Last Will, Living Trust, Power of Attorney or Living Will

	Last Will	Living Trust	Power of Attorney	Living Will
Recommended for	People who want to distribute property to loved ones and name guardians for minor children.	People who want to transfer property to loved ones quickly and privately, generally avoiding probate.	People who want to appoint an individual to make key legal and financial decisions on their behalf.	People who want to specify their wishes for medical care and artificial life support in advance.
Specifies guardianship for minor children?	Yes. A last will can establish guardianship for minor children.	It can with a “pour over will”.1	No. A power of attorney does not establish guardianship.	No. A living will does not establish guardianship.
Outlines medical wishes if you are unable to communicate?	No. A last will does not specify medical wishes.	No. A living trust does not specify medical wishes.	It can.	Yes. A Living Will allows you to make decisions regarding life support, pain medication, artificial nutrition, organ donation, and how anatomical gifts are to be distributed, as allowed by the laws in your state.
Assigns someone to handle personal financial affairs?	No. A last will nominates an executor (personal representative) to ensure your instructions are carried out.	No. A living trust nominates a "successor trustee" to ensure your trust's instructions are followed.	Yes. A power of attorney appoints someone to handle specific legal or financial affairs. You can grant powers in as many or as few legal or financial areas as you wish (banking, insurance, real estate, etc.).	No. A Living Will includes a Healthcare Power of Attorney that appoints someone to make medical decisions on your behalf if you are unable to communicate your wishes.

Is it private?	Last wills are probated in court and become a matter of public record.2	Yes. A living trust distributes assets privately and does not usually require probate court.1	Yes. In most cases, the details of a power of attorney remain private.	Yes. The details of a living will are kept between you, your family and your physician.
When does it go into effect?	Goes into effect upon your death, but probating an estate and receiving court approval to distribute the property can be costly and time consuming depending upon state law and the complexity of your estate.	Goes into effect immediately when the document is signed and the trust is funded. A living trust helps speed the transfer of assets to loved ones.	Goes into effect immediately, or upon a specific event (e.g., incapacitation, travel). Dates of duration can also be specified.	Goes into effect upon incapacitation.
Requires court involvement?4	Yes. A last will must generally go through probate court.	No. A living trust helps avoid probate court, saving your loved ones delays and court and attorneys fees.	No. A power of attorney does not generally require court involvement.	No. A living will does not generally require court involvement.
Duration	No expiration, but can be revised or revoked at any time.	No expiration date is required, but a living trust can have an expiration date. Can be revised or revoked at any time.3	Duration depends on the type of power of attorney, but can be revised or revoked at any time.	No expiration, but can be revised or revoked at any time.

1 A “pour-over Last Will", which may be subject to probate court. This "pour-over Last Will" can establish guardianship of minor children.

2 All last wills are subject to probate court, unless the total value of your estate is below the statutory minimum.

3 With an A/B trust, if one spouse dies, that spouse's half of the trust becomes irrevocable.

4 Any document that is challenged by a third party may be reviewed in court.

Provided by the State Bar of South Dakota

PROBATE

In this country the right to own property is a privilege we all enjoy. At death, the owner of the property, by use of a properly drawn and executed will, has the right to transfer such property to persons of their choice. (Property can either be real, such as a home, or personal, such as a boat or an automobile.)

A person who dies and has a will is said to have died testate. A person who dies without a will is said to have died intestate.

When a person dies without a will, the court appoints a personal representative to administer the estate and to distribute the property, as provided by law. A bond may be required of a personal representative.

A person who dies with a will usually appoints a personal representative of their choice to administer their estate and to distribute their property as directed by the terms of their will. A person who leaves the will usually waives the bond requirement for the personal representative.

A will does not take effect until a person dies. As long as a person is competent, a person may change their will as many times as they desire during their lifetime. A will may be changed or amended by using what is called a codicil.

In South Dakota, every person over the age of eighteen (18) years, who is of sound mind, may execute a will. The will should be in writing, signed by the testator in the presence of two (2) witnesses. The two (2) witnesses must write their names on the will.

Uniform Probate Code

Effective July 1, 1995, South Dakota adopted Articles I, II, III, IV and VIII of the Uniform Probate Code. The purpose of the Uniform Probate Code is to:

1. Simplify and clarify the law concerning the affairs of decedent;
2. Discover and make effective the intent of a decedent as to distribution of his property;
3. Promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to the heirs; and
4. Make uniform the law among various jurisdictions.Why do we have probate?

Any person who dies owning property must take provision for the distribution of those assets. In many instances this is done by a probate proceeding. If there is a will devising the property, there will be a testate proceeding. When there is no will, there will be an intestate probate proceeding. These proceedings are generally in the county where the deceased lived at the time of death. Probate proceedings are usually administered under the supervision of the Clerk of Courts. Persons entitled to share in the distribution of an estate are determined from the provisions of the will, or if there is no will, by the rules of intestate succession.

Probate laws are designed to protect the rights of heirs and creditors and to assure the orderly collection, preservation, and transfer of property. The probate court also provides for the collection of appropriate state estate, federal estate, income, real property, sales and use taxes before the estate may be closed.

