WILLS-TRUSTS-LIVING WILLS

Guardianship-Health Care Consent-Durable Power of Attorney-Probate-Estate Planning

A will is a written document which states how and to whom you wish your property to go after your death. There are certain requirements which must be met for a will made in South Dakota to be considered legal. The law requires that:

- The maker of the will (called the testator) be at least eighteen (18) years old and of sound mind.
- The will must be written. (An oral will may be considered legal only in certain unusual circumstances.)
- The will must be witnessed strictly in accordance with the law. (No witnesses are necessary if the will is dated and if the signature and instructions are in the handwriting of the testator. This is called a holographic will.)

Changing your 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.

A will you make when you are single is not revoked when you marry, but if you do not provide for your spouse, upon your death, your spouse receives what he or she would have received had you died without a will. All changes in your will, including any change in marital status, require a careful analysis and reconsideration of the provisions of your will to insure that it reflects your wishes. Handwritten revisions on a will may not be effective in order to change the will. A will may be changed by re-writing it in its entirety or through a codicil. A codicil is a written amendment which can change a single provision or several provisions in the will, leaving all other provisions of the original will in effect.

Restrictions. Although you may dispose of your property in almost any way you wish through your will, 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.

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Other provisions in the law provide for benefits to the surviving spouse and the decedent's children. These additional benefits can be explained by your lawyer.

If you have children, you are not required to leave them any portion of your estate. 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 in the years past would leave, "The sum of one dollar to my son, John." Today, an accepted provision is, "I have intentionally failed to provide for my son, John."

Expenses. If there is property to be administered or taxes to be paid, the fact that you have a will does not increase probate expense. A will can, in fact, actually reduce expense.

What if there is no will? The property of a person who dies intestate (without a will) is distributed according to a formula set by state law. This is called intestate succession. First, all debts, costs of administration of the estate, and certain other expenses must be paid. If there are minor children who receive property, it may be necessary for a conservator to be appointed by the court to manage and account to the court for the property which the minor child has inherited.

A spouse is to receive the entire intestate estate unless the decedent was survived by descendants of a prior marriage or other relationship, in which event the spouse receives $100,000.00 plus half of the remaining estate.

If you elect not to have a will, you must consider that the legislature can change the laws of intestate succession. Therefore, you will not have certainty concerning the way in which your property will be distributed.

Life Insurance. Life insurance is not a substitute for a will. Life insurance is a contract between the insured and the insurance company which provides for payment of insurance benefits to beneficiaries which the insured may name. Insurance policies which require payments to minor beneficiaries may require the guardian of those beneficiaries to establish a conservatorship. Life insurance programs should be coordinated with the individual estate plan since a will does not override a specific beneficiary designation. It is to your benefit to have advice from your lawyer and life insurance counselor.

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.

Designating beneficiaries on your insurance or annuity policies and IRA or 401(k) accounts, or naming joint tenants with right of survivorship on real estate titles or certificates of deposit, can create unwanted or unequal distributions. Since named beneficiaries and joint owners take outside of the will, your will does not control these distributions.

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.

Ownership of Assets. Joint tenancy should be distinguished from tenancy in common. Joint tenan-

cy property, upon the death of one of the joint tenants, usually goes to the surviving joint tenant.

Tenancy in common property usually means that each tenant in common owns an undivided interest in the property. Upon the death of one of the tenants in common, that person's property will be distributed to the person named in the will or to the person's heirs under the intestate laws.

Many people have their property owned in joint tenancy. This arrangement is not likely to save either taxes or expenses in the long run. There are instances where joint tenancy is useful, but as in other estate plans, the use of joint tenancy should be coordinated with your general plan of distributing your assets to your heirs. Countless problems can be created by the indiscriminate use of joint tenancy ownership.

Will information provided curtesy of the State Bar of South Dakota.

LIVING WILLS

A living will is another tool that allows you to make health care decisions now for those times when you are unable to do so. It is a document that gives instructions to your physician and other healthcare providers as to the circumstances under which you want to life sustaining treatment provided, withheld or withdrawn. It is different from a durable power of attorney for health care because it does no cover anything besides your wishes for life sustaining treatment.

Like the durable power of attorney, living wills should be created by an attorney to ensure your special needs are included. You should also consult with our physician, family, and religious advisor, telling them that you have created and signed a living will. You should also make sure someone knows where to find it. You can choose to amend or revoke a living will at any time.

For samples of a Living Will Declaration please visit the South Dakota State Bar's website at www.sdbar.org or contact them at 605-224-7554.

TRUSTS

Every adult person should have an estate plan. One way of creating an estate plan is the living trust.

