



# State Bar of South Dakota

## Law and Death

### Wills And Joint Tenancy

#### What is a will?

A will is a written document that directs how your property is to be distributed on your death. A will also allows you to name a personal representative and/or a trustee to handle the distribution of your estate according to your wishes. If you have minor children you may also designate the individuals or institution that you wish to serve as guardian(s) of their person and conservator(s) of their estates.

#### What are the legal requirements for a will?

An individual 18 or more years of age who is of sound mind may make a will. A will must be: in writing; signed by you; and, signed in your conscious presence by two or more individuals who, in your conscious presence, witnessed either the signing of the will or your acknowledgment of your signature.

A "holographic" will is valid if the signature and material portions of the will are in your handwriting.

A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money.

Such a statement must be signed by you and must describe the items and the persons to receive the items with reasonable certainty.

A will is not required to be notarized, however, a will may be made "self-proved", which adds to the authenticity and proof of the will when it is offered for probate after your death.

## **Do I need a will?**

Yes. A will is important, regardless of the size of your estate, to insure that your wishes are fulfilled. Many people believe they do not need a will if they own all of their property in joint tenancy with their spouse. However, the last surviving spousal joint tenant's will controls the distribution of the jointly owned property. Also, it is rare for an individual to die without leaving some personal property that could pass under the terms of your will.

## **May I disinherit my spouse?**

No. South Dakota law provides that the surviving spouse of a decedent who dies domiciled in this state has a right of election to take an elective share amount equal to the value of an elective share percentage of the estate. This elective share amount is determined by the length of time the spouse and the decedent were married to each other according to the terms of a table. The table provides for a minimum of \$50,000.00 up to a maximum of 50% of the augmented estate for a marriage of 15 years or more. The surviving spouse must petition the court for any elective share entitlement. Spouses may waive their right before or after marriage by a written agreement to waive an elective share of the other spouse's estate. The elective share proceedings and waiver of elective share rights are complex matters and should be discussed with your attorney.

## **What if I die without a will?**

If you die without having made a will, the law, not you, will provide for the distribution and disposition of your property. After certain exemptions and allowances, payment of taxes and other valid debts, claims and expenses of administration, the estate of a person who dies without leaving a will is divided as follows:

If you have a surviving spouse, your surviving spouse receives the entire estate if you have no surviving descendants or if all of your surviving descendants are also descendants of your surviving spouse. Otherwise, the first \$100,000 plus 1/2 of any balance passes to your surviving spouse if one or more of your surviving descendants are not descendants of your surviving spouse.

Any part of your estate not passing to the surviving spouse, or the entire estate if there is no surviving spouse, passes to the individuals who survive you in the following order: