

APPENDIX TO CHAPTER 43-30  
STATE BAR OF SOUTH DAKOTA  
2022 TITLE STANDARDS

Introduction

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## INTRODUCTION

The State Bar of South Dakota Title Standards are the work of the Real Property, Probate and Trust Section's Title Standards Committee. The Standards themselves are not the authority. Rather, they are in some sense a restatement of the law designed to aid the practitioner in determining the current status of practice in a particular area.

The Standards are based on existing South Dakota statutes and case law from South Dakota's courts and other relevant jurisdictions. The committee members' experience with the relevant authorities is crucial to drafting Standards.

The 2002 Standards were in part based on the Model Title Standards, existing South Dakota Title Standards and various Title Standards from other jurisdictions, predominantly North Dakota and Nebraska. The Title Standards Committee has discovered that to be most useful the Title Standards must keep pace with the ever-evolving landscape of the law. The ideal way to achieve this goal is through a standing Title Standards Committee charged with an on-going review of statutory and case law whose members are familiar with the dynamics of practice, enabling them to draft and revise Standards as necessary. In 2021, the Title Standards Committee was tasked with reviewing and updating the 2002 Standards. It is anticipated that additional review and updates will be needed going forward.

## CITATION

These Title Standards may be cited as 2022 South Dakota Title Standards referencing the appropriate Standard number. The citation may be abbreviated 2022 SDTS.

### **A-01. Examining attorney's attitude**

The purpose of the examination of title and of objections, if any, shall be to secure for the examiner's client a title which is in fact marketable and which is shown by the record to be marketable, subject to no other encumbrances than those expressly provided for by the client's contract. Objections and requirements should be made only when the irregularities or defects reasonably can be expected to expose the purchaser or lender to the hazard of adverse claims or litigation.

When an examiner finds a situation which he believes creates a question as to marketable title and has knowledge that another attorney handled the questionable proceeding or has passed the title as marketable, the examining attorney before writing an opinion, should communicate, if feasible, with the other attorney and afford an opportunity for discussion.

**Authority:** Former SDTS 1.1; Model Standards 2.1.

### **A-02. Abstracter's certificate, liability on**

Under SDCL 36-13-15, the conditions of an abstracter's bond are for the payment by such abstracter of all damages which may be sustained by or accrue to any person (whether the original purchaser, owner or holder of the abstract) by reason of error deficiency, mistake in any abstract or certificate of title. In view of this statutory provision, such certificate may be construed as extending the protection and liability to the public generally.

**Note:** Payment for or ordering abstract immaterial. The statute provides that the abstracters are

liable for all damages occurring to any party by reason of any error or deficiency or mistake in any abstract or certificate of title made and issued by such abstractor, and the liability is to the person injured without regard to who pays for the abstract or by whom it had been ordered. [Goldberg v. Sisseton Loan & Title Co. \(1909\) 24 SD 49, 123 NW 266, 140 Am St Rep 775.](#)

### **A-03. Recertification**

The examiner should accept, without recertification, prior entries in an abstract of title, provided the same were previously certified to by a qualified abstractor.

**Authority:** Former SDTS 1.3.

### **1-01. Tribal lands**

Any transaction affecting Indian trust land is subject to the approval of the Secretary of the Interior, or as otherwise prescribed by federal statute, and any transaction affecting Indian tribal land is subject to the consent of the tribe, or as otherwise provided by the tribe's constitution and federal statute.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 1, p. 9 (1995).

### **2-01. Contracts for deed--deed to vendee**

Where there is a contract for deed in favor of A and later a deed is given to A and another party or parties, a title examiner should treat the deed as creating the estate as indicated in the deed.

**Authority:** [Whitney v. Smith, 22 NW 181 \(Minn. 1885\).](#)

[McCarthy's St. Louis Park Cafe, Inc. v. Minneapolis Baseball and Athletic Association, 104 NW2d 895 \(Minn. 1960\).](#)

[Pappas v. Pappas, 177 NW2d 401 \(Minn. 1970\).](#)

[Cornell v. Heirs of Walik, 235 NW2d 828 \(Minn. 1975\).](#)

[Sullivan v. Eginton, 406 NW2d 599 \(Minn. 1987\).](#)

### **2-02. Contract for deed--merger**

A deed executed in pursuance of a contract for deed supersedes and merges all prior negotiations or contracts relating to it, provided there is no fraud or mistake or collateral contractual provisions or agreements which are not intended to be merged in the deed.

**Authority:** [Nelson v. Gregory County, 323 NW2d 139 \(SD 1982\).](#)

[Taylor v. White River Valley Ry. Co., 27 SD 528, 132 NW 152 \(1911\) aff'd 29 SD 12, 135 NW 758 \(1912\)](#)

[Hammerquist v. Warburton, 458 NW2d 773 \(SD 1990\).](#)

### **2-03. Contract for deed--conveyances of interests**

The vendor and vendee under an executory contract for deed each have an interest in the real property which is capable of conveyance, and transfers of any interest must meet the statutory requisites, including words of conveyance.

### **2-04. Contract for deed--transfers by vendor**

A transfer by a vendor of an interest in the real property subject to a contract for deed creates an interest in the real estate in the vendee. If the transfer is in the form of a deed to the real estate, no further conveyance from the vendor is required to complete the chain of title.

**Caveat:** Title examiners need to distinguish between a conveyance of real estate and an assignment of the right to receive money or other consideration.

#### **2-05. Contract for deed--vendee's interest**

A vendee's interest in the real property subject to a contract for deed is an interest to which a judgment lien will attach by operation of law before fee title is conveyed to the vendee. The interest may be mortgaged or levied upon.

**Authority:** [SDCL 15-6-7](#); [1 ALR 2d 727](#); [Fridley v. Munson, 194 NW 840 \(1923.\)](#)

**Caveat:** Judgment creditors should be joined in an action to cancel the contract, as they may have rights which should be terminated. In order to extinguish their claims, other inferior claimants such as mortgage holders and holders of tax liens must be joined as defendants or their claims must otherwise be released from the property.

#### **2-06. Contract for deed--effect on joint tenancy**

A contract for deed for the sale of real property held in joint tenancy does not have the effect of dissolving the joint tenancy relationship of the vendors if the contract for deed is executed by all the joint tenants, unless otherwise specifically provided in the instrument.

**Authority:** [SDCL 43-26-4](#).

#### **2-07. Contract for deed--cancellation**

When the record shows that a contract for deed has been cancelled by action, a title examiner need only require the recording of a certified copy of the judgment, which includes reference to the date the redemption period, if any, expires, and the recording of an affidavit or other document establishing non-redemption.

**Authority:** SDCL ch. 21-50.

#### **2-08. Contract for deed--deeds held in escrow**

A deed in performance of a contract for deed which has been executed and held in escrow pending performance of the contract, has been conditionally delivered to the grantee and, upon recording, is deemed effective as of the date of its execution.

#### **3-01. Leases – limitations on lease term**

No lease of agricultural land for longer period than twenty years is valid, and no lease of any town or city lot for a longer period than ninety-nine years is valid. An owner of a life estate cannot create a lease which will extend beyond the life estate holder's life.

**Note:** Such owner cannot create an estate or any other interest which will extend beyond the duration of his or her life estate.

### **3-02. Leases--notice of renewal**

In the absence of notice of renewal from possession, record, or otherwise, a title examiner may disregard a recorded lease when the term as expressed in said lease has expired. However, reference shall be made to the lease when its continuation or renewal is dependent upon a contingency that may have occurred, such as production on lands covered by an oil, gas or mineral lease.

### **4-01. Effect of judgment on joint tenancy property**

The mere docketing of a judgment resulting in a judgment lien on the joint tenancy property of a debtor does not alone sever the joint tenancy.

**Authority:** [SDCL 43-2-12](#), [43-2-13](#), [43-2-14](#) and [64 A.L.R. 2d 918](#) § 30.

**Note:** *Armstrong v. Hellwig*, (SD 1945) cited in the original draft does not appear to bear on this issue.

### **4-02. Conveyances to two or more individuals--inclusion of business name**

Property is acquired in the name of the partnership by a transfer to one or more partners in their capacity as partners in the partnership, if the name of the partnership is indicated in the instrument transferring title.

**Authority:** UPA Sec. 204(b)(2).

**Source:** Carlsen and Kirkeby, *South Dakota Land Title Guide*, ch. 4, pp. 31-32 (1995).

### **4-03. Homestead rights--effect of partnership on**

Homestead rights do not attach to the interests of a married partner in specific partnership property. A title examiner need not require any evidence of release, waiver or nonexistence of the marital rights of a partner's spouse.

**Authority:** UPA Sec. 501; 302; 401(g.).

Former Law [SDCL 48-4-14](#).

**Source:** Carlsen and Kirkeby, *South Dakota Land Title Guide*, ch. 4, p. 31 (1995).

### **4-04. Conveyances by partnership**

A conveyance of property held in the partnership name made and signed by the individual partners and not in the partnership name conveys equitable title only and a new conveyance in the partnership name must be obtained.

**Authority:** UPA Sec. 302.

Former Law [SDCL 48-4-3](#) and [48-4-6](#).

**Note:** UPA Sec. 302 provides specific rules for conveyances according to the manner in which title is held.

**Source:** Carlsen and Kirkeby, *South Dakota Land Title Guide*, ch. 4, p. 31 (1995).

### **4-05. Conveyances to and by partners**

Any estate in real property may be acquired in the partnership name. Subject to a recorded statement of partnership authority, title so acquired can be conveyed only by an instrument

executed in the partnership name by one or more partners of the partnership.

**Authority:** UPA Sec. 101(11); 302(a)(1.).

Former Law [SDCL 48-4-3](#) and [48-4-5](#).

**Caveat:** An act of a partner which is not apparently for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership only if the act was authorized by the other partners.

UPA 301(2).

Former Law [SDCL 48-2-1](#).

**Cross Reference:** Standard 7-05.

See UPA 302(a) for general guidelines for the conveyance of partnership property.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 4, pp. 31-34 (1995).

#### **4-06. Conveyances by partnership--when proof of authority not required**

In the absence of knowledge or notification to the contrary, no affirmative proof of authority need be required of a general partner apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership.

**Authority:** UPA Sec. 301.

Former Law [SDCL 48-2-1](#) and [48-2-2](#).

**Caveat:** UPA Sec. 303 provides for the recording of a statement of partnership authority. Recording of this statement in the office of the register of deeds of the appropriate county provides constructive notice of authority, or lack thereof, under the act. UPA 303(e).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 4, pp. 31-32 (1995).

#### **4-07. Conveyances of partnership interest after death of partner**

After the death of a partner, the surviving partner or partners may convey real property owned by the partnership. After the death of the last surviving partner, the personal representative of the last surviving partner may convey the partnership property provided such conveyance is for partnership purpose.

**Authority:** UPA Sec. 803.

Former Law [SDCL 48-4-15](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 4, p. 33 (1995).

#### **4-08. Partnership--effect of dissolution or cessation of business**

Absent a winding up of the partnership, dissolution or cessation of business as a partnership does not change the status of partnership property as an asset of the partnership.

**Authority:** UPA Sec. 802.

[SDCL 48-5-1](#); [48-5-2](#).

[Jade, Inc. v. Bendewald, 468 NW2d 138 \(SD 1991\)](#).

[Zimmerman v. Harding, 227 US 489, 33 S.Ct. 387, 57 L.Ed. 608 \(1913\)](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 4, p. 32 (1995).

#### **4-09. Partnership--effect of judgments**

A judgment against a partner does not constitute a lien on specific real property owned by the partnership.

**Authority:** UPA Sec. 501;  
Former Law [SDCL 48-4-14](#).

**Cross Reference:** UPA 502, 503 & 504 provide for a “transferable interest” which may be levied upon, but which does not directly reach partnership property.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 4, p. 32 (1995).

#### **4-10. Deed divests present title of all grantors**

A deed in which all parties to the title join conveys and releases all title presently held by the grantors regardless of the nature or character of the interest or interests held by or vested in such grantors. Accordingly, for example, it is unnecessary to refer to the grantors as "joint tenants" if they happen to be such.

**Authority:** Former SDTS 2.1.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 4, p. 30 (1995).

#### **4-11. Partnership--duration presumed**

A title examiner may presume that a partnership continues in existence in the absence of actual knowledge of the dissolution of the partnership.

#### **5-01. Affidavit of marital status**

Recitals as to the marital status of parties to the instrument, or as to the homestead status of the property, or as to the identity of parties named in instruments in the chain of title, in any conveyance or other instrument affecting title to real estate in this state, which has been, or hereafter shall be, recorded in the office of the register of deeds for the county in which the land is situated, or the record of the instrument, or a certified copy of the record, shall be prima facie evidence of the truth of such recitals.