What is a living trust? A living trust, also known as a revocable trust, is an alternative way to own property. You create a living trust during your lifetime by signing a trust agreement which is a legal document that directs how property transferred to the trust will be managed, when and to whom the income and principal from the trust will be paid, and to whom the trust property will be distributed when you die. You are called the settlor, grantor, or trustor of the trust, while the person to whom you transfer your property is called the trustee. The persons who will receive the income during your lifetime or who will receive the trust property after your death, are called the beneficiaries. You may be the settlor, a trustee and a beneficiary, all at the same time. The property in the trust is called the trust principal, corpus, or res. As the settlor, you may change the terms of the trust agreement or may revoke the trust and regain ownership of the trust property.

Whom should I name as trustee? You may be the only trustee or you may be a co-trustee. You may name another individual(s), or financial institution with trust powers, as your trustee. You should also provide for a successor trustee to act in the future in the event of your disability or after your death. Anyone you select as a co-trustee or successor trustee should be capable and trustworthy.

Family members may or may not be selected by you depending upon your circumstances and their abilities. You should also consider whether a bank can provide services that an individual cannot, but keep in mind that only banks with trust authority can act as trustee.

What are the advantages of a living trust?

- You can have another person or bank which has expertise act as a trustee and make investment or other management decisions for you.
- You can avoid the necessity of having a conservator manage your property if you become incompetent, but only if all of your property is in the trust.
- After your death, the trustee can distribute the trust assets directly to the beneficiaries without probate. This is particularly beneficial if you own real estate in more than one state as it may avoid having to conduct a probate proceeding in each state.
- It may be more difficult to contest than a will.
- After your death, the costs and expenses for personal representatives, lawyers, accountants and others may be less.

What are the disadvantages of a living trust?

- You will undoubtedly spend more time and money in properly creating and transferring your assets to a living trust than you would to have a will prepared.
- To effectively avoid probate, you must keep track of your assets and keep all of your property in the trust, including property acquired after you create the trust.
- You may experience problems in transferring or selling assets or making purchases with trust checks and encounter banks, transfer agents or others who want to see the trust agreement in order to know that the trustee has certain powers and authority.
- Upon your disability or death, the management of your trust assets will depend upon the honesty and management ability of your successor trustee who may act without court control or involvement.
- You may have to pay trustee's fees and expenses if you use a third party as trustee, including the costs of filing an annual trust income tax return.
- Because a living trust does not require that notice be given to your creditors, a creditor can make a claim against the trust beneficiaries' years after your death.
- No court determines the validity of the trust as the case with a will.

Does a living trust save taxes? The grantor of a revocable living trust retains control of the trust property. Therefore, for federal income tax purposes, as long as you act as the trustee or the co-trustee and the trust uses your social security number for its taxpayer identification number, your living trust will be treated no differently than if you had not created the trust. Likewise, you will not save any death taxes (state or federal) simply because you have created a living trust since you have not irrevocably disposed of the trust assets. Although, a properly prepared living trust can save death taxes, exactly the same savings can be achieved by a will.

How do I transfer ownership of my property to the trust? In order to avoid probate, you must transfer the ownership of each and every asset to the trust. To transfer real property, a deed must be signed and recorded; transfer of publicly traded stocks and bonds will likely require the services of a broker; transfer of partnerships and closely held corporations may require the review of the governing instruments to determine whether other partners or stockholders must consent to such transfer; assets without formal legal title such as household contents and farm machinery will require a bill of

sale.

What if I do not transfer all of my property to the trust? Any property which you do not transfer to the trust will be subject to probate and distribution as set out in your will or the South Dakota laws providing for distribution of your estate if you do not have a will. You should have a will to cover any assets that are not transferred to the trust. This may be a "pourover will" which transfers any property which you own at the time of your death to your living trust or a will which has other provisions.

Can my successor trustee immediately distribute property from the trust after my death? Generally, No. Your trustee must first pay your debts and expenses resolve any trust problems, file tax returns (income, state estate tax and federal estate tax) and pay any taxes that are due and owing.

Once I set up a trust, can I change my mind? Yes. While you are alive and competent, you are in complete control of your trust. You may change or terminate the trust at any time provided the trust document specifically gives you that right.

Can I use a living trust form or kit that I buy? You can use a form or kit or even prepare the trust agreement yourself, but your situation may not fit the form, or the form may have been poorly prepared and may lead to adverse tax consequences and conflicts over property distributions. Problems with the form or kits may not surface until years later, sometimes not until after your death when you cannot change the trust and clear up the problem.

