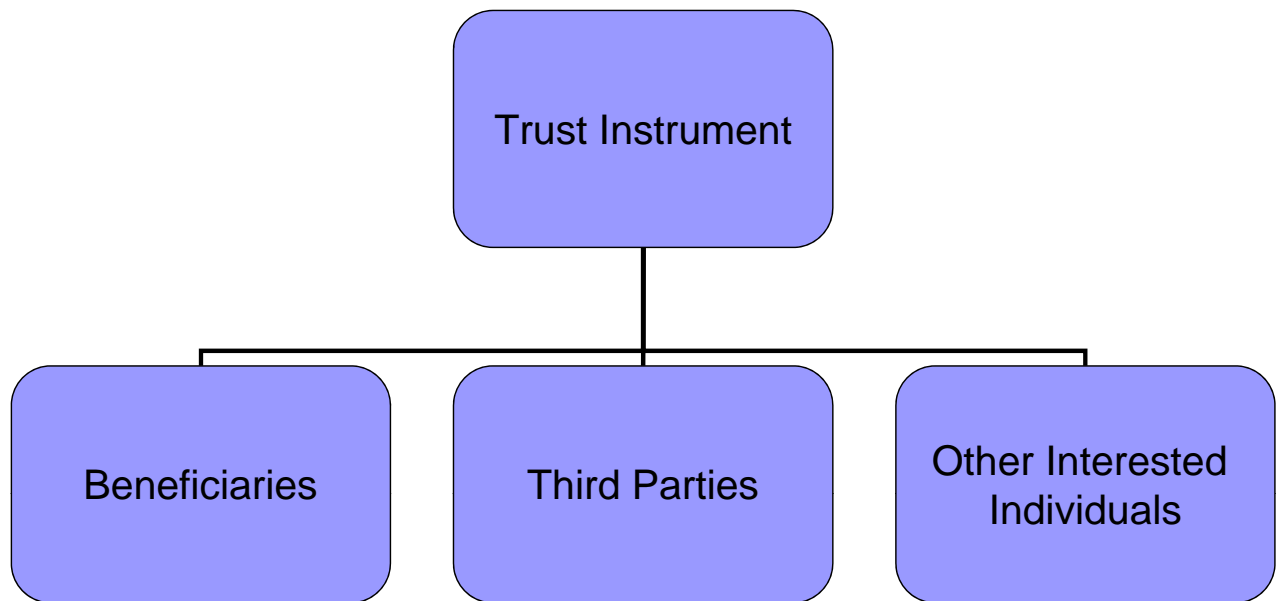




Confidentiality & Privacy

- One of the main reasons a client chooses a trust over a Will relates to privacy - the trust is not a public record.
- Typically, administration and settlement of a trust is a private matter.
- Trustees and attorneys have a duty to protect confidentiality and privacy of a trust.

Who is Entitled to a Copy of the Trust?



General Guidelines for Providing Information to Beneficiaries



- Under common law, beneficiaries have certain rights to trust information.
- Even contingent beneficiaries have been found to have certain due process rights in a trust.
- Distinctions are made between irrevocable and revocable trusts. Beneficiaries of irrevocable trusts have greater rights to trust information.

General Guidelines for Providing Information to Beneficiaries



- Trustee's duty of confidentiality to grantor typically does not apply to disclosure of trust information to beneficiaries.
- Trustee still has a duty to act with sensitivity when providing information to beneficiaries.
- General fiduciary principles include the duty to provide beneficiaries with information concerning trust and its administration.

Rights of Beneficiary under South Dakota Law

- SDCL § 55-2-13, which has gone through several amendments in the past few years (most recently in 2010) only allows a “qualified beneficiary” to receive a copy of the trust instrument.
- A “qualified beneficiary” is one who is 21 years old and on the date the qualification is determined:
 - Is a distributee or permissible distributee of trust income or principal;
 - Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees terminated on that date; or
 - Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

SDCL § 55-2-13 continued

- However, if the trust is revocable, a trustee has no duty to notify even qualified beneficiaries of the trust's existence.
- If the trust is irrevocable, the trustee must, within 60 days after accepting trusteeship of the trust, or within 60 days after the date the trustee acquires knowledge that a revocable trust has become irrevocable, notify the qualified beneficiaries of the trust's existence and of the right of the beneficiary to request a copy of the trust instrument.
- Upon request of a qualified beneficiary, a trustee of an irrevocable trust shall further furnish a copy of the trust instrument to such beneficiary and shall promptly respond to a request for information related to the administration of the trust unless such request is unreasonable under the circumstances.

SDCL § 55-2-13 continued

- The provisions of the statute are only applicable to trusts created after June 30, 2002.
- For trusts created before July 1, 2002, a trustee has no duty at common law or otherwise to notify a qualified beneficiary of the trust's existence – unless otherwise directed by the trustor.

Rights of Beneficiary in Revocable Trust

- SDCL § 55-2-14 further provides some guidance on a beneficiary's right to receive a copy of a revocable trust instrument.
- While a trustee does not have a duty to inform a trust beneficiary of the trust and its administration under that statute, if the trustee obtains actual knowledge that the settlor is incapacitated and has no designated agent, the trustee may keep each interested trust beneficiary, who, if the settlor were then deceased, would be a current trust beneficiary, reasonably informed of the trust and its administration.
- Further, the court may order the trustee to keep other beneficiaries reasonably informed of the trust and its administration.
 - *Note that the statute does not use "qualified beneficiary" limitation.*

Rights of Beneficiary in Testamentary Trust

- Under SDCL § 29A-3-705, devisees of a testamentary trust must receive a copy of the Will admitted to probate within 14 days after appointment of the personal representative.
- Seemingly, the beneficiaries of such trust would then receive a copy of the trust instrument since “devisee” is defined in the probate code as a person designated in a Will to receive a devise. For the purposes of Chapter 29A-2, Intestate Succession & Wills, in the case of a devise to an existing trust, or to a trust described by Will, the beneficiaries are devisees and the trustee or trust is not a devisee. For purposes of Chapter 29A-3, Probate of Wills & Administration, however, the trust or trustee is the devisee and the beneficiaries are not devisees. SDCL § 29A-1-201.
- Accordingly, in a probate proceeding, the devisee who is entitled to receive a copy of the trust instrument under the Will is actually the trust or trustee and not the beneficiaries.

Rights of Beneficiary in a Court Trust

- Chapter 21-22 has broad application to all trusts whose situs is here or if beneficiary or trustee resides here.
- SDCL § 21-22-1 defines “beneficiary” as any person in any manner interested in the trust.
- Under SDCL § 21-22-3 (which was amended in 2010), a trustee of a court trust must file a certified copy of the trust instrument with the Clerk and a statement showing names of all persons, including conservators, who are interested in the trust, including any who are minors.
- SDCL § 21-22-18 provides that notice of any filings must be given to all beneficiaries.
- In addition, SDCL § 21-22-13 allows a beneficiary to seek an accounting or other special report from the trustee and SDCL § 21-22-14 requires the trustee to file an annual accounting of the trust.
- SDCL § 21-22-28 allows the court to seal the trust instrument to protect the privacy of the settlor. However, the trust instrument shall still be made available to any beneficiary.
- Clearly, beneficiaries under Chapter 21-22 are given broad rights to trust information.

Rights of Third Parties Under South Dakota Law

- There are a number of third parties who should be provided with trust information to properly administer the trust.
 - SDCL § 55-1A-31 authorizes a trustee to “employ attorneys, accountants, investment advisors, agents or other persons[.]”
 - SDCL § 55-1A-38 provides that “[a] trustee may perform such other acts, which, in the judgment of the trustee, may be necessary or appropriate for the proper management, investment, and distribution of the trust estate.”



Third Party Rights

- There is no statute or case law authority that gives a bank, title company or other third party an absolute right to the trust instrument.
- However, in some cases, you have no choice but to provide that if you want to complete a particular transaction.
- The statutes cited above give implied authority for the trustee to provide a third party with trust information in order for the third party to properly perform its duties.

Certificate of Trust as Substitute for Trust Instrument

- SDCL § 55-4-51 was amended by the South Dakota Legislature in the 2010 session and provides that instead of furnishing a copy of the trust instrument to a third party, the trustee may provide a Certificate of Trust.
- Certificate of Trust may be signed by a trustee, grantor, or trust protector and should contain the following:



Certificate of Trust Requirements

1. A statement that the trust exists, the name of the trust and the date of execution;
2. The name of the grantor;
3. The name of each original trustee and name and address of each trustee and each trust protector currently empowered to act under the trust instrument on the date of execution of the certificate;
4. The powers of trustee and trust protector;
5. A statement that the trust is irrevocable or if revocable, a statement to that effect (& identity of person holding power to revoke), and if applicable, a statement that the trust has been terminated or revoked;
6. A statement that trust is not supervised by a court, or if applicable, a statement that the trust is supervised by a court and a statement that sets forth any restrictions imposed by the court on the trustee's ability to act;
7. If applicable, a description of any property to be conveyed by the trustee;
8. A statement that the trust has not been amended in any manner that would cause the representations in the certificate to be incorrect;
9. The person signing the certificate shall certify that such statements are true and correct.