When a conveyance has been recorded and no spouse has joined therein, evidence should be required that the grantor was unmarried at the time of the execution of the conveyance or if married, that the premises conveyed did not constitute the grantor's homestead and that neither the grantor nor any member of the grantor's family reside thereon should be considered sufficient evidence.

The evidence may consist of an affidavit by any person, including the grantor or grantee or an affidavit pursuant to the Marketable Record Title Act, SDCL Ch. 43-30.

**Authority:** [SDCL 43-28-19](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 36; ch. 7, p. 63 (1995).

#### **5-02. Indication of marital status**

A recital in the body of a deed or in a certificate of acknowledgement, or both, that the grantor is single, a widow, a widower, unmarried or divorced, or that the grantors are husband and wife, may be relied upon as a sufficient indication of marital status without inquiry or further notice.

**Authority:** Former SDTS 5.2, 5.3, 5.4, and 5.5; Model Standards 9.1, 9.2 and 9.3.

**Note:** Marital Status Unrecited. A conveyance totally silent on the marital status of the grantor impairs the marketability of the title. [Grand Lodge A.O.U.W. v. Fischer \(1945\) 70 SD 562, 21 NW2d 213, 161 ALR 1466.](#)

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 36 (1995).

### **5-03. Recitation of marital status**

If a deed fails to recite the marital status of the grantor or if a married grantor's spouse fails to join in the conveyance, then the deed is defective unless it is possible to determine from the record that the property is not the homestead of the grantor.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 36 (1995).

### **5-04. Failure to include marital status**

If the description of the marital status of the grantor has been omitted from either the body of the instrument or the certificate of acknowledgment and if the instrument has existed of record for more than twenty years with no action commenced, then it is not necessary to correct the record in order to make the title marketable.

**Authority:** [SDCL 43-29-8\(4\).](#)

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 37 (1995).

### **5-05. Recitals of record**

Employment of factual recitals in conveyance is sound, liberal practice. In the absence of special circumstances creating suspicion, adequate recitals should be accepted and relied upon, for example, in overcoming an error in the given name, names or initials or a minor error in the surname of the person, as the same appears in a prior instrument.

**Authority:** Former SDTS 5.1.

### **5-06. Execution by spouse under power of attorney**

A conveyance of homestead property executed by one spouse, individually, and as attorney-in-fact for the other spouse is sufficient if the power of attorney specifically authorizes conveyance of homestead property.

A conveyance of homestead property executed by a non-spousal attorney in fact for one or both spouses is sufficient.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, pp. 36-37 (1995).

### **5-07. Deed of homestead**

A conveyance or encumbrance of a homestead by its owner, if married and both husband and wife are residents of this state, is valid if both husband and wife concur in and sign or execute such conveyance or encumbrance either by joint instrument or by separate instruments.

**Authority:** [SDCL 43-31-17.](#)

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 36 (1995).

#### **5-08. Rule of idem sonans**

Differently spelled names are presumed to be the same when they sound alike or when their words cannot be distinguished easily or when common usage by corruption or abbreviation has made their pronunciation identical. This rule should be liberally applied.

**Authority:** Former SDTS 10.1.

**Note:** Liberal Application. Doctrine of *idem sonans* should be liberally applied. [Webb v. Ferkins \(1940\) 277 Iowa 1157, 290 NW 112.](#)

Spelling Difference. Where mortgagors named “Peterson” are identified as “Petersen” in the mortgage foreclosure proceedings, the discrepancy is so slight that it should be presumed the parties are identical. [Grand Lodge A.O.U.W. v. Fischer \(1945\) 70 SD 562, 21 NW2d 213, 161 ALR 1466.](#)

**Cross Reference:** Statutory basis for standard, [SDCL 43-29-4](#) and [43-29-7\(5\)](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 37 (1995).

#### **5-09. Use or nonuse of middle names or initials**

The use in one instrument and nonuse in another of a middle name or initial ordinarily does not create a question of identity affecting title, unless the examiner is otherwise put on inquiry.

**Authority:** Former SDTS 10.2; Model Standard 5.2.

**Note:** Abbreviation of Middle Names. Where there was sufficient evidence to show that “G. W. Allen,” “Geo. W. Allen,” “Sir George William Allen,” and “Sir George Allen,” were one and the same person, there is no such reasonable doubt as would render the title unmarketable or not a good and sufficient title. [Spencer v. Lyman \(1911\) 27 SD 471, 131 NW 802.](#)

**Cross Reference:** Statutory basis for standard, [SDCL 43-29-4](#) and [43-29-7\(4\)](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 37 (1995).

#### **5-10. Abbreviations**

All customary and generally accepted abbreviations of first and middle names should be recognized as their equivalents.

**Authority:** Former SDTS 10.3; Model Standard 5.3.

**Note:** Customary abbreviations and derivations of given names may be relied upon. [Brown v. Piper \(1875\) 91 US 37, 23 LEd 200.](#)

**Cross Reference:** Statutory basis for standard, [SDCL 43-29-4](#) and [43-29-7\(4\)](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 37 (1995).

#### **5-11. Name variations**

Name variations from that of the record owner appearing in mechanics' liens, easements, licenses, rights of way or court documents dealing with divorce, probate and similar documents other than mortgages or deeds may be ignored.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, page 37 (1995).

### **5-12. Effect of prefix, suffix and descriptio personae**

Prefixes such as Rev. and suffixes such as M.D. are descriptio personae forming no part of the name and may be disregarded; however, "Senior" and "Junior" and their abbreviations do have significance when both appear in connection with the same name in the chain of title.

**Authority:** Former SDTS 10.4; Model Standard 5.5.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, page 37 (1995).

### **5-13. Statement indicating identity**

A recital such as "formerly known as" may be used in overcoming variations resulting from a change of name.

A recital such as "also known as" may be used in overcoming an error in the given name, names or initials, or a minor error in the surname of a person as the same appears in a prior instrument.

### **5-14. Variance in name of grantors**

If the grantees in one instrument of conveyance are "John Smith and Mrs. John Smith," and the grantors in a succeeding instrument in the chain of title are "John Smith and Mary Smith," further evidence e.g. affidavit, recital, etc., should show that Mrs. John Smith is the same person as Mary Smith. The same conclusion should be reached if the grantees were "John Smith and Mary Smith," and the grantors in a succeeding instrument in the chain of title were "John Smith and Mrs. John Smith."

**Authority:** Former SDTS 10.6.

### **5-15. Variance between signature or body of deed and acknowledgment**

Where the given name or names or the initials used in a grantor's signature on a deed vary from the name as it appears in the body of the deed, but the name as given in the certificate of acknowledgment agrees with either the signature or the name in the body of the deed, the certificate of acknowledgment should be accepted as providing adequate identification.

**Authority:** Former SDTS 10.7.

### **5-16. Deceased persons**

A conveyance to a person who is deceased at the time of the conveyance is invalid.

**Note:** If a deed was prepared and escrowed or Grantee was alive at the time the transaction was entered, this standard is not applicable.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 35 and ch. 7, p. 64 (1995).

### **5-17. Conveyance--fictitious persons**

A conveyance is invalid if the named grantee is a mere fictitious person. If an existing person acquires title to real estate under an assumed or fictitious name, there are specific methods for establishing record identity of the person.

**Note:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, pp. 39-40 (1995).

**Caveat:** Title Examiners do not necessarily agree with the suggestion indicated on page 38 with regard to sole proprietors who are doing business as a different identity. Conveyances by an individual acting under a power of attorney applies only when the written instrument gives specific authorization for conveyances regarding real estate. The examiner should establish that the power is in effect on the date the power is exercised. If no expiration is given on the power of attorney, then the same is terminated by a revocation recorded in the office of the Register of Deeds, or by the death or incapacity of the principal unless the principal has executed a durable or continuing power. A conveyance executed by the attorney-in-fact on behalf of the principal must identify the principal in the body of the instrument and must sign the name of the principal and his or her own name as attorney-in-fact on the conveyance.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 38 (1995).

### **5-18. Powers of attorney**

A conveyance or encumbrance executed by an attorney in fact on behalf of the principal must identify the principal in the body of the instrument. The attorney in fact must then sign the name of the principal and his or her own name as attorney in fact, although it is permissible to type the name of the principal.

**Authority:** [SDCL 59-3-1](#).

**Caveat:** Watch for proper acknowledgment for Power of Attorney. [SDCL 18-5-10](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 39 (1995).

### **5-19. Durable power of attorney**

A durable power of attorney, which contains the words "this power of attorney is not affected by subsequent disability or incapacity of the principal" or similar words showing the intent of the principal that the authority conferred is exercisable notwithstanding the subsequent disability of the principal and all acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal shall bind the principal and the principal's successors in interest as if the principal were competent and not disabled.

**Authority:** [SDCL 59-7-2.1](#) and [59-7-2.2](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 40 (1995).

### **5-20. Grant of power of attorney**

A power of attorney or certified copy thereof must be recorded to establish the authority of an attorney in fact to act on behalf of the principal. The power of attorney must include in its grant of authority the power to sell or convey if a deed is being executed; or the power to mortgage, pledge or grant as security for loans if a mortgage is being executed. The power to sell or mortgage shall be presumed to include the authority to execute the documents related to consummating the transaction.

**Authority:** [SDCL 59-3-12](#) and [59-3-5](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 39 (1995).

### **5-21. Recording power of attorney**

For any deed or conveyance signed by a person under a Power of Attorney, evidence must

be shown of record to be in effect on date of instrument.

**Authority:** [SDCL 44-8-2](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 39 (1995).

### 5-22. Conveyances under authority of power of attorney

Except as otherwise provided herein, Aa general authority to convey shall grant to the attorney-in-fact named in the power of attorney authority to convey any interest the principal has in any property.

Further inquiry may be required if the examiner has reason to believe that the attorney-in-fact engaged in self-dealing without clear and unmistakable language authorizing self-dealing acts in the power of attorney document indicating that the attorney-in-fact is authorized to engage in self-dealing.

Authority: Bienash v. Moller, 2006 S.D. 78, 13, 721 N.W.2d 431, 435

Smith Angus Ranch, Inc. v. Hurst, 2021 S.D. 40

Bienash, 2006 S.D. 78, ¶ 13, 721 N.W.2d at 435

Wyman, 2018 S.D. 17, ¶ 23, 908 N.W.2d at 177

Estate of Stoebner v. Huether, 2019 S.D. 58

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 39 (1995).

### 5-23. Designation of "trustee"

When the name of a party to an instrument is followed by "trustee" or "as trustee" or "in trust", and neither this instrument nor any other recorded instrument in the chain of title sets forth the powers of such party, or names as the beneficiary, a conveyance by such party can be approved without investigation of the power of such party to convey.

**Authority:** Former SDTS 2.2; Model Standard 11.1.

**Note:** [SDCL 55-4-43](#) provides that a certificate may be recorded to provide conclusive proof of the trustee's authority to act. [SDCL 43-28-22](#) provides that conveyances by a fiduciary shall be treated as if they had been made to or by the fiduciary.

Mere Use of Word "Trustee". The mere employment of the word "trustee" after the name of the grantee is insufficient to create a trust or operate as notice of any kind to a subsequent purchaser. [Rua v. Watson \(1900\) 13, SD 453, 83 NW 572](#), followed in [Strain v. Chamberlain Auto & Supply Co. \(1937\) 65 SD 427 274 NW 661](#).

Designation of grantee as trustee does not necessarily create trust. [Hart v. Seymour, 147 Ill 598, 35 NE 246](#); [Hodgson v. Dorsey \(1941\) 230 Iowa 730, 298 NW 895, 137 ALR 456](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 46 (1995).

### 5-24. Trust conveyances--curative statute

A curative statute validates transfers made to or by a trust prior to July 1, ~~2003~~1994, and construes such transfers to have been made to or by the trustee.

**Authority:** [SDCL 43-28-22](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 44 (1995).

### **5-25. Property in trust**

Real property acquired in the name of a trust should be conveyed in the same manner as title was taken.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 44 (1995).

### **5-26. Discrepancy in corporate name**

The alternate use of "Co." for Company, "Inc." for Incorporated, "Corp." for Corporation, "LLC" for Limited Liability Company, "LLP" for Limited Liability Partnership, "PLC" for Professional Limited Liability Company, "Coop." for Cooperative, "Ltd." for Limited, "P.C." for Professional Corporation, and similar common abbreviations, the omission or inclusion of the word "The," whether or not a part of the corporate name, and the alternate use of "and" and " & " may be disregarded as immaterial unless there is evidence of record that the variation has significance.

Where a place or location preceded by "of" or "in" is a part of the title of a corporation and a variance relative thereto appears in the record, it is proper to require the execution of another instrument or an appropriate showing of identity.

**Authority:** Patton on Titles, Secs. 403 (2d ed. 1957).

Bayse, Clearing Land Titles, Sec. 19 (2d ed. 1070).

