Wills

What is a last will and testament?

A will is a formal written document executed voluntarily which states how you wish your property to be distributed after your death. There are certain requirements which must be met for a will to be considered legal in in South Dakota.

If there is property to handle or taxes to be paid, the fact that you have a will does not increase probate expense. A will can, in fact, reduce expense by clarifying your intentions. A will can identify the person you wish to be in charge of distributing your estate (the “personal representative”), it can nominate guardians for your surviving minor children, and it can provide for management of your estate if you have heirs that are too young to inherit.

What is required to make a will?

In South Dakota, the following requirements must be met:

- The creator of the will (the “testator”) must be at least eighteen (18) years old and of sound mind.
- The will must be written.
- The will must be signed. Any mark may be enough, and you may direct someone to sign for you if you are unable to sign.
- The will must be witnessed in accordance with the law. In South Dakota you must have two witnesses who attest to your signature. There is no rule against “interested witnesses” from serving as witnesses. But witnesses must be competent adults.
- South Dakota also recognizes “holographic wills”, the material provisions of which are in the testator’s handwriting. Holographic wills must also be signed by the testator.

What is meant by “sound mind”?

To make a valid will, you must be of “sound mind.” This means that you know what is written in your will, you sign it voluntarily, and you are capable of understanding what property you own, the “natural objects of your bounty,” and what you want to have happen to your property when you die.

What happens if I die without a will?

It is not uncommon for someone to die without a will. Occasionally, someone leaves a valid will, but it fails to give away all of the decedent’s property. When this occurs, the will governs the distribution of some property and the rest is distributed according to intestacy rules.

The property (or “estate”) of a person who dies without a will (or “intestate”) is distributed according to state law. This is called intestate succession. First, all debts, costs of administration of the estate, and certain other expenses must be paid. (Debts and expenses are also paid if the person died with a will (or “testate”).) If there are minor children who receive property, it may be necessary for a conservator to be appointed by the court to manage the property which the minor child has inherited.

- A surviving spouse receives the entire intestate estate unless the decedent was survived by descendants of a prior relationship who are not descendants of the surviving spouse, in which event the spouse receives the first $100,000 plus half of any remaining estate·
- If the decedent did not leave a spouse, the intestate estate is distributed in equal shares to the decedent’s surviving children (or grandchildren, if a child has predeceased with children of their own surviving).
- If the decedent did not leave a spouse or any descendants, then the intestate estate is distributed to the decedent’s parent or parents that survived the decedent.
- If the decedent did not leave a spouse, descendants, or parents, then the intestate estate is distributed to the decedent’s siblings or their descendants.
- Ultimately, an intestate estate could be distributed to the decedent’s grandparents or their descendants.
- But if the decedent is not survived by a spouse, the decedent’s grandparents, or any descendants of the decedent’s grandparents, then the intestate estate will “escheat” to the State of South Dakota.

If you elect not to have a will, you must consider that the legislature could change the laws of intestate succession. Therefore, the way your property will be distributed under intestate succession may be uncertain. It is relatively uncommon for the rules of intestacy to be modified very frequently, however.

Can I disinherit someone from my will?

Generally, you can disinherit anyone you choose. You may dispose of your property in almost any way you wish through a will, but there are some restrictions. Married persons may not completely disinherit their surviving spouse, unless their spouse agrees. Depending on the provisions in the decedent's will for the surviving spouse, the surviving spouse may exercise an option to take an elective share in lieu of the provision made in the will. The amount of the elective share is determined by the length of time the spouse and the decedent were married to each other and the total net worth of both spouses.

If you have children, you are not required to leave them any portion of your estate unless there is an outstanding order of child support. A common misconception is that a person must leave each child at least one dollar. This idea may have evolved from the fact that the failure of a will to make a provision for or "remember" a child results in a presumption that the person making the will merely forgot to include that child. To overcome this presumption, the person making the will might leave: "The sum of one dollar to my son, John." Today, an acceptable alternative provision is simply: "I have intentionally failed to provide for my son, John."

What is not transferred by Will?

- Life Insurance: Life insurance is a contract with the insurance company which provides for benefits to be distributed to beneficiaries named by the insured. A named beneficiary will receive proceeds of a life insurance policy. Therefore, the policy – not a will – determines the distribution of policy proceeds unless the policy pays to the decedent’s estate. But typically, it is preferable for life insurance to pass directly to beneficiaries rather than through an estate.
- IRA or 401(k), 403(b), and other retirement accounts: Designated beneficiaries on your retirement accounts take outside of the will, your will generally does

not control these distributions, either unless the account pays to your estate. Again, typically, it is preferable to have retirement accounts pass directly to beneficiaries rather than through an estate.

- The above list represents a list of what are commonly termed “nonprobate assets” since they can pass outside the provisions of a last will and testament. However, nonprobate assets are part of an individual’s estate plan and need to be taken into account when drafting an estate plan. Also, titling assets with another individual can have important consequences that need to be carefully considered.

- Joint Tenants with Rights of Survivorship (JTWROS) assets: Assets titled jointly with rights of survivorship vest in the surviving co-owner. Assets titled jointly as tenants-in-common, by contrast, do not. Joint assets often include real property, vehicles, and accounts. Titling an asset jointly with another individual may be irrevocable unless the co-owner consents to a change. This is unlike making of a will or naming beneficiaries on an account or life insurance policy because you retain the ability to change your will or beneficiaries.
- Payable on Death (POD), Transfer on Death (TOD) accounts, or “Totten Trust” accounts: These kinds of accounts are distributed based on the named beneficiary as well.
- Trust assets: Assets titled in a trust will pass according to the terms of the trust and not according to a will.

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What about Changing my will?

A will is in effect until it is changed or revoked. You may do that as often as you wish. You should review your will from time to time. A review of your will every three (3) to five (5) years is recommended as there may be changes in your family circumstances, in the amount and the kind of property you own, and in tax laws which could necessitate changes in your will.

Drafting Your Will

Drafting a will involves decisions which require professional judgments. A lawyer can help you to avoid many pitfalls and advise you concerning your best course of action.

Competent advice in drafting a will and planning an estate, with the assistance of your attorney, can, in many cases, reduce tax consequences and prevent unforeseen problems in the administration of your estate.

Laws change over time and family circumstances do, too. Accordingly, wills should be reviewed regularly especially if there has been a change in your legal, personal, or financial situation since the will was drafted.

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Estate Planning Wills

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