PLEASE NOTE: Certain persons selling living trust kits have been misleading people into thinking that the property in a living trust is protected from taxes and creditors. **This is not true!** A living trust will not protect your property from nursing home expenses, hospital bills, or other creditors, nor will the creation of a living trust qualify you for Medicaid. You have taken a lifetime to accumulate your wealth. You should take great care to make certain that your estate plan carries out your wishes without problems. A living trust may or may not be right for you. Competent professional help is essential to make certain that your estate plan meets your specific needs.

Living Trust information provided courtesy of the State Bar of South Dakota.

GUARDIANSHIP & CONSERVATORSHIP

A guardianship is a legal relationship that gives one or more individuals or agencies the responsibility of the personal affairs of the protected person.

What is a protected person? A protected person is someone who has been determined by the court to be either incompetent or incapacitated. Therefore, a protected person to whom a guardian has been appointed has been determined to be unable to make decisions about various personal affairs of his/her life without the assistance or protection of a guardian. These decisions can involve issues relating to the person's health, care, safety, habilitation, therapeutic needs, financial affairs, and others areas of the protected person's life.

What are the types of guardianships? Guardianship provides the guardian with decision-making authority and responsibility over the protected person's personal affairs.

Limited guardianship gives the guardian decision-making authority and responsibility over only se-

lected areas that the protected person has been determined unable to manage by him/herself; for example, a limited guardianship may only apply to health care decisions.

The court may appoint a **temporary guardianship** for a person for a 90-day period if it is felt that such an appointment is in the person's best interest.

Finally, the court may appoint **joint guardianship**, which is more than one person acting as a protected person's guardian at the same time and sharing in the decision-making authority and responsibilities that accompany guardianship.

What is a conservatorship? Conservatorship is similar to guardianship in that it is a legal relationship between a protected person and one or more individuals appointed by the court to make decisions on behalf of the protected person, a conservatorship however is limited to the management of the property and financial affairs of a protected person. As with guardianship, a conservatorship may be full, limited, temporary, or joint.

Who can be a guardian/conservator? A family member or other interested individual may petition for the appointment of guardian/conservator for a protected person. However, when a relative or other appropriate person is not qualified and willing to act in this capacity, the South Dakota Department of Human Services and the Department of Social Services are authorized to act as guardian/conservator for persons under their care.

What are the duties of a guardian/conservator? A guardian/conservator must maintain contact with the protected person to become familiar with the protected person's needs and limitations, and only exercise their decision-making authority to the extent required by those limitations. The guardian/conservator must respect the fact that their relationship with the protected person is a confidential one, and should encourage the person's participation in decision-making to the extent possible. The guardian/conservator must always act in the best interest of the protected person, and never become involved in a situation that might give the appearance of a conflict of interest. Finally, the court does require that the guardian/conservator provide some information to the court, including information pertaining to the protected person's finances and personal inventory, and an annual personal status report.

What is the potential liability of a guardian/conservator? A guardian or conservator is not individually liable for the actions of the protected person unless the guardian/conservator was personally negligent. Also, a guardian/conservator is not required to expend his/her own funds on behalf of a protected person. However, a guardian may be held liable if they have failed in taking reasonable steps to assure that the protected person receives proper care and/or services, or have improperly managed the protected person's property or finances.

What rights does a protected person give up when a guardian/conservator is appointed? A protected person retains all rights not granted to the guardian/conservator through the appointment by the court. For example, the guardian/conservator does not have the right to change a protected person's state of residence, marital status, parental rights, or power of attorney without the court's specific authorization.

What is the procedure for the appointment of a guardian/conservator? First, a petition for the appointment of guardianship/conservatorship outlining the need for the appointment and the type of

appointment requested is filed in the appropriate county. A statement of financial resources and a report from a physician, psychologist, or psychiatrist describing the person's level of impairment, ability to appear at the hearing, and need for protection is also filed. The court then conducts a hearing and determines whether a guardianship /conservatorship is appropriate, and if so, whether a full or limited appointment is most appropriate.

The decision to seek guardianship or conservatorship of another individual is never a decision to be made lightly. Guardianship and conservatorship places strict limits on the rights of the person for whom the appointment is made.

For further information regarding guardianship/conservatorship services or application contact the Department of Human Services, Guardianship Program at 1-800-265-9684.

HEALTH CARE CONSENT

Every person has the right to make their own health care decisions, but there might come a time when you or a family member is not capable of making those decisions. Durable powers of attorney for health care and living wills can help plan ahead for these times. In the absence of these tools, South Dakota law authorizes others to make health care decisions for those unable to make their own.

By law, a person is incapable of giving informed consent if:

- A guardian has been appointed for the person.
- The court has determined the person to be legally incompetent.
- It has been determined in good faith by the person's attending physician.