Certificate of Trust

- The 2010 Legislature added another section to Chapter 55-4 providing that if the Certificate is recorded with the register of deeds or presented to a third party, it documents the existence of the trust, the identity of trustees, powers of trustees, and any other matters it sets out as though the full trust instrument had been recorded or presented.
- Until amended or revoked or until the trust instrument or Will is recorded, a Certificate is conclusive proof as to the matters contained therein and any party may rely upon the Certificate, except a party dealing directly with the trustee who has actual knowledge of the facts to the contrary.

Practical Considerations When Dealing with Third Parties

- To protect the privacy of a trust, a Certificate of Trust should be used when possible rather than disclosing the entire trust instrument.
- If a third party demands more information than provided by the Certificate, the trustee should consider providing only the relevant provisions of the trust rather than the entire trust instrument. SDCL § 55-4-52 provides that a recipient of a Certificate may require the trustee to furnish copies of those excerpts from the trust instrument that designate the trustee and confer on the trustee the power to act in the pending transaction.
- It is advisable, however, to provide certain advisors with the entire trust instrument. *E.g.* the accountant should receive a copy of the trust instrument in order to understand any estate and income tax issues; allocation and distributions of trust income and principal; and other administrative duties with tax implications.
 - *There is no “accountant-client privilege” so information shared with an accountant is not protected as privileged confidential information.*

Why should a third party accept a Certificate of Trust?

- Any person who acts in reliance on a Certificate without knowledge that the representations contained in the Certificate are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the Certificate. SDCL § 55-4-53.
- Any person who in good faith enters into a transaction in reliance on a Certificate may enforce the transaction against the trust property as if the representations contained in the Certificate were correct. SDCL § 55-4-54.
- Any person making a demand for the trust instrument in addition to a Certificate is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument. SDCL § 55-4-55.
- However, the above provisions do not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust. SDCL § 55-4-56.



Rights of Interested Parties Under South Dakota Law

- A trust will commonly include other interested parties to help with the administration of the trust, *i.e.*, a trust protector, trust advisor, investment advisor, investment committee, distribution committee, and other fiduciaries.
- The powers set forth in Chapter 55-1A apply to any trust governed by South Dakota law unless excluded by the trust instrument. If not expressly provided in the trust instrument that an interested party may receive a copy of the trust instrument, it is implied by SDCL § 55-1A-38 that a trustee may provide an interested party with the relevant trust information and a copy of the trust instrument in order for the interested party to have the information needed to exercise its powers.
- The directed trust statutes under Chapter 55-1B also imply the ability for such interested parties to receive a copy of the trust instrument and pertinent trust information. *E.g.* if a trust protector is given the power to modify or amend the trust instrument or a trust advisor has the right to manage investments, they will thus need to examine the instrument.

THE “MONET” FACTORS

- Like the paintings of Claude Monet, the statutes setting forth beneficiaries' rights to the trust instrument, seemingly straightforward, become complex the more that you study them.



Closer Look at § 55-2-13

- From far away, SDCL § 55-2-13 appears to provide all of the answers as to which beneficiaries are entitled to a copy of the trust instrument and when, but up close, it is not as clear.
 - First, the term “qualified beneficiary” means a beneficiary who is 21 years of age, thus excluding minor beneficiaries and those between the ages of 18 and 20.
 - There is no exception that authorizes a trustee to provide a copy of the trust instrument to the natural guardian or legal guardian or conservator of a beneficiary.
 - Within the narrow confines of SDCL § 55-2-13, this statute leaves a parent or a legal guardian/conservator without the ability to obtain information to protect the interest of a minor or an incapacitated person and prohibits young adult beneficiaries from receiving the trust instrument.

But what about SDCL § 55-2-14?

- That statute, which applies to revocable trusts, allows the trustee to keep a beneficiary reasonably informed of the trust and its administration if a trustor is incapacitated.
- Further, upon good cause shown, a court may order the trustee to keep the beneficiaries reasonably informed.
- Does that mean any beneficiary is entitled to a copy of a revocable trust instrument if trustor is incapacitated?