Former SDTS 10.8.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 48 (1995).

### **5-27. Corporate deed**

The corporate seal or corporate acknowledgment of any corporation attached to a deed, mortgage, assignment of mortgage, release of mortgage or other instruments is prima face evidence that an officer was duly authorized to execute the instrument ~~in~~ on behalf of the corporation and that the person has authority.

**Authority:** [SDCL 43-25-21](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 48 (1995).

### **5-28. Corporate existence**

When an instrument of a private corporation appears in the title and the instrument is executed, acknowledged and sealed in proper form, the title examiner may assume that the corporation was legally in existence at the time the instrument took effect.

**Authority:** Former SDTS 3.1; Model Standard 12.4.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 48 (1995).

### **5-29. Ultra vires not assumed**

Where an instrument of a domestic or qualified foreign private corporation appears in the title, an examiner may assume that the corporation was authorized or not forbidden to acquire and sell the real property affected by instrument.

**Authority:** Former SDTS 3.2; Model Standard 12.5.

**Note:** Presumption of Authority. Courts presume that corporations act within the scope of their powers. [McCannon v.Lusk-Mitchell Newspapers \(1940\) 67 SD 291, 292 NW 82.](#)

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide: ch. 5, p. 48 (1995).

### **5-30. Corporate acknowledgments**

A corporate acknowledgment should not be considered void because the notary public is also an officer, director, employee or stockholder of the corporation.

**Authority:** [SDCL 43-25-20](#) and [18-1-7](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5, p. 48 (1995).

### **5-31. Conveyances to or from unincorporated associations**

Prior to January 1, 1992, a conveyance to an unincorporated association vests title in such association. Any unincorporated association may mortgage or convey real estate so long as the resolutions and notices as required by SDCL 43-25-24 are complied with.

**Authority:** [SDCL 43-25-25](#) and [43-25-24](#).

**Note:** All conveyances by such unincorporated associations prior to January 1, 1992, are presumed valid. ([SDCL 43-25-24](#).)

### **5-32. Authority of unincorporated associations**

An unincorporated religious, benevolent, fraternal, charitable or educational association may mortgage or convey any real estate which is owned by such association by adopting a proper resolution authorizing such mortgage or conveyance and publication as required by statute.

**Authority:** [SDCL 43-25-22](#) and [43-25-23](#).

**Note:** Practitioners should pay specific attention to the association's bylaws in conjunction with the requirement of the statutes.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide: ch. 5, p. 46 (1995).

### **5-33. Conveyance--limited liability company, authority presumed**

Any instrument duly executed and acknowledged by an authorized person of a limited liability company may be presumed to be within the authority and duly authorized by the limited liability company.

**Note:** “Manager” includes any one of the following: President, Vice President, Secretary, Treasurer or Manager of a limited liability company.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5 (1995).

### **5-34. Execution--corporate or limited liability company**

A title examiner may presume the power and authority of any officer of a corporation, except a bank, if a corporate acknowledgement or corporate seal is made a part of the document. Upon review of the Articles of Organization, a title examiner may presume the power and authority of any manager of a manager-managed limited liability company or member of a member-managed limited liability company to execute and acknowledge a document affecting property, unless the Articles of Organization limit the authority.

**Authority:** [SDCL 43-25-21](#) and [47-34A-301](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 5 (1995).

### **5-35. Political subdivisions--no specific standard**

Note: The acts of any political subdivision must be tested by specific statutes governing the type of political subdivision and type of transaction. This would include organized and unorganized counties, school districts, water and sewer districts and others. This would include organized and unorganized counties, school districts, water and sewer districts and others.

### **6-01. Delivery, delay in recordation**

Delivery of an instrument, acknowledged and recorded, is presumed. Delay in recordation, with or without record evidence of the intervening death of the grantor, does not dispel the presumption.

~~However, the fact that such a deed is presumed to be valid and effective does not dispose of the question whether the transfer of the property conveyed may have been subject to inheritance tax. (See Standard [7.1] relative to lien for inheritance tax.)~~

**Authority:** Patton on Titles, Sec. 20

Patton on Titles, Sec. 20 (2d ed. 1957).

Bayse, Clearing Land Titles, Sec. 13 (2d ed. 1970).

Flick, Abstract and Title Practice, Sec. 164, 167.

Flick, Abstract and Title Practice, §§ 384, 387 (2d ed. 1958).

[141 ALR 305](#).

Former SDTS 2.3. Delivery, delay in recordation; Model Standard 6.3.

**Note:** [SDCL 43-28-14](#).

Burden of Proof. Deed duly executed and acknowledged and shown to be in possession of grantee is self-proving and burden of proving nondelivery is upon party claiming nondelivery; presumption is not overcome by fact that deed was not recorded prior to death of grantor. [McGillivray v. Wipf \(1936\) 64 SD 367, 266 NW 724](#), followed in [Senechal v. Senechal \(1962\) 79 SD 416, 112 NW2d 618](#).

Grantor's Reservation of Right to Revoke. Reservation by the grantor of the right to revoke the deed does not make the deed invalid. [Huber v. Backus \(1961\) 79 SD 342, 112 NW2d 238](#).

Mortgage. Under statute providing that grant takes effect only upon delivery by grantor, mortgage was ineffective where it simply remained in mortgagor's personal files until after his death and its existence was unknown to mortgagee during mortgagor's life. [Cox v. Bowman \(1945\) 71 SD 72, 21 NW2d 277](#).

Mutual Deeds between Husband and Wife. Unrecorded mutual deeds between husband and wife executed with intent that survivor take all were ineffective to pass title after death of one spouse. [Kniebbe v. Wade \(1954\) 161 Ohio State 294, 118 NE 2d 833](#).

Return of Deed to Grantor. A delivery is not invalidated by the fact that a grantee returns the deed to the grantor to obtain release of dower or homestead interest of the grantor's wife or for some other special purpose. [Birchard v. Simons \(1932\) 59 SD 422, 240 NW 490](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide: ch. 6, p. 53; ch. 7, p. 65 (1995).

### **6-02 Forms of acknowledgment**

Recommended forms of certificates of acknowledgement for various situations are set forth

in SDCL Chapter 18-4, and SDCL Chapter 18-5. Certificates of acknowledgment substantially following the forms recommend by either chapter are acceptable.

Chapter 18-4's recommendations appear in the following:

SDCL 18-4-12 – General individuals

SDCL 18-4-13 – Corporate officers

SDCL 18-4-14 – Attorneys in fact

SDCL 18-4-15 – Deputy Sheriffs.

SDCL 18-4-29 – Remote Acknowledgement (Video)

Chapter 18-5's recommendations appear in the following:

SDCL 18-5-8 – Individuals

SDCL 18-5-9 – Corporate officers

SDCL 18-5-10 – Attorneys in fact

SDCL 18-5-11 – Public officers and fiduciaries

SDCL 18-5-12 – Partners

The recommended forms may be adapted as appropriate for legal entities, legal representatives, or officers other than those listed.

Authority: SDCL 18-4 and SDCL 18-5

### **6-032. Date of acknowledgment**

A title examiner may disregard the absence of the date of acknowledgment or an acknowledgment dated before or after the date of the instrument.

**Authority:** Patton on Titles, Secs. 197 and 204. Patton on Titles, Secs. 350 and 357 (2d ed. 1957).  
1A CJS, Acknowledgments, Sec. 62.  
5 ALR 2d 1141.

Buck v. Gage, 43 NW 110 (Neb. 1889).

Tenney Co. v. Thomas, 237 NW 710 (ND 1931).

Hernett v. Meier, 173 NW2d 907 (ND 1970).

SDCL 18-5-1.

**Source:** NDTs 1950 amended in 1955, 1961 and 1988.

### **6-043. Notary act presumed valid**

A title examiner may presume that a notarial act outside of South Dakota is in accordance with the laws of that jurisdiction.

**Authority:** SDCL 18-5-15 and 18-5-14.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide: ch. 6, p. 55; ch. 7, p. 65 (1995).

### **6-054. Expired notary**

Where the record of an instrument shows a notarial commission to have expired prior to the date of acknowledgment, the acknowledgment is invalid, but the record of the instrument is constructive notice, subject to the provisions of SDCL 18-5-13.

**Authority:** 1A CJS, Acknowledgments, Sec. 34. Patton on Titles, Set 63 (2d ed. 1957).

[Sousley v. Citizens' Bank of Nepton, 181 S.W. 960, \(Ky. 1916\).](#)

**Note:** Expiration is optional; [SDCL 18-5-13](#).

**Source:** [Wambole v. Foot, 2 NW 239](#) Dakota Terr.; [Cannon v. Deming, 53 NW 863 \(SD 1892\)](#).

### **6-065. Notary seal**

All certificates of acknowledgment by notaries public on documents filed for record are binding, legal, and enforceable regardless of whether the notary seal is stamped or embossed.

**Authority:** [SDCL 18-5-13](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide: ch. 6, p. 55; ch. 7, p. 65 (1995).

### **6-076. *Lis pendens*--effect of judgment**

The entry of judgment in an action for which a *lis pendens* has been filed discharges the *lis pendens*.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 6, p. 54 and ch. 25, p. 308 (1995).

### **6-087. Statute of limitations--*lis pendens***

A title examiner may disregard a *lis pendens* of record more than ten years.

**Authority:** Former SDTS 7.2; Model Standard 22.2; [SDCL 43-29-1](#).

**Cross Reference:** Statutory basis for standard, [SDCL 43-29-1, 43-29-7\(1\)](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 6, p. 54 and ch. 25, p. 308 (1995).

### **7-01. Signatures by mark**

A title examiner should not object to a signature or subscription by "mark" even though there is no witness if the instrument contains a proper certificate of acknowledgment.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 7, p. 63 (1995).

### **7-02. Alternative grantees**

A conveyance to grantees in the alternative renders the conveyance void.

**Authority:** Patton on Titles, Sec. 183.

Patton on Titles, Sec. 336 (2d ed. 1957).

**Note:** [Armstrong v. Hellwig, 18 NW2d 284 \(SD 1945\)](#).

### **7-03. Strangers to title**

An instrument executed by a person who is a stranger to the record chain of title at the time such instrument is recorded does not make the title unmarketable, unless recently recorded, in which event some inquiry may be justified.

A title examiner should take notice of the interest of a person joining with the record owner

in a contract, mortgage, lease, plat or easement, other than a spouse joining for possible homestead interest. Conveyances by strangers to the chain of title may be disregarded, unless a title examiner has actual notice of knowledge (through sources other than the record) of the interest of the grantor, or unless subsequent to such conveyance there is recorded a deed or other conveyance vesting title in such stranger.

**Authority:** Former SDTS 2.4; Model Standard 3.3; Bayse, Clearing Land Titles, Sec. 42 (2nd ed. 1970).

**Note:** Conveyance by Stranger. A conveyance or encumbrance attempted by one who has no interest in the property and is a stranger to the chain of title does not constitute a cloud upon such title. [Tripp v. Sieler \(1917\) 38 SD 221, 164 NW 67](#).

Equitable Interest. In view of statute providing for keeping of numerical index in office of register of deeds, purchaser is charged with notice of previously recorded mortgage even though mortgagor had only equitable title and did not appear as transferee in regular chain of title. [Fullerton Lumber Co. v. Tinker \(1908\) 22 SD 427, 118 NW 800, 18 Ann Cas 11](#).

#### **7-04. Quit claim--after acquired title**

A quit claim deed does not pass after-acquired interest in property, unless words expressing such intent are added.

**Authority:** [SDCL 43-25-8](#).

23 Am.Jur.2d, Deeds, Section 14.

Patton on Title, Sec. 126, p. 427.

Patton on Title, Sec. 216 (2d ed. 1957).

**Source:** [State v. Kammeraz, 84 NW 771](#) and [90 NW 150 \(1900\)](#); Carlsen and Kirkeby, South Dakota Land Title Guide: ch. 7, p. 61 (1995).

#### **7-05. Deeds--after acquired title**

A warranty deed, limited warranty deed or special warranty deed passes after acquired title.

**Authority:** [SDCL 43-25-17](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide: ch. 7, p. 61 (1995).

#### **7-06. Marketable title acts**

Chapter 233 Laws for 1947

Chapter 256 Laws for 1951 (SDC Supp. 51.16B)

Chapter 266 Laws for 1957 (SDC 1960 Supp. 51.16B)

[Chapter 43-30]

The above are valid statutes of limitation and may respectively be relied upon as a cure or remedy for imperfections in the chain of title and a bar against all claims arising prior to the several dates referred to in each, except those specifically reserved therein. As a prerequisite to reliance upon these statutes for the purpose of title examination, it will be necessary only to require that the abstract or record examination show the recording of an affidavit of possession, as required by the act relied on; that such possession is in the holder of the record title and that there is no claim of record under the provisions of the act relied upon.