If the attending physician determines a person is incapable of giving informed consent, that determination remains effective until decided otherwise by a physician or the State. In the absence of a power of attorney or appointed guardian, a health care decision may be made by the incapacitated person's family.

When no family members are available or family members do not agree on the decision to be made, the State can make the health care decisions. The State may also determine who is authorized to make the decision or appoint its own representative to make the decision. Health care consent procedures can be avoided by preparing a durable power of attorney for health care. This option appoints someone in advance to make these decisions.

DURABLE POWER OF ATTORNEY

A durable power of attorney (POA) enables a person, called the "principal", to appoint an "agent," such as a trusted relative or friend, to handle specific health, legal and financial responsibilities.

There are two types of durable power of attorney:

- **POA for Healthcare** – Gives a designated person the authority to make health care decisions on behalf of the person.
- **POA for Finances** – Gives a designated person the authority to make legal/financial decisions on behalf of the person.

Families should prepare these legal documents long before someone starts having trouble handling

certain aspects of life. At the time of the signing, the elderly person establishing a durable power of attorney must be capable of deciding to seek assistance.

When choosing a POA as your agent you need to think carefully about who knows you the best and who is best able to speak for you on financial and health care matters. For many, this will be a spouse or child, but you may name anyone, including a friend. Secondly, you should consider naming a second person to act as an agent in the event that your first choice is unavailable or is unwilling to make the decision.

Once you've chosen an agent, ask if he or she is willing to accept the responsibility of being your POA. If the person you have selected accepts the responsibility, then discuss the various kinds of financial and health care decisions that may have to be made in your future and what your wishes are. What kind of treatment you want or do not want to receive should be clearly stated. Some of things you may want to think about are:

- Do I want to be kept alive artificially by a machine?
- Do I want to have a feeding tube?
- Do I want to be resuscitated should my heart stop or should I stop breathing?

Like a trust, a durable power of attorney can be written so that the transfer of responsibilities occurs immediately. Or, the POA can state that the POA goes into effect when your elderly parent becomes incapacitated. Until that point, the elder can choose to continue to make decisions on his/her own.

If you choose to create a durable power of attorney, a lawyer can tailor your document to meet your needs. For a sample of a Durable Power of Attorney please visit the South Dakota State Bar's website at www.sdbar.org or contact them at 605-224-7554.

PROBATE

Probate is a legal proceeding that transfers your property following your death according to the terms of your will or in the absence of a will, to your heirs based on probate law. The South Dakota Uniform Probate Code was designed to protect the rights of heirs and to assure the orderly collection, preservation and transfer of property.

Having a will undoubtedly simplifies the distribution of your property. A will helps speed the probate process because your wishes are already outlined.

Testate probate proceedings are held for those who have a will upon their death.

For those who die without a will, probate law provides a means for distributing the property of the deceased, called an intestate probate proceeding. The court will appoint a personal representative to administer the estate and distribute the property. This person is often a surviving spouse or another beneficiary. Because there is no will, state law will be used to distribute property. Property will usually go to surviving spouses and other heirs.

With either type of probate proceedings, all creditors must be paid from the estate. The probate court also provides for the collection of appropriate state inheritance, federal estate and income taxes. A handful of other taxes must also be paid to the state before the estate can be closed. Administrative costs, court costs and attorney fees are also paid by the estate. Probate law is complex. When used

correctly, it will ensure that the property of the deceased is distributed quickly and fairly. As with all estate planning, contact your lawyer for more details.

ESTATE PLANNING

Planning for you future is an important part of growing older. Have you ever thought about what would happen if you suddenly became incapable of making your own health care decisions? Who would make the decisions for you? How would they be made? Estate planning is a way to address these concerns.

Patients who are capable of making their own health care decisions have the right to consent, to reject, and to withdraw consent for medical procedures, treatments or interventions. They may say yes, no, or "I will think about it." For patients who are incapable, someone else must make these decisions for them. For many patients, this possible loss of control is a concern. Should they try to speak in advance for themselves? Should they try to designate someone else to speak for them? How do they protect and effectively transfer their right to choose to a person whom they know will speak their mind and heart?

If you become incapacitated and do not have a Living Will or a Durable Power of Attorney for financial and health care directives, family can become emotionally frustrated if they do not know the death wishes of the dying family member. Discussing this issue and making a legal document before an unexpected situation occurs can be very beneficial to any family. Death is not an easy topic to discuss, but the actual death of a loved one can be very stressful for the family members that are left behind. Preparing a document like a Living Will or a Durable Power of Attorney may make the grieving process much easier to endure.