Other Relevant Statutes

- In addition, when you add the layers of applicable statutes from other sections of the Code, it is even more unclear.
- SDCL § 21-22-3 requires a trustee under a court trust to file a copy of the trust instrument with the Clerk.
- SDCL § 21-22-13 allows a beneficiary to seek an accounting or other special report from the trustee.
- SDCL § 21-22-1 defines beneficiary as “any person in any manner interested in the trust”.
- SDCL § 21-22-18 provides that notice of any filings must be given to all beneficiaries.
- Clearly, Chapter 21-22 has a very broad definition of beneficiary. There is no exception to providing trust information to minors or to beneficiaries between the ages of 18 and 20. Arguably, incapacitated individuals who are beneficiaries are entitled to the trust instrument as SDCL § 21-22-3 allows conservators to be named in the statement of interested parties.

Additional Considerations When Providing Trust Information

- In some situations, it may not be enough to simply provide a copy of the trust instrument to the beneficiary. *E.g.* where a beneficiary must consent, ratify or provide a release of liability, it may be necessary that the beneficiary be provided with more than the trust instrument in order for the beneficiary's decision to be valid.
- Because of fiduciary relationship between trustee and beneficiary, a trustee normally has the burden to show the beneficiary was sufficiently informed to understand the character of the act or omission and was in a position to reach an informed opinion.
- Even if a beneficiary is not a "qualified beneficiary", it may be advisable to provide the trust instrument and material trust information in order to validate the decision by the beneficiary.
- **Example:** Trustee needs consent of beneficiaries to sell certain trust assets under the trust instrument. Trustee should provide copy of trust instrument and relevant information surrounding the transaction to the beneficiaries so they can make an informed decision.

Virtual Representation Adds Another Layer

- The “virtual representation” statutes are found in Chapter 55-3 and are also relevant.
- The doctrine of virtual representation originated as a jurisdictional concept. It was, and still is, in most jurisdictions used as a method of acquiring jurisdiction over minors, unborn persons, and persons under a disability without making those persons parties to the proceeding, yet binding the them to the result.



So how is virtual representation applicable?

- An example where virtual representation becomes applicable is in the case where a grantor or trustee desires to amend a trust and seeks court approval to do so under Chapter 55-3. Instead of providing notice of the amendment to all beneficiaries, the petitioner uses virtual representation to only involve certain beneficiaries.
- These statutes provide many benefits including administrative convenience for the trustee. However, the doctrine of virtual representation requires that there is a commonality of interests of the beneficiaries which begs the question of how does a beneficiary of whom virtual representation is being applied know there is commonality of interests without being provided the relevant information?
- Inherent conflicts may exist between the various beneficiaries. Although many jurisdictions have virtual representation statutes, it is prudent for a trustee to question the adequacy of the representation that can be provided if virtual representation is utilized. Likewise, the attorney for a beneficiary of whom virtual representation is being applied should pay attention to the adequacy of the representation.

Ethical Considerations

- Capacity Issues
 - An attorney or advisor working with an elderly or disabled client may have to face the issue of the client's incapacity. Unfortunately, there is little guidance for those dealing with clients who become incapacitated.



Rules of Professional Conduct



- Except for a few exceptions, **Rule of Professional Conduct 1.6** provides that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.
- However, **Rule of Professional Conduct 1.14** does give the attorney some guidance on handling a client who is incapacitated. When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, may seeking the appointment of a guardian or conservator.
- Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to Rule 1.14, the lawyer is impliedly authorized under Rule 1.6 to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.



Practical Considerations if Client Incapacitated

- If a client has diminished capacity but shows that he or she can comprehend the need for planning and knows what he or she wants to do, then enlisting a trusted family member or advisor to assist may be desirable.
- However, permitting a third party to be present creates problems with confidentiality.
- The client should sign a waiver of confidentiality that permits the third party to be present and authorizes the disclosure of information to such person.
- Under the Rules, if a client is truly incompetent, an attorney may take protective action for his or her client such as to seek the appointment of a guardian.



Trustee's Duty to Provide Information if Trustor Incapacitated

- SDCL § 55-2-14 gives some guidance to a trustee if the trustor is incapacitated.
- It requires the trustee to keep the incapacitated trustor's designated agent reasonably informed of the trust and its administration.
- If the trustor has no designated agent, then the trustee may provide information to the beneficiaries as stated above.