**Authority:** Former SDTS 8.1.

#### **7-07. Affidavit of possession to be recorded--affiant**

In the event the condition of the title or the abstract is such that it is deemed necessary or advisable to gain the benefit of the provisions of the marketable title statute, now SDCL 43-30, in order to attain the benefit thereof it shall be necessary that the Affidavit as prescribed therein be executed and placed of record. The Affidavit may be made by anyone who knows the facts.

**Authority:** Former SDTS 8.3.

#### **7-08. Affidavit of possession as basis for creating marketable title under tax deed**

Where a tax deed is regular on its face and has been of record for twenty-three years or longer, the title conveyed thereunder can be considered as marketable, if the affidavit of possession as prescribed by SDC Supp. 51.16B07, as amended by Ch. 266 of the Laws of 1957, SDC 1960 Supp. 51.16B07 [§ 43-30-7] is made and filed for record.

**Authority:** Former SDTS 8.2.

**Note:** Nature of Tax Title. A tax title is not derivative, nor the title of the person who had been assessed and had failed to pay the taxes, but it is a new title in the nature of an independent grant from the sovereignty, extinguishing all former titles and liens not expressly excepted. [Warren v. Blackman \(1933\) 62 SD 26, 250 NW 681.](#)

Where abstract shows filing of affidavit and no claims thereunder, tax title is marketable. Title originating through treasurer's tax deed would not be considered unmerchantable where compliance with Marketable Title Act could cure defect. [Renner v. Crisman \(1964\) 80 SD 532, 127 NW2d 717.](#)

#### **7-09. Use of affidavits**

A title examiner may rely upon affidavits as to facts in relation to the title in the following cases:

1. From any person based on personal knowledge stating:
  - a. The identity of any person appearing in such chain of title under names varying in the spelling thereof or in the use of initials; or
  - b. That certain property was or was not homestead property.
2. As to marital status.
3. To explain ambiguous recitals in instruments of record.
4. Marketable record title affidavits under SDCL Ch. 43-30.
5. When authorized by any other statute.

**Authority:** SDCL 43-28-3.1 and [43-28-19.](#)

#### **7-10. Contents of affidavit--interest of maker**

An affidavit may be used as a means of correcting discrepancies and variances in names and in other cases where it may be accepted as curative evidence under South Dakota statute. It should include some showing that the material statements in it are based on affiant's personal knowledge. The value of an affidavit is not diminished by the fact that the maker is interested in the title or the subject matter of the affidavit, when nothing appears in the record to affect his

credibility.

**Authority:** Former SDTS 16-03 and prior to that SDTS 5.6.

**Cross Reference:** Affidavit entitled to recording, [SDCL 43-28-2](#), [43-28-4](#).

### **7-11. Corrective instruments**

A grantor who has conveyed by an effective, unambiguous instrument cannot, by executing another instrument, make a substantial change in the name of the grantee, decrease the size of the premises or the extent of the estate granted, impose a condition or limitation upon the interest granted, or otherwise derogate from the first grant, even though the latter instrument purports to correct or modify the former. However, marketability dependent upon the effect of the first instrument is not impaired by the second instrument.

**Authority:** Former SDTS 7-10. R. & C. Patton, Titles '82 (2d ed. 1957); Decennial Digests, Deeds, Key No. 43; [Kirkpatrick v. Ault, 177 Kan. 552, 280 P.2d 637 \(1955\)](#); [Watlers v. Mithcell, 6 Cap.App. 410, 92 P. 315 \(1907\)](#); [Lytle v. Hulen, 128 Or. 483, 275 P. 45 \(1929\)](#).

**Note:** History--Adopted as 4.4, December 2, 1961, 32 O.B.A.J. 2280 (19631), printed, *id.* at 1865, 1920, 1969 & 2029, *see also id.* at 1425.

### **7-12. Instruments which are altered and re-recorded**

The act of re-recording an instrument, after it has been materially altered, does not of itself destroy the rights of the parties to the original unaltered instrument.

To give effect to a material alteration of a previously recorded document affecting title to real property, the instrument must be re-executed, re-acknowledged, re-delivered and re-recorded. However, a grantor cannot unilaterally derogate from a previous grant; see Standard 3.4.

A material alteration to an instrument is defined as an alteration which changes the legal effect of the instrument or the rights and liabilities of the parties to the original instrument.

**Authority:** Former SDTS 7-11. 15 O.S. § 239; [Briggs v. Sarkey, 418 P.2d 620 \(Okla. 1966\)](#); [Smith v. Fox, 289 P.2d 126 \(Okla. 1954\)](#); [Boys v. Long, 268 P.2d 890 \(Okla. 1954\)](#); [DeWeese v. Baker-Kemp Land Trust Corporation, et al., 187 Okla. 1341, 102 P.2d 884 \(1940\)](#); [Sandlin v. Henry, 180 Okla. 334, 69 P.2d 332 \(1937\)](#); [Criner v. Davenport-Bethel Co., 144 Okla. 74, 289 P.742 \(1930\)](#); [Eneff v. Scott, 120 Okla. 33, 250 P. 86 \(1926\)](#); [Sipes v. Perdomo, 118 Okla. 181, 127 P. 689 \(1925\)](#); [Orr v. Murray, 95 Okla. 206, 219 P. 333 \(1923\)](#); [Francen et ux. v. Okla. Star Oil Co., 80 Okla 103, 194 P. 193 \(1921\)](#); Patton on Titles, § 65 n. 36.

**Note:** What constitutes a material alteration varies depending on the court's analysis of the facts of each case. As to changing a name of a party to an instrument, *see* [Sipes v. Perdomo, Sandlin v. Henry and Criner v. Davenport-Bethel Co., supra](#), and [American National Bank of Wetumka v. Hightower, 87 P.2d 311, 315 \(Okla. 1939\)](#).

### **7-13. Conveyances--farm credit--right of first refusal**

Agricultural real estate that is conveyed or leased by a Farm Credit System entity after January 6, 1988 is subject to a right of first refusal in the previous owner-mortgagor. If the Farm Credit System entity conveys or leases land to a person other than the previous owner-mortgagor had been offered the right to repurchase or lease the acquired land, and has failed to exercise that right. Documentation can include an affidavit from a Farm Credit System agent.

**Authority:** [12 USC 2219a \(PL 100-233\)](#) dated January 6, 1988; 101 Stat. 1582).

**Note:** Farm Credit System entities include Federal Land Bank Associations, Federal Land Banks, Farm Credit Banks, Farm Credit Services, Production Credit Associations, Federal Intermediate Credit Banks and Bank for Cooperatives.

Notice should be taken of the rights of borrower-previous owners, operators and other entities to purchase of lease agricultural real estate acquired by the Farmers Home Administration as provided under [7 USC 1981 et seq.](#)

**Cross Reference:** Former [SDTS 7-12](#) and prior to that former [SDTS 3-04](#).

### **8-01. Ownership of water**

All waters within the limits of the State of South Dakota subject to limitations as provided belong to the public. An examiner may ignore in his opinion any reference thereto.

### **8-02. Accretion, reliction, erosion and avulsion**

The effects of accretion, reliction, erosion and avulsion should be taken into consideration when examining title to real property bound by a body of water.

**Authority:** [SDCL 43-17-5](#) to [43-17-9](#), [43-17-10](#), [43-17-14](#) to [43-17-19](#), [31-18-4](#).

**Note:** The boundary line of a parcel of land bordering upon a body of water may shift with the bed of such body. A title examiner should consider whether a survey is necessary to determine if the boundary may have shifted.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 8, p. 83 (1995).

### **8-03. High-water mark boundaries**

The public has a right to use the strip of land 50 foot landward from all navigable waters provided the strip is between the ordinary high water mark and ordinary low water mark of public bodies of water.

**Authority:** [SDCL 43-17-1](#); 43-17-2.

### **8-04. Road and street as boundaries**

An adjacent owner is presumed to own to the middle of a platted road, though the public has a right to use the platted road.

**Authority:** [SDCL 11-3-6](#), [11-3-12](#), [43-16-3](#) and [43-25-29](#).

**Cross Reference:** A transfer of land bounded by a highway passes the title of the person whose estate is transferred to the soil of the highway in front, to the center thereof, unless a different intent appears from the grant. [Pluimer v. City of Belle Fourche 549 NW2d 202, 1996 SD 65](#).

### **8-05. Vacated highway, street, alley or public right of way**

A conveyance of real estate, which abuts upon a vacated highway, street, alley, other public right-of-way, includes the vacated highway, street, alley or public right-of-way, either by operation or presumption of law, unless a contrary intent appears.

**Authority:** [SDCL 43-25-29](#), [43-25-30](#), [31-3-10](#) and [31-19-60](#).

### **8-05.1. Effect of abandonment of public use easement by South Dakota Department of Transportation or county commission.**

A public use easement held by the South Dakota Department of Transportation or a county may be abandoned by resolution of the South Dakota Transportation Commission or board of county commissioners, respectively, and such lands then revert to the former owner or such former owner's assigns.

**Authority:** SDCL 31-19-60.

### **8-06. Conveyances to state for highway purposes**

In transfers to the State of South Dakota or any of its political subdivisions of property for highway purposes, the grantee only acquires an easement. (No opinion is expressed as to ownership of non fluid minerals/substances on or underlying the grantee's acquired right of way.) Prior to July 1, 1986, the South Dakota Department of Transportation could not acquire fee title in right-of-way. On and after July 1, 1986, the South Dakota Department of Transportation may acquire fee title in right of way by gift, devise or purchase, but may not acquire fee title in right of way acquired by condemnation.

**Authority:** SDCL 43-16-3; S.D. Const. Art. VI, § 13; and *Pluimer v. City of Belle Fourche*, 549 NW2d 202, 1996 SD 65, and *Northwest Realty Co. v. Jacobs*, 273 N.W.2d 141 (S.D. 1978). (Whether a conveyance of right of way transfers fee title or only an easement depends on the following factors: (1) amount of consideration; (2) particularity of description; (3) extent of limitation on use; (4) type of interest that best serves parties' intent; (5) peculiarities of wording; (6) to whom was property assessed and who paid taxes; and (7) how have parties, heirs and assigns treated the property. Of these factors, considerable weight is given to the language of the conveying instrument. Interpreting the instrument begins with the presumption of fee simple title, unless it appears from the granting language that a lesser estate was intended. The final construction of the conveying instrument must give fair consideration to the entire instrument and give effect to all words.)

**Note:** If a deed does not reference that it is “for highway purposes,” then the deed may convey title in fee simple.

### **8.06.1. Rights of way in state trunk highway system acquired prior to 1939.**

Effective July 1, 1939, all rights-of-way of the state trunk highway system, together with all appurtenances, the right or interest in or to which was in any county, transferred to and vested in the State of South Dakota for highway purposes by operation of law.

**Authority:** S.D. Code of 1919 § 18.1301; 1939 S.D. Sess. L. ch. 113.

### **8-07. Dedication of streets, etc.**

Title is not made unmarketable if streets, alleys and public grounds in a platted area, outside of or inside a municipality, are not expressly dedicated in the owner's certificate on the plat. They may be dedicated in any appropriate manner.

**Authority:** Former SDTS 13.1; SD Standards, p. 39.

### **8-08. Mineral ownership--notation**

A title examiner need not refer to the mineral ownership where no severance appears in the record, unless a specific request for it is made.

**Authority:** Former SDTS 8-09.

### **8-9. Severance of minerals--notation**

A title examiner need not note the severance of the mineral estate from the surface nor indicate the present ownership of the minerals if the examiner includes a caveat that no opinion is expressed as to the status of the mineral estate.

**Note:** A title examiner should note the possibility of rights of ingress and egress in the surface estate because of severed minerals.

**Authority:** Former SDTS 8-10

### **8-10. Conveyances of royalties and minerals**

In conveyances affecting mineral estates distinction between perpetual non-participating royalty and a conveyance of perpetual mineral interests should be noted, and the respective burden of a perpetual royalty interest on the mineral estate should be contained in the opinion.

**Authority:** Former SDTS 8-11.

### **8-11. Oil and gas leases--contingent future interests**

Where an oil and gas or other mineral lease covers land subject to a contingent future interest, the oil and gas or other mineral lease must be executed by the statutory trustee.

**Authority:** 64 ALR 2d 932.  
**Former SDTS 8-12.**

### **8-12. Leases--oil--gas**

Prior to July 1, 1995, where the mineral owner is deceased an oil-gas lease must be executed by the personal representative as provided by statute.

After July 1, 1995, a personal representative of an estate holding unrestricted letters may execute oil and gas leases and other instruments affecting the mineral estate without court approval.

**Authority:** Bancroft, Probate Practices, (2d Ed.) Sec. 8.  
**Former SDTS 8-13.**

### **9-01. Easements as encumbrances**

Easements, including those reflected on plats, servitudes or non-appurtenant restrictions on the use of real property should be noted as encumbrances.

### **9-02. Rights-of-way as encumbrances**

A covenant of warranty should not be considered broken by the existence of a highway or

railway, or right-of-way for either, upon the land conveyed by an instrument of conveyance, unless otherwise particularly specified in the deed. However, the existence of such highway, railway, or right-of-way should be noted.

**Authority:** Patton on Titles, §§ 599, 600 (2d ed. 1957).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide: ch. 9, p. 92 (1995).

### **9-03. Conveyances--effect of reservations or exceptions**

A deed referring to a nonexistent reservation or exception and made expressly subject thereto does not operate to reserve and except to the grantor any interest in the matter or matters made subject to exception or reservation and the same shall be considered to have passed to the grantee notwithstanding such recitation in the deed.

**Authority:** Murray v. United States, 292 F.2d 161 (8th Cir. 1961).

[Winter v. United States, 783 F.2d 152 \(8th Cir. 1986\).](#)

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide: ch. 9, p. 93 (1995).

### **9-04. Railroads**

When determining the status of title for lands that contain ownership by a railroad in the chain of title, you must consider the source of the title and the language of the document vesting title in the railroad. Railroads may obtain title through grants, condemnation or purchase. Language in the vesting document may state or imply a fee simple interest or easement interest but several cases have interpreted the interests differently depending upon the timing of the conveyance and the language of the document.

**Authority:** This standard provides references to begin research for railroad ownership issues. It does not provide a rule that railroads own a fee, an easement, or some other interest in the real property where the railroad is or was located.

**Cross Reference:** [43 U.S.C. §§ 934-939](#) (General Railroad Right-of-Way Act of 1875); [43 U.S.C. § 912](#) (Disposition of Abandoned railroads); [43 U.S.C. §§ 904-907](#) (Abandonment of Railroad Rights-of-Way); [25 U.S.C. §§ 312-318](#) (Railroad rights-of-way across Indian Reservations); [Rio Grande Western Railway Company v. Stringham, 239 U.S. 44 \(1915\).](#)

[Great Northern Railway Co. v. U.S., 315 U.S. 262, 62 S.Ct. 529 \(1942\)](#) (citing [43 U.S.C. §§ 934-939](#)).

[City of Aberdeen v. Chicago and North Western Transp. Co., 602 F.Supp. 589 \(D.C.S.D. 1984\)](#) (citing [43 U.S.C. §§ 934-939](#) and Great Northern Railway (above)).

[Barney v. Burlington Northern Railroad Co., Inc., 490 NW2d 726. \(SD 1992\)](#) (citing [43 U.S.C. § 912](#)).

[Meyerink v. Northwestern Public Service Co., 391 NW2d 180 \(SD 1986\).](#)

[Nystrom v. State, 104 NW2d 711 \(SD 1960\)](#)

[Sherman v. Sherman, 122 NW 439 \(SD 1909\).](#)

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide: ch. 9, p. 93. (1995).

### **9-05. Wind or solar energy easements**

A property owner may grant a wind or solar easement properly created and recorded, however, the maximum term of such easement is fifty years. Any such easement is void if no

development of the potential to produce energy from wind or solar power associated with the easement has occurred within five years after the effective date of the easement.

**Authority:** [SDCL 43-13-17](#).

#### **9-06. Wind or solar energy rights--limitation on severance**

No interest associated with the production or potential production of energy from wind or solar power may be severed from the surface estate as defined in § 45-5A-3 except that such rights may be leased for a period not to exceed fifty years. Any such lease is void if no development of the potential to produce energy from wind or solar power has occurred on the land within five years after the lease began.

**Authority:** [SDCL 43-13-19](#) and [43-13-17](#).

#### **9-07 – Wind or solar energy easement – mortgage by holder**

If the wind or solar easement holder mortgages or otherwise encumbers to any party any part of the easement holder's rights and interests under the easement, any such mortgage or encumbrance on the easement is the responsibility of the wind or solar easement holder and attaches only to the easement holder's rights and does not otherwise attach to the land or obligate the property owner.

**Authority:** [SDCL 43-13-17](#).

#### **10-01. Covenants, conditions and restrictions defined**

The term "covenants, conditions and restrictions" is used in title examining to describe various limitations on the use of land imposed in deeds or other instruments in the chain of title.

**Note:** Restrictions on the use of land may assume several forms. *Hammerquist v. Warburten*.

**Cross Reference:** [SDCL 43-25-6](#), ch. 11-5.

**Source:** Carlsen and Kirkeby, *South Dakota Land Title Guide*, ch. 10, p. 101 (1995).

#### **10-02. Covenants, conditions & restrictions are generally deemed to run with the land**

Covenants contained in conveyances of real property are appurtenant and pass with them to the successor in interest and run with the land.

**Authority:** [SDCL 43-12-1](#).

**Caveat:** Any restriction against alienation is void. [SDCL 43-5-1](#).

**Cross Reference:** [SDCL 43-12-2](#), 3; *see also* ch. 11-5.

**Source:** Carlsen and Kirkeby, *South Dakota Land Title Guide*: ch. 10, p. 102 (1995).

#### **10-03. General plan restrictions--subdivision of tracts**

Uniform restrictions as to the use and occupancy of all lots in a subdivision may be imposed by properly executing and recording a declaration or contract.

**Authority:** SDCL ch. 11-5.

**Source:** Carlsen and Kirkeby, *South Dakota Land Title Guide*: ch. 10, p. 102 (1995).

#### **10-04. Revocation of declaration or contract--execution by successor in interest**

In first and second-class municipalities an owner and all successor owners in interest may revoke and cancel the covenants by a properly recorded deed of revocation. Such revocation is not effective until approved by the governing body of the municipality.

**Authority:** [SDCL 11-5-6](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide: ch. 10, p. 103 (1995).

#### **10-05. Expiration of covenants, conditions and restrictions**

Declarations authorized by SDCL 11-5-1 and 11-5-2 shall only be prescribed but not exceed forty years from the date of the declaration.

**Authority:** [SDCL 11-5-4](#).

**Caveat:** [SDCL 11-5-1](#) and [11-5-2](#) speak to restrictions of landowners in a first or second-class municipality.

**Cross Reference:** [68 ALR 2d 1022](#); [95 ALR 458](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide: ch. 10, p. 103 (1995).

#### **10-06. Validity of restrictions**

A title examiner need not determine the validity or enforceability of covenants, conditions or restrictions but should show those in the chain of title.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 10 (1995).

#### **10-07. Restrictions in derogation of existing law**

Covenants, conditions or restrictions which contain language that discriminates on the basis of race, color, religion, sex or national origin are unenforceable and void.

**Caveat:** The exception would be unless and only to the extent said covenant is (a) exempt under Ch. 42, Section 3607 of the United States Code or (b) relates to handicap but does not discriminate against handicapped persons.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide: ch. 10, p. 106 (1995).

#### **11-01. Medical assistance lien**

A medical assistance lien created under SDCL 28-6 becomes a lien against real property only from the time the lien is filed with the Register of Deeds.

**Authority:** [SDCL 28-6-24](#) and [28-6-25](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 24, pp. 291, 295 and 296 (1995).

#### **11-02. Child support liens**

The Department of Social Services may impose a lien for support obligations and the notice of lien, properly filed with the Register of Deeds, establishes the priority as of the date of filing.

**Authority:** [SDCL 28-20-2](#).

**Note:** This provision was created by the legislature in 1986. However, the legislature failed to include any provisions regarding the satisfaction of such lien.

### **11-03. Tax lien--county**

A county poor lien becomes a lien against real property at the time the record is filed in the office of the Register of Deeds of the county in which the poor person resides or in the county of his legal residence or last residence if he is an inmate of a state institution or deceased. All liens created prior to July 1, 1970, are terminated as a matter of law.

**Authority:** [SDCL 28-14-6](#) and [28-14-20](#)

**Note:** The Board of County Commissioners has the authority to correct, compromise, settle or otherwise release, discharge, or satisfy a county lien.

### **11-04. Poor relief lien**

Any lien established under SDCL 24-14 with regard to county poor relief shall continue, a foreclosure shall not be commenced until one year after the last payment to or for the benefit of the poor person during the lifetime of the poor person or until after the death of the poor person. Any lien or encumbrance created prior to July 1, 1970, is terminated as a matter of law.

**Source:** [SDCL 28-14-20](#) and [28-14-11](#).

### **11-05. Claims under federal laws**

A title examiner need not mention in the opinion the possibility of claims under federal laws which do not show upon local records.

**Authority:** [SDCL 15-16-29](#) and [15-16-28](#).

**Cross Reference:** Former SDTS 3-11.

### **11-06. Tax Lien--State or Federal**

A federal or state tax lien becomes a lien against real property from the time the lien of the tax is entered in the index of tax liens kept by the register of deeds.

**Authority:** [SDCL 44-7-2.1\(2\)](#); SDCL ch. 10-59

**Cross Reference:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 12, p. 124 (1995).

### **12-01. Judgments--lapse**

A title examiner may ignore a judgment after ten years have passed from the date on which it was docketed unless the judgment has been renewed as provided in SDCL 15-16-33.

**Authority:** [SDCL 15-16-7](#).

**Cross Reference:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 12, p. 123 (1995).

### **12-02. Divorce--judgment affecting defendant's title**

A divorce judgment which states that the defendant is entitled to the plaintiff's interest in real property owned either jointly between plaintiff and defendant or by plaintiff alone shall be sufficient to vest title in the defendant if the divorce judgment contains the following information

and statement:

- (1) A legal description of the property being vested in said defendant; and
- (2) A statement by the court that should the plaintiff fail to execute an appropriate instrument of conveyance, the judgment shall act in lieu of such conveyance.

### **12-03. Divorce--sufficiency of judgment**

A divorce judgment vesting in the plaintiff the defendant's interest in real property, whether owned solely by said defendant or jointly with said plaintiff, shall be sufficient to vest the defendant's interest in such property, provided that the judgment or the court's file affirmatively shows the following:

- (1) The legal description of property;
- (2) A statement by the court that should the defendant fail to execute appropriate instrument of conveyance, the decree thus being entered shall act in lieu of such conveyance; and
- (3) The defendant appeared in said action after having been served either by publication or personally and by such appearance, either stipulated to the entry of judgment and property settlement, which stipulation agreed to the vesting of the property in question or the action was litigated after due appearance at the hearing at which said judgment was ordered; and
- (4) If there was no appearance by the defendant after being served either personally or by publication, the judgment must affirmatively show further as follows:
  - (a) If defendant was served personally, that the complaint indicated the action was for the purpose of divesting defendant's interest in the particular property and the complaint set forth in full the legal description of said property; or
  - (b) If the service was by publication, that the summons and complaint indicated the action was for the purpose of divesting defendant's interest in the particular property by full legal description and that the affidavit for publication indicated that the action was for divorce and also for purposes of divesting defendant's interest in real property.

### **12-04. Notice of levy**

A notice of levy, when properly recorded under SDCL 15-18-22, may only be released upon:

1. Proof of the satisfaction of judgment;
2. A deed from the debtor specifying the intent to satisfy the judgment;
3. Proper release from the levy;
4. Sheriff's deed; or
5. Release or abandonment of the execution.

**Authority:** [SDCL 15-18-32](#) and [15-19-24](#).

**Note:** In most cases, Agisters' liens and crop liens are not liens recorded against real property.

**Source:** SDCL 40-7-1 [SDCL 40-27-1](#) and [38-17-7](#).

### **12-05. Real property abandoned by bankruptcy trustee**

The marketability of title to real property abandoned by a bankruptcy trustee for debtor-in-possession exercising the powers of a bankruptcy trustee is not adversely affected if the following should appear of record:

- (1) The petition in bankruptcy of the title holder;

- (2) The certificate of commencement of a case under Title 11, United States Code;
- (3) If the case was commenced under Ch. 7, Ch. 12 or Ch. 13 of Title 11, United States Code, or if a trustee was appointed pursuant to 11 U.S.C. § 1104, the order appointing trustee and the order approving trustee's bond;
- (4) In any case under Title 11, United States Code, a motion for abandonment, an order for or notice of hearing with proof of service, and an order authorizing abandonment; if no separate proceedings were had for abandonment but such abandonment was made a part of the final report of the trustee, there should appear of record the final report, the notice of hearing on the final report, with proof of service, and the order closing the estate;
- (5) If the property was abandoned pursuant to the terms of a plan under Ch. 11, Ch. 12 or Ch. 13 of Title 11, United States Code, an order for or notice of hearing on confirmation with proof of service and an order of confirmation.