Drafting Considerations

- Protecting Privacy and Confidentiality
 - Since trusts are commonly used to protect privacy of the grantor, it is important to discuss the grantor's desires with regard to disclosure of trust information.
 - Adding provisions to trust agreement to avoid the necessity of providing third parties a copy of the entire trust is recommended.
 - An example is in your outline.



Drafting Considerations

- Protecting Grantor's Desires
 - The estate planning attorney should also consider drafting around statutes that do not reflect the grantor's desires.

- Example:
 - If the grantor desires that a minor grandchild receive a copy of the trust instrument and notice of trust actions, then language should be included to nullify the qualified beneficiary statute (SDCL § 55-2-13) and virtual representation statutes (SDCL §§ 55-3-31 to 55-3-38).



Comparison of State Laws





Leading the Way

- Not surprisingly, *Trust & Estates* magazine ranked the top four trust states for 2010 as South Dakota, Delaware, Alaska and Nevada.
- All four states allow the substitution of a trust instrument with a Certificate of Trust to persons other than a beneficiary.
- Nevada, however, provides that a trustee may present a Certificate of Trust to any person, in lieu of a copy of any trust instrument.
- South Dakota stands alone with its definition of “qualified beneficiary” as it is the only one that does not allow a copy of the trust to be given to a person under 21 or to a person who is incapacitated.

STATE LAW COMPARISON

	South Dakota	Nevada	Delaware	Alaska
Substitute Certificate of Trust for Trust Instrument - 3rd Party	Yes	Yes	Yes	Yes
Substitute Certificate of Trust for Trust Instrument - Beneficiary	No	Yes	No	No
Definition of Beneficiary entitled to Irrevocable Trust Instrument	Beneficiary who is 21 & is entitled to trust income or principal or would be entitled thereto if interests of distributees or trust terminates	Person who has a present or future beneficial interest in the trust, vested or contingent; further allows trustee to give notice to any heir of settlor or other interested person	Except as otherwise provided in trust instrument, each beneficial owner of trust has right to copy of trust & other relevant information	On date qualification is determined, beneficiary entitled or eligible to receive trust income or principal or would be if trust terminates

Summary of Beneficiary Rights – *Revocable Trust*

- Under § 55-2-13, beneficiaries have no right to trust instrument unless provided by terms thereof.
- However, under § 55-2-14, if grantor is incapacitated & has no designated agent, trustee may keep beneficiaries informed of the trust & its administration.

Summary of Beneficiary Rights – *Irrevocable Trust*

- Pursuant to § 55-2-13, for trusts created prior to July 1, 2002, a beneficiary is not entitled to receive a copy of the trust instrument unless otherwise provided therein.
- For trusts created after June 30, 2002, a qualified beneficiary (one who is 21 & who may receive principal or income) has right to receive a copy of the trust instrument.
- Under § 29A-3-705, devisees are entitled to receive a copy of a probated Will which will include terms of the testamentary trust. Devisee, for purposes of probate administration, is the trust or trustee and not the beneficiaries.
- Under Chapter 21-22, beneficiaries are entitled to receive copies of all court filings, including trust instrument.

Summary of Third Party Rights

- Third parties have no absolute right to receive copy of trust instrument under S.D. law.
- Chapter 55-1A authorizes trustee to employ agents & perform acts that are necessary or appropriate for management of trust estate; provides implied authority for trustee to supply trust to these parties.
- The directed trust statutes under Chapter 55-1B further imply the ability of interested parties such as trust protectors to receive copy of trust instrument.
- Certificate of Trust may be substituted for entire trust instrument to protect privacy of grantor. In addition, relevant trust pages may be given along with the Certificate.

Questions to Ponder



- Should the gap in SDCL § 55-2-13 be closed so that natural guardians or legal guardians/conservators may receive the trust information on behalf of the minor or protected person?
- For uniformity purposes with other laws, should the requirement of a beneficiary being the age of 21 be reduced to the age of majority?
- For uniformity purposes between SDCL § 55-2-13 and SDCL § 55-4-51, should a Certificate of Trust be allowed to be given to beneficiary who is not a “qualified” beneficiary in addition to a third party?
- Should SDCL § 55-2-13 address how a qualified beneficiary of a trust that existed before July 1, 2002, obtain a copy of the trust since said statute eliminates any common law duty or other duty to notify of the trust’s existence?
- Should a statute specifically authorize a trustee to give trust information to interested parties that may have a fiduciary or other professional relationship with a trust?