**Authority:** Former SDTS 14.1.

**Derivation:** Adopted at Annual Meeting of State Bar, June 20, 1987.

#### **12-06. Real property claimed as exempt by debtor**

The marketability of title to real property claimed as exempt by a debtor in a bankruptcy proceeding is not adversely affected if the following should appear of record:

- (1) The petition in bankruptcy of the title holder;
- (2) The certificate of commencement of a case under Title 11, United States Code;
- (3) That portion of the schedules of the debtor reflecting that the property involved was listed and claimed as exempt;
- (4) The certificate of the clerk of the bankruptcy court or the clerk of the United States District Court showing that no objections to the debtor's claim of exemptions were filed, or an order of the Bankruptcy Court or United States District Court determining that the property was properly exempt.

**Authority:** Former SDTS 14.2.

**Derivation:** Adopted at Annual Meeting of State Bar, June 20, 1987.

#### **12-07. Real property sold free and clear of any interest in course of bankruptcy proceedings**

The marketability of title to real property sold free and clear of any interest in such property in the course of any bankruptcy proceeding is not adversely affected if the following should appear of record:

- A. If the real property is sold by a debtor-in-possession then the following shall be required:
  - (1) The petition in bankruptcy of the title holders;
  - (2) The certificate of commencement of case under Title 11, United States Code;
  - (3) The notice of proposed action or motion to sell property free and clear of any interest, an order for or notice of hearing with proof of service, and an order confirming such sale with proof of service;
  - (4) If the debtor did not hold the only ownership interest in the property, a summons and complaint requesting authority to sell free and clear of the other ownership interest, with proof of service, an order or judgment authorizing such sale with proof of service, a notice of proposed action or motion to sell property free and clear of any interest; an order for or notice of hearing with proof of service, and an

- order confirming sale with proof of service;
- (5) A deed from the debtor-in-possession.
- B. If the real property is sold by a trustee then the following shall be required:
- (1) The petition in bankruptcy of the title holders;
  - (2) The certificate of commencement of case under Title 121, United States Code;
  - (3) If the case was commenced under Ch. 7, Ch. 12 or Ch. 13 of Title 11, United States Code, a copy of the document appointing the Ch. 7, Ch. 12 or Ch. 13 trustee;
  - (4) If the case was commenced under Ch. 11 of Title 11, United States Code, and a trustee was appointed pursuant to 11 U.S.C. § 1104, a certified copy of the order appointing the Ch. 11 trustee;
  - (5) The notice of proposed action or motion to sell property free and clear of any interest, an order for or notice of hearing with proof of service, and an order confirming such sale with proof of service;
  - (6) If the debtor did not hold the only ownership interest in the property, a summons and complaint requesting authority to sell free and clear of the other ownership interest, with proof of service, an order or judgment authorizing such sale with proof of service, a notice of proposed action or motion to sell property free and clear of any interest; an order for or notice of hearing with proof of service, and an order confirming sale with proof of service;
  - (7) A deed from the trustee.

**Authority:** Former SDTS 14.3.

**Derivation:** Adopted at Annual Meeting of State Bar, June 20, 1987; Amended at Annual Meeting of State Bar, June 16, 1990.

### **12-08. Bankruptcy lien avoidance**

A lien may be deemed to have been extinguished if the bankruptcy court issues an order avoiding the lien.

**Authority:** Former NDTS 1988.

### **12-09. Bankruptcy discharge**

A discharge operates to extinguish the personal liability of the debtor only. It does not extinguish the debt as to any other person or any lien perfected after filing and which is not avoided.

**Authority:** Former NDTS 1988.

### **13-01. Mechanic's lien**

A mechanic's lien may be disregarded after lapse of the time within which suit for foreclosure may be filed (six years), unless proceedings for its foreclosure have previously been commenced.

**Authority:** Former SDCL 7.3; Model Standard 17.1; (SDTS 7.3)

**Cross Reference:** Limitation on mechanic's lien, [SDCL 44-9-24](#).

### **13-02. Mechanic and materialmen's lien**

The filing of a Notice of Project Commencement does not constitute a cloud, lien or encumbrance upon, or defect to the title of the real property described in the notice.

**Source:** [SDCL 44-9-52](#).

### **14-01. Mortgages**

Whenever a conveyance shows affirmatively that it was given as security it should be treated as a mortgage.

Whenever a conveyance is from the record owner to the holder of a mortgage on the property that fact alone does not place a subsequent purchaser on inquiry as to whether the conveyance was given as security and is not grounds for an objection unless by reason of the date or recital it places a purchaser on inquiry.

**Authority:** Former SDTS 9.1; Model Standard 16.3 (1).

**Note:** (Modify in light of [SDCL 43-29-7\(2\)](#) and Rau).

Security Transaction Intended. Title cannot be quieted in an ostensible grantee, filing suit in 1953 where the trial court found that the original parties in 1931 intended a security transaction and there was nothing of record to indicate that the conveyance was a deed. [Fuller v. Middaugh \(1956\) 76 SD 288, 77 NW2d 841](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 14, p. 147 (1995).

### **14-02. Reference to nonrecorded mortgage**

When a deed filed for record more than twenty years refers to a mortgage which is not shown of record and the record does not show that any action has been commenced with reference thereto, such reference to mortgage may be disregarded.

**Authority:** Former SDTS 9.2.

**Cross Reference:** Statutory basis for standard, [SDCL 43-29-8\(3\)](#).

**Source:** SD Standards, p. 16 (Former No. 15).

### **14-03. Mortgages--release or assignment**

Where a mortgage has been re-recorded and a release or assignment is given which describes only one of the recordings, the release or assignment is sufficient; but where a new mortgage is recorded which purports to be given to correct a defect in a former mortgage, there should be a release or assignment of both mortgages.

**Authority:** Patton on Titles, Sec. 567 (2d ed. 1957).

Bayse, Clearing Land Titles, Sec. 353 (2d ed. 1070).

[98 ALR 843](#).

[Don Kral v. Lindstrom, 173 NW 2d 921 \(Minn. 1970\)](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 14 (1995).

### **14-04. Mortgages--statute of limitations**

A mortgage past due more than fifteen years from its due date or recorded extension

thereof, or if no due date is stated therein or ascertainable therefrom, thirty years from the date of the mortgage, is ineffective and void and the record thereof may be disregarded.

**Authority:** Former SDTS 7.4; [SDCL 15-2-5](#), [15-2-7](#) and [15-2-28](#).

**Caveat:** A different statute of limitation applies to a collateral real estate mortgage pursuant to [SDCL 44-8-26](#).

**Cross Reference:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 11, p. 119 and ch. 14, p. 147 (1995).

#### **14-05. Satisfaction by one of plural mortgagees**

Where a mortgage is given to two or more mortgagees a satisfaction by one of such mortgagees is sufficient to release the mortgage except where the mortgage shows that it secures debts which are owned separately by the different mortgagees.

**Authority:** Former SDTS 9.5.

**Source:** 59 CJS, Mortgages, Section 45S (2).

[Delaney, et al. vs. Fritz \(Minn\) 21 NW 2d 479](#).

Patton Titles, 2nd Addition, Section 567 at Page 460.

Restatement, Contracts, Section 130.

Williston on Contracts, Section 343 (3rd ed. 1957).

[142 ALR 371](#).

Corbin on Contracts, Section 941 (1951).

#### **14-06. Release of mortgage by other than mortgagee**

A title examiner may treat a mortgage as satisfied if a mortgage release complying with the requirements in SDCL 44-8-31 is recorded.

**Authority:** [SDCL 44-8-30](#) and [44-8-31](#).

#### **14-07. Release--assignment of rents**

A title examiner shall require a release of a separately recorded assignment of rents even though the mortgage given on the same date or for the same debt is satisfied or released, unless the assignment of rents by its own terms is satisfied when the mortgage is satisfied or released or the satisfaction or release indicates the underlying debt is paid.

**Authority:** Kratovil, Modern Mortgage Law and Practice, 2d. Ed., Section 20.07.

59 CJS, Mortgages, Section 317.

Bayse, Clearing Land Titles, Sec. 353.

#### **14-08. Defect in satisfaction of mortgage**

A satisfaction of a mortgage is sufficient notwithstanding error in some details in date, amount, book and page of record, property description, names and position of parties, or other details, if, considering all circumstances of record, sufficient data are given to identify the security interest sought to be satisfied.

**Authority:** Former SDTS 9.3; Model Standard 16.4; [Gadsden v. Latey, 60 NW 322 \(Neb. 1894\)](#).

The court stated that a formal release, which in some particulars misdescribes the mortgage to which it relates, is nevertheless sufficient if it identifies the mortgage.

**Cross Reference:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 14, p. 146 (1995).

#### **14-09. Deeds--unsatisfied mortgage**

A deed from the record holder of an unsatisfied mortgage or other encumbrance, who is also the record title holder, which does not except the encumbrance or state that the deed is given subject to the encumbrance, is sufficient as a discharge of the encumbrance.

**Authority:** Patton on Titles, Sec. 303; Patton on Titles, Sec. 564 (2d ed. 1957).

**Commercial Merchants Natl. Bank & Trust Co. of Peoria v. Le Tourneau**, 137 F.2d 87 (7th Cir. 1943).

#### **14-10. Mortgage--merger of title**

If the holder of a mortgage acquires the estate of the mortgagor, the mortgage interest may be merged in the fee and the mortgage extinguished, although it is only when the fee and the lien center in the same person without any intervening claims, liens or equities that a merger of the title and the lien will take place.

However, merger depends upon the intent of the parties. In determining intent, equity is not limited by the rules of law, and under unusual circumstances, a mortgage may be extinguished where it would continue to exist at law, or a mortgage may be preserved where it would be merged at law. Because of the difficulty in determining what a court might decide in any particular case, if merger cannot be determined from the instruments, then a merger is not ordinarily assumed so long as the mortgage remains unsatisfied of record.

If there is an outstanding or intervening lien or title, the foundation for the merger does not exist and no merger will be declared.

**Authority:** Patton on Titles, Secs. 562 & 564 (2d ed. 1957).

**Cross Reference:** [Perry v. Perry](#), 221 NW 674 (1928).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 14, p. 147 (1995).

#### **14-11. Foreclosure of mortgage by action**

The instruments required to be recorded to show title based on a mortgage foreclosure by action are the sheriff's certificate of sale, and the sheriff's deed.

If mortgagor redeems, recording the original certificate of redemption will eliminate the foreclosed mortgage and does not affect status of junior liens. Satisfaction of the original mortgage is neither necessary nor desirable. Foreclosure cuts out subsequent liens and satisfaction or release of them is not necessary.

Satisfaction of lien holders, properly joined in the action, is not necessary.

**Authority:** Former SDTS 9.4; Model Standard 16.5; [SDCL 21-48-19](#), [21-48-21](#) and [21-49-38](#).

**Note:** Clerical Error. An apparent ambiguity which is patently a mere clerical error and which, when considered in connection with the other facts relative to the foreclosure, could not have misled the mortgagor or an intending purchaser, does not render the foreclosure ineffective. [Loomis v. Stoddard](#) (1919) 42 SD 272, 173 NW 859.

**Cross Reference:** Statutory basis for standard, [SDCL 43-29-2](#) and [43-29-7\(2\)](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 14, pp. 163 & 167 (1995).

#### **14-12. Foreclosure by advertisement**

The instruments required to be recorded to show title based on a mortgage foreclosure by advertisement are the sheriff's certificate of sale, any certificates or affidavits of non-redemption, the affidavit of publication of notice of sale, an affidavit stating notice was provided to all required parties and that no request for foreclosure by action was made, an affidavit relating to the military status of the owner and the sheriff's deed.

**Authority:** [SDCL 21-48-19](#) and [21-48-22](#).

(Revised July 1, 2002).

**Caveat:** The Constitutionality of this method is questionable.

**Cross Reference:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 14, p. 155 (1995).

#### **15-01. Probate and Estate Administration --chain of title**

Prior to July 1, 1995 (the effective date of adoption of the Uniform Probate Code in South Dakota), for ultimate distributions from an estate, as distinguished from conveyances from an estate, a certified copy of a decree of distribution made by a South Dakota circuit court is sufficient to complete the chain of title.

**Authority:** SDCL Titles 29 and 30 [Repealed by [SL 1995 ch 167, § 82](#)]. Replaced by procedures as provided in Title S DCL 29A (Uniform Probate Code).

**Note:** SDCL ch 29A-8 provides for a July 1, 1995, effective date for the Uniform Probate Code. In accordance with [SDCL 29A-8-101](#) this standard can apply to estates commenced prior to July 1, 1995, even though the distribution from the estate is made after July 1, 1995.

#### **15-02. Executor's deed**

For conveyances out of an estate, as distinguished from ultimate distributions from an estate pursuant to decedent's will or intestate succession, prior to July 1, 1995 (the effective date of adoption of the Uniform Probate Code in South Dakota), a certified copy of an order confirming sale made by a South Dakota circuit court and an executor's or administrator's deed is necessary to complete the chain of title, except in certain circumstances of an independent administration.

**Authority:** SDCL 30-18A-4 & 5; SDCL 30-22-63 & 64 [Repealed by S.L. 1995, Ch. 167, Section 82]. Replaced by procedures as provided in Title SDCL 29A (Uniform Probate Code).

**Note:** SDCL ch. 29A-8 provides for a July 1, 1995 effective date for the Uniform Probate Code. In accordance with [SDCL 29A-8-101](#) this standard can apply to estates commenced prior to July 1, 1995 even though the conveyance from the estate is made after July 1, 1995.

#### **15-03. Conveyances made under ~~probate~~the Uniform Probate Code**

For conveyances occurring after July 1, 1995 under the Uniform Probate Code, SDCL ch. 29A, whether or not in ultimate distribution of the estate under the decedent's will or intestate succession, a duly recorded personal representative's deed with attached certified copy of the Letters of Personal Representative ~~or a duly recorded order of complete settlement distributing specifically described real property to the heirs or devisees in specified shares or proportions~~ is

required to complete the chain of title.

**Authority:** ~~Former SDTS 2.5; SDCL 29A-3-907, 29A-3-715(b) and 29A-3-1002(e); SDCL 29A-3-907, SDCL 29A-3-908, and SDCL 29A-3-1001~~

#### **15-04. Chain of title--probate**

A title examiner examining a title for an intended purchaser or mortgagee for value from a distributee of an estate need only require proof of unrestricted letters of the personal representative in effect on the date of the original conveyance from the estate to the distributee of the estate in order to complete the chain of title.

**Authority:** [SDCL 29A-3-910](#).

#### **15-05. Authority of personal representative**

Upon the death of a person, the real and personal property devolves to the heirs or devisees, subject to claims and the administration of the estate, and the personal representative, acting on behalf of the estate, and on behalf of the heirs or devisees of the decedent, has the authority to convey said real and personal property, which includes the authority of the personal representative to convey.

**Authority:** [SDCL 29A-3-101](#).

**Source:** SDCL 1995.

#### **15-06. Deed of distribution**

A deed of distribution is evidence of the distributee's title. The distributee's receipt of the deed is conclusive evidence that the distributee is the one entitled to the property.

**Authority:** [SDCL 29A-3-907](#) and [29A-3-908](#).

**Source:** SDCL 1995.

#### **15-07. Delayed probate or administration**

If no proceedings concerning succession or estate administration have been commenced within three years of the date of the decedent's death, a probate has not been commenced within three years from the decedent's death, a personal representative may be appointed for the sole purposes of transferring property pursuant to the terms of the decedent's will or by intestate succession, by will or intestacy.

**Authority:** [SDCL 29A-3-108\(4\)](#) and [\(5\)](#).

#### **15-08. South Dakota inheritance tax liens**

The South Dakota inheritance tax was repealed effective July 1, 2001, and any remaining inheritance tax liens of record are of no further force or effect. is limited to twelve years from the date of death for any decedent dying prior to July 1, 2001. When the record does not establish that a decedent died more than twelve years prior to the examination of the title, a title examiner should require evidence of record that no tax is owed, that any tax owing has been paid, or that any potential lien has been removed from the subject property.

**Authority:** Former SDTS 7.1; [SDCL 10-41-81](#) and Art. II, § 15, South Dakota Constitution.

**Note:** The repeal of the inheritance tax does not affect the estate tax liens imposed under SDCL ch. 10-40A.

**Cross Reference:** Exemption of State of South Dakota, [SDCL 43-30-13](#)

### **15-09. Termination of ~~life-tenant~~ life estate or the interest of a life tenant**

To establish termination of the interest of a life tenant in real property, the certified record of death must be recorded together with an affidavit setting out the legal descriptions of the property involved. Alternatively, if the interest of a life tenant is the subject of proceedings concerning succession or estate administration, the court, in its order of complete settlement, may terminate the decedent's life estate in the property by the recording of the order of complete settlement in the land record.

**Authority:** [SDCL 21-44-1](#) and [21-44-2](#).

[Estate of Jackson, 508 N.W.2d 374 \(S.D. 1993\).](#) and [SDCL 30-23-41](#)

**Note:** For a decedent dying prior to July 1, 2001, a certified copy of an order determining there is no inheritance tax due or a court order determining the tax due and proof of the payment of tax, shall also be recorded.

If the decedent has been deceased more than 12 years, a record of the death and an affidavit identifying the affected property is sufficient to terminate any interest of the decedent pursuant to [SDCL 43-28-20](#).

Requirements for affidavit by spouse--[SDCL 21-44-27](#).

A record of death can be obtained for persons who have been absent for more than 7 years under the procedures set forth in [SDCL 21-44-17\(19\)](#).

### **15-10. Probate--existence of federal lien**

No objection shall be made to the possible existence of federal tax liens if the personal representative provides to the title examiner a lien release, a closing letter or an affidavit stating that no federal estate tax liability exists.

**Authority:** [Section 6321](#) and [6324 of the Internal Revenue Code](#).

**Note:** A federal estate tax lien arises automatically upon death and is enforceable for 10 years.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 15, p. 186 (1995).

### **15-11. Authority of successor fiduciary**

A successor personal representative or successor conservator has all of the powers of the succeeded personal representative and succeeded conservator, subject to any restrictions indicated in the letters.

**Authority:** [SDCL 29A-3-716](#) and [29A-5-502](#)

### **15-12. Term of authority for fiduciary**

The authority of a personal representative or conservator continues until the appointment is terminated or modified. Unless otherwise indicated, a title examiner may presume that letters originally issued continued in effect and unmodified from the date of their issuance to the date of any subsequent certification of a copy thereof.

**Authority:** [SDCL 29A-3-711](#), [29A-5-501](#) and [29A-5-502](#).

### **15-13. Acts authorized by personal representative or conservator**

No order confirming or authorizing any act by a personal representative or conservator, not contrary to any restriction shown in the letters, shall be required.

**Authority:** [SDCL 29A-3-704](#) and [29A-5-411](#).

**Note:** There are restrictions against self-dealing. See [SDCL 29A-5-413](#) and [29A-3-713](#). Sales of real estate where the fair market value is not readily ascertainable requires notice of the proposed sale. [SDCL 29A-5-412](#). Such notice is also required of a personal representative who has received a demand for notice under § 29A-3-204, [SDCL 29A-3-715\(b\)](#)

### **15-14. Guardian's deeds**

For conveyances from a guardian prior to July 1, 1993, a certified copy of an order of a court confirming the sale, together with a guardian's deed is necessary to complete the chain of title.

**Authority:** SDCL 30-29-27. (Former law.)

### **15-15. Conservator's deeds**

For conveyances from a conservator on or after July 1, 1993, a conservator's deed and a certified copy of the letters of conservatorship from a court of competent jurisdiction are necessary to complete the chain of title.

**Authority:** [SDCL 29A-5-103](#) and [29A-5-418](#).

**Note:** A certified copy of unrestricted letters of the conservator which establishes that the letters were in effect on the date of the title transaction, is conclusive evidence of the conservator's authority.

Guardianship proceedings in existence prior to July 1, 1993, continue in effect after that date and the guardian of the estate appointed prior to July 1, 1993, shall have the same powers as previously granted. [SDCL 29A-5-103](#).

A conservator must file and record the letters within 90 days following the appointment. [SDCL 29A-5-418](#).

Normal power includes power of sale; but note, if asset does not have readily ascertainable fair market value, then comply with statute. [SDCL 29A-5-412](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, p. 24 (1995).

### **15-16. Authority of conservator**

A certified copy of proof of authority of appointment from a court of competent jurisdiction and bond, and a certified copy of unrestricted letters of the conservator which establishes that the letters were in effect on the date of the title transaction, are necessary to evidence the conservator's authority.

**Note:** Unless modified or terminated, all guardians appointed prior to July 1, 1993, shall have the same powers as previously granted. [SDCL 29A-5-103](#).

A conservator must file and record the letters within 90 days following the appointment. [SDCL § 29A-5-418](#).

Normal power includes power of sale; but note, if asset does not have readily ascertainable fair market value, then comply with statute. [SDCL 29A-5-412](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, p. 24 (1995).

### **15-17. Foreign personal representative**

A foreign personal representative appointed in testacy must be appointed by an order or statement from a South Dakota court or clerk, qualify and be issued letters in order to administrate transfer title to the real estate. If no local administration or application or petition therefor is pending in this state, a foreign personal representative appointed in intestacy may file certified copies of the foreign documents of appointment and of any official bond with the clerk of courts in a county in which property belonging to the decedent is located and thereafter be authorized to transfer title to real property in South Dakota with the same authority as a locally appointed personal representative. However, a bank or trust company shall not have the authority to act unless qualified to do trust business or exercise trust powers in this state.

**Authority:** [SDCL 29A-3-103](#) and [29A-4-204](#), -205.

**Note:** A will must be probated in order to prove title.

### **15-18. Guardian and conservator**

The fact that an individual or entity deals with a guardian, if appointed prior to July 1, 1995, or conservator with knowledge of the representative capacity does not alone require an inquiry into the guardian's or conservator's authority, except that any such individual or entity is charged with knowledge of restrictions that may appear on the letters of guardianship or conservatorship.

**Note:** Certified copy to be filed within ninety days. [SDCL 29A-5-418](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide: ch. 5, p. 41 (1995).

### **15-19. Omitted real estate or faulty description of closed estate**

When an estate has been as administered in probate court and a final decree of distribution recorded in the land records, no reopening of the estate shall be required to convey an interest of the decedent merely because: (1) all of the real estate of the decedent or interest therein was not included in the inventory or in the decree of distribution, or (2) the description of such estate or interest was mis-described in the probate record. A deed by heirs or devisees, whether in warranty or quitclaim, shall be effective to pass title to real estate if the existing probate record enables a clear and unambiguous determination that the grantors would be the persons entitled to decree of such estate or interest if the estate were reopened to correct the error or include the omitted property.

### **16-01. Omission and inconsistency of dates**

The fact that an instrument affecting title may not be dated, or that inconsistency exists between its date, the date of attestation, the date of acknowledgment or the date of recordation, does not impair marketability, unless the inconsistency is of such peculiar significance, when considered with other circumstances of record, as to impel a reasonable suspicion on the part of

the examiner that the title may be defective.

**Authority:** Former SDTS 11.1; Model Standard 6.2.

### **16-02. Effect of curative acts**

An act, curative of matters of execution, acknowledgment and recording, or procedural omission, irregularities or defects, is presumed to be valid legislation, effectively eliminating objections based upon the imperfections of title which fall within its scope as to subject matter and date, thus avoiding necessity of action to quiet title.

A curative statute purporting to legalize alleged defects in probate proceedings is inoperative as against a claim based upon legal action or proceeding which the record shows was pending at the time the curative statute went into effect, whether or not the curative statute so states.

**Authority:** Former SDTS 11.1; Model Standard 6.2.

### **16-03. Condominiums**

A condominium project is established whenever the developers or the owners of a building or buildings expressly declare, through the recordation of a master deed or lease, their desire to submit their property to the formation of a condominium under the laws given in SDCL ch. 43-15A.

**Cross Reference:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 16, p. 198 (1995).

**Authority:** Former SDTS 16-04.

### **17-01. Requirements For Transfer On Death Deed.**

To create a transfer on death deed, the transferor must have the same capacity required to make a will. The transfer on death deed must be recorded in the county where the property is located before the transferor's death and must include:

- a. the essential elements and formalities of a recordable inter vivos deed; and
- b. a statement that the transfer is to occur at the transferor's death.

A transfer on death deed does not require consideration, notice, delivery, or acceptance during the transferor's life. A transfer on death deed has no effect while the transferor is alive, nor does it affect the rights and interests of a designated beneficiary, creditor, or future creditor until the death of the transferor.

**Authority:** SDCL 29A-6-407; 408; 409; 413; 414; 29A-2-501

### **17-02. Revocation Of Transfer On Death Deed.**

A transfer on death deed may not be revoked by a revocatory act, such as burning, tearing, canceling, or otherwise destroying the deed, after it is recorded. A recorded transfer on death deed can only be revoked, in whole or in part, by an instrument subsequently acknowledged by the transferor and recorded. The instrument must be either:

- c. a transfer on death deed, inter vivos deed, or other instrument of revocation expressly revoking the prior transfer on death deed; or
- d. a transfer on death deed revoking the prior transfer on death deed by inconsistency.

An optional revocation form can be found in SDCL 29A-6-431.

Authority: SDCL29A-6-405; 410; 411; 412; 431.

### **17-03. Limitations On Liability Of Beneficiary Of Transfer On Death Deed.**

A purchaser for value or a lender acquiring a security interest in the property from the beneficiary takes their interest free and clear of any claims or liability to the transferor's estate or creditors as long as they had no knowledge that the transfer was improper.

Authority: SDCL29A-6-425

### **17-04. Impact Of Transfer On Death Deed At Transferor's Death.**

Upon the death of the transferor, property that is the subject of a transfer on death deed transfers to the designated beneficiaries who survived the transferor, subject to any restrictions contained in the transfer on death deed and disclaimers recorded by beneficiaries with the Register of Deeds in the county where the property is located. —Beneficiaries take the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests the property is subject to at the time of the transferor's death. The transfer on death deed transfers the property without covenant or warranty of title, even if the transfer on death deed contains a contrary provision.

Authority: SDCL 29A-6-415, 416, 418, 419; 29A-2-801

### **17-05. Joint Owners Making A Transfer On Death Deed.**

If the transferor is a joint owner of the land, upon the transferor's death, the property which is the subject of the transfer on death deed will belong to any surviving joint owners. However, if the transferor is the last surviving joint owner, then the transfer on death deed is effective and the property transfers to the designated beneficiaries.

Authority: SDCL29A-6-417

### **17-06. Transfer On Death Deed Beneficiary's Liability For Debts And Obligations.**

A beneficiary of a transfer on death deed may be liable to the creditors or personal representative of a deceased transferor for an amount up to the value of the property conveyed to the beneficiary, as determined at the time of transferor's death.

Authority: SDCL 29A-6-420, 421, 422, 423, 424

### **17-07. The Making Or Modification Of Beneficiary Of Transfer On Death Deed By Agent.**

In the absence of a document establishing an agent's right to act or a court order expressly authorizing such action, an attorney in fact, custodian, conservator, or other agent of the

transferor may not make, change, or revoke a beneficiary designation on a transfer on death deed. However, this does not prohibit or limit the agent's ability to sell, pledge, or otherwise enact a present transfer of the property during the transferor's life with such express authorization, in effect, extinguishing the designated beneficiary's right to receive the property upon the transferor's death.

Authority: SDCL 29A-6-426

### **17-08. Affidavit Of Confirmation After Transfer On Death Deed.**

To evidence the transfer of property upon the death of the transferor of the transfer on death deed, a beneficiary must file and record an affidavit of confirmation in the county where the property is located. The affidavit must comply with the requirements of SDCL 29A-6-427. An optional form of the affidavit of confirmation can be found in SDCL 29A-6-432. The register of deeds will make an index reference in the record of deeds to any affidavit of confirmation properly filed.

Authority: SDCL 29A-6-427, 428, 429, 432

### **19-01. Metes and bounds**

When any owner of a government subdivision or a platted tract or lot divides that land into parcels for the purpose of transfer that cannot be described except by metes and bounds, the parcels of land so divided must be platted before any instrument of transfer can be recorded. Real property descriptions using metes and bounds may be recorded only if a previous conveyance by the same metes and bounds has been made and recorded.

**Authority:** [SDCL 43-21-4](#) and [43-21-4.1](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 16, p. 196 (1995).

### **19-02. Legal description from survey or plat**

A legal description is eligible for recordation if the document contains a reference to a legal survey or is capable of being indexed in one of the two statutory numerical indexes maintained by the office of the Register of Deeds for that particular county.

If a legal description includes a reference to a platted division or subdivision, the legal description should also identify the lot or tract number, the block or tract number and the name of the platted addition or subdivision taken directly from the recorded plat. The legal description should also include a concluding reference identifying the county and state where the plat is recorded along with the book and page.

**Note:** Good practice would suggest putting the book and page in the legal description where reference is made to a plat. Further note that roads within platted areas must comply with the specific requirements for dedication under [SDCL 11-6-33](#).

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 16, p. 192 (1995).

### **19-03. Platting**

Any subdivision of land containing two or more lots shall be platted or replatted and must

be submitted for proper platting according to law.

**Authority:** [SDCL 11-6-31](#).

#### **19-04. Plats - designation or variations in addition or subdivision name**

Although a plat should be referred to in a conveyance as entitled in the owner's dedication clause in the filed plat as reflected by the abstract or record examination (without reference to the present state of incorporation of the municipality unless part of the plat name), minor inaccuracies in description such as the interchange of the words "subdivision" and "addition," the addition or omission of the word "first" when there is only one such addition, and other similar discrepancies which do not create a problem of identification can be disregarded, provided a title examiner is satisfied that the discrepancies do not create the possibility of reference to any other platted area in the village, city, municipality, township or other government subdivision of which the plat is part. It is sufficient in such instances to request the abstracter to note that there is only one such platted area.

**Cross Reference:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 19, p. 232 (1995).

**Source:** [SDCL 43-21-4](#) and [43-18-6](#).

#### **19-05. Plats, effect of joinders in**

A conveyance from the record owner shall be sufficient notwithstanding that a stranger to the title joins in the dedication of the plat or covenants of which the tract is a part if the record shows an interest of said stranger in another tract within the plat or subject to the covenants.

Such showing may be by recitation in the plat or covenants as to which parts thereof each joining party claims an interest. If the plat or covenants do not so designate, a title examiner should require the abstracter to place in the abstract or record examination, for reference purposes, the conveyance to the joining party of part or parts of the platted area.

**Cross Reference:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 19, p. 235 (1995).

#### **19-06. Plats, vacation before lots sold**

The recording of an instrument executed by all of the owners of a subdivision vacating a plat before any lots have been sold extinguishes all easements created by the plat and revokes the dedication to the public of all rights in the streets, alleys, easements and public grounds.

**Authority:** [SDCL 11-3-16](#).

**Caveat:** *See* [SDCL 9-45-7](#) re: vacation by petition of streets, alleys or public ground.

**Cross Reference:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 19, p. 235 (1995).

#### **19-07. Plats, vacation after lots sold**

The vacation of all or any part of a plat after the sale of any lots must be executed by all of the owners of the subdivision and by all of the owners of the lots sold.

**Authority:** [SDCL 11-3-16](#).

**Cross Reference:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 19, p. 235 (1995).

### **19-08. Discrepancy in survey**

Title shall not be considered unmarketable because a survey discloses differences in deed or plat distances or courses and subsequently measured distances or courses if the surveyor states that both descriptions describe the same parcel.

**Note:** This standard covers only the situation arising where modern surveying methods and equipment disclose differences in deed or historic descriptions and new survey measurements.

**Caveat:** Any mistakes in a properly recorded plat can only be corrected by filing a new plat. (See AG Opinion 97-02.)

**Cross Reference:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 19, p. 230 (1995).

### **19-09. Plats, effect of replat on rights in the public and easements.**

The replat of a platted subdivision extinguishes the rights in the public and the public easements and rights-of-way created in the original plat as set forth in the replat or to the extent they are inconsistent with the replat. Any private easements shown on a plat cannot be extinguished without joinder of the parties benefitted by the private easement.

**Authority:** [SDCL 11-3-20.4](#) and [11-3-20.2](#). See also SDCL 11-3-8, 11-3-12, 11-3-16, 11-3-17, and 11-3-19 regarding effect of vacation of plat. Nelson v. Garber, 960 N.W.2d 340, 2021 S.D. 32.

**Cross Reference:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 19, p. 235 (1995).

### **23-01. Marketable record title--statute of limitations**

No title shall be considered unmarketable by reason of any claim or defect twenty-two years or older, if the record title holder has an unbroken chain of title through the holder's immediate or remote grantors by a deed of conveyance which has been recorded twenty-two years or more, and if the record title holder is in possession of the property. This standard does not extinguish or bar those claims provided for under SDCL 43-30.

**Authority:** [SDCL 43-30-3](#); [71 ALR2d 846](#); [31 ALR4th 11](#).  
[Teddell v. Hanes, 82 NW2d 119 \(Iowa 1957\)](#).  
[Wichelman v. Messner, 83 NW2d 800 \(Minn. 1957\)](#).  
[Smith v. Berberich, 95 NW2d 325 \(Neb. 1959\)](#).

### **23-02. Title by patent**

The chain of title must be based upon a recorded patent or certified copy of the patent except when the title is founded upon a congressional grant which by its terms does not require a patent, a judgment or a treaty.

**Authority:** Patton on Titles, Sec. 290 (2d ed. 1957).  
12 U.S. Stat. 239, Sec. 14.  
25 U.S. Stat. 676 (school land grants of sections 16 and 36, etc.).

**Note:** Federal patents can be obtained from the Bureau of Land Management, Post Office Box 36800, Billings, Montana 59107-6800, (406) 255-2888. State patents can be obtained from the School & Public Lands, Pierre, South Dakota.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 23, p. 278 (1995).

### **23-03. Validity of patent under General Allotment Act**

A title examiner may not assume the validity of a fee patent issued pursuant to the General Allotment Act of February 8, 1887.

A title examiner may rely upon a deed from the heirs of a deceased allottee as passing title free of trust provided that the deed has been approved by the Secretary of the Interior.

**Authority:** Felix S. Cohen, Handbook of Federal Indian Law, 1982 Edition, ch. 11, section B4.

**Note:** The General Allotment Act at Section 5 (28 USC 348) provided for a twenty-five year trust. This trust was extended by presidential orders until June 18, 1934 when trusts were continued indefinitely. The Burke Act (1906) [25 USC 349](#) allowed competent Indians to apply for and receive patents free of this trust. The Clapp Amendment June 21, 1906, 34 Stat 353 was misinterpreted as removing all trusts. As a result, the Department of Interior issued fee patents to Indian allottees and recorded them in county land records. Unless these patents were properly applied for they are void. [State v. Zay Zah, 259 NW2d 580, \(Minn. 1977\)](#); [Morrow v. US, 243 F 854 \(8th Cir. 1917\)](#). In many cases the trust patents are unrecorded. Only a search of the Department of Interior, Bureau of Indian Affairs records can determine the validity of the patents. These patents will generally have a series of numbers in the upper left hand corner which is the BIA file number. There are several thousand forced fee patents issued in North Dakota. Patents issued under homestead acts will not be in this category (Acts of April 24, 1820 and May 20, 1862).

*See also:* 32 Stat. 245.

### **23-04. Financial institution name change or successor**

A title examiner may rely on a recitation in an instrument of record executed by a regulatory authority, or an officer or counsel for a financial institution that the financial institution changed its name or is the successor of one or more previous financial institutions.

**Authority:** Practice and Usage in the Banking Industry based on statutes in other states, e.g. [Minnesota Statutes Annotated, Sec. 507.411](#).

**Note:** The recitation may merely be incidental to the instrument and need not be the principal purpose of the instrument.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 23, p. 283 (1995).

### **26-01. Tax title**

Neither a tax deed issued pursuant to any of the provisions of SDCL 10-25-12, nor any combination of such deeds, terminates the rights of the owner who owned it prior to its sale for taxes, unless there is:

- (1) A judgment in a quiet title action;
- (2) A marketable Record Title Affidavit pursuant to SDCL 43-30-7 (using as a "root of title" the tax deed from the county); or
- (3) A deed conveying the prior owner's interest.

**Authority:** SDCL ch. 21-42, 10-25-12 and 43-30-7.

**Note:** Under SDCL 10-25-13, the issuance of a tax deed to the county constitutes prima facie evidence of the regularity of the proceedings leading up to the issuance of the deed, including the

expiration of the period for redemption. Under SDCL 10-25-18, the expiration of the redemption period cuts off all of the prior owner's rights in the property and results in a waiver of all errors in the tax sales proceedings except jurisdictional defects.

There is no way of knowing what the courts will consider to be a jurisdictional defect, but historically they have been exceedingly stringent in requiring exact and precise compliance with all of the statutory steps in the tax sales proceedings. Moreover, SDCL 21-42-1 specifically contemplates and authorizes a quiet title action by a prior owner against the tax deed grantee of the county, which seemingly indicates a legislative lack of confidence in the regularity of tax sales proceedings. For those and other reasons, tax titles are considered inherently suspect in the absence of some curative action or occurrence--such as appropriate use of the provision of the Marketable Record Title Act--to extinguish the title of the party or persons who owned the real property prior to its being lost for unpaid taxes.

Beyond all of this, however, (except in the rather rare case when a third party and not the county is the purchaser at the original tax sale), the prior owner and other persons have various statutory rights of re-purchase or preemptive purchase under SDCL 21-42-10 as long as the property remains in the hands of the county. In theory the sale of the property by the county to a third party should terminate these statutory rights, but again historically the courts have been lenient in allowing the holders of such rights to attack the title of purchasers from the county.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 26 (1995).

#### **26-02. Effect of tax deed**

A valid tax deed clothes the grantee with a new and complete title under an independent grant from the sovereign authority of the state, extinguishing all prior titles.

**Authority:** SDCL ch. 10-25.

**Note:** The tax deed does not convey marketable title.

**Source:** Carlsen and Kirkeby, South Dakota Land Title Guide, ch. 26, page 318 (1995).