Rights of creditors

A creditor of the decedent must be paid from the assets of the estate before there is any distribution of the estate property to the heirs and beneficiaries. Determination of valid debts and payment of those debts is usually done during the probate proceedings. If there is money owed to the estate, these funds are usually collected during the probate proceedings.

Establishing property title

If a decedent dies owning title to property in the decedent's own name, it is during the probate proceedings that title to these assets would be given to the beneficiaries and heirs. There can be no transfer of property in a probate proceeding until provisions have been made to pay any state or federal death taxes which may be due. When all debts and taxes have been paid, the property would be distributed to the heirs and the probate proceedings would be closed.

Rights of the surviving spouse

Protecting the rights of the surviving spouse and minor children is another responsibility of the probate court.

A common misconception concerning our laws is the idea that when a person dies without a will, the property passes directly to the surviving spouse. This is not the case.

In South Dakota, when a person dies without leaving a will, the surviving spouse is entitled 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, plus certain exempt property, family allowances, and homestead allowances. The exempt property is that which the spouse and unmarried minor children are entitled to receive absolutely, regardless of provisions made by the spouse for disposition of the other assets.

This exempt property includes such items as the family Bible, books (with a $200.00 value limitation), clothing, and fuel for one year. The family allowance is an award made to the surviving spouse and the minor children to live on during the administration of the estate. The amount of the award is based on the family's previous standard of living.

In addition, 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.

It is no longer possible to disinherit a spouse in the state of South Dakota, unless the spouse agrees.

Expenses of probate

The administration of any estate generally involves the following expenses:

- Bond Premiums. Each personal representative is required to provide the court with an indemnity bond guaranteeing the faithful performance of duties unless bond is specifically waived by the decedent in his will or, in certain cases, by the court.
- Published Notices. Notices may be published during the administration of an estate. These notices are for the protection of those interested in the estate and vary in cost.
- Court costs. Court costs paid to the Clerk are in an amount set by law.
- Personal Representative and Attorney Fees. The fee received by the personal representative is set by law. The attorney who assists in the administration of an estate is hired by the personal representative of the estate and those fees are a matter of contract. The personal representative is entitled to reimbursement from the estate for payment of attorney fees in handling the estate. If the personal representative is an attorney, he will receive only one fee.

Small Estates

If your estate does not exceed a certain value (currently $25,000.00) and consists solely of personal property, a probate proceeding may not be required and the estate can be transferred with an affidavit. Creditor claims must still be paid, however.

This brochure is based on South Dakota law and is designed to inform, not to advise. No person should ever apply or interpret any law without the aid of a trained expert who knows the facts and may be aware of any changes in the law.

What is a will?

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.

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."

Expense

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.

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 beneficiariesto establish a conservatorship. A conservatorship would require an annual accounting to the court. Any life insurance proceeds payable to a child over the age of eighteen (18) years will be paid directly to that child. 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 tenancy 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. Consultation with your attorney is recommended.

Your personal estate planning.

Every adult person should have an estate plan. One way of creating an estate plan is the living trust. The purpose of this brochure is to give you answers to questions frequently asked about living trusts so you can determine whether a living trust is right for you.

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.

Do I need a living trust?

You may decide you need a living trust, but first you should review your own situation with your lawyer to decide whether or not a trust is correct for you. It could be that a will, some other type of trust, or other arrangements would better fit your situation.

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.

Why is there so much publicity about living trusts?

It is possible to avoid probate of assets held in a living trust. Much of the current interest comes from concern and publicity about the perceived cost and length of time to complete a probate. Lengthy delays and excessive costs of probate are problems in some heavily populated states, but in South

Dakota probate can be relatively simple and economical. You should consult with your lawyer about the comparative costs of various estate plans.

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.
- It is possible that a living trust can be kept more confidential than a will.

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 fonus 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.

Warning.

Certain publicity and 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.

The Truth About Probate In South Dakota

How does the probate process begin?

When a person dies owning assets in his or her name alone, an estate must be started by a personal representative to handle the decedent's assets and take care of settling the decedent's affairs. This is called the probate or estate administration process. The personal representative is called an executor in some states. The personal representative can be an individual or corporation (such as a bank or trust company).

What happens after an estate is started?

The job of the personal representative is to wind up the decedent's affairs by notifying beneficiaries, gathering assets, paying debts and taxes, accounting for all estate transactions and properly distributing the estate. The personal representative is the only one legally authorized to deal with the assets of the estate and handle matters of estate administration.

Why is there a probate process?

Reasons for the probate process include prevention of fraud and protection of creditors and rightful beneficiaries of estates. Beneficiaries are entitled to notice of the estate administration and an accounting of all estate transactions. They also have access to all documents filed by the estate. The probate process in South Dakota is an efficient way to protect beneficiaries and creditors and to assure proper distribution of estate assets.

What are the costs of probate?

In South Dakota, the costs of probate include filing fees for opening the estate, publishing a notice to creditors and preparing the inventory of estate assets and other documents to complete the administration process. The South Dakota court filing fee is relatively modest in comparison to some other states. Other costs of probate include legal fees paid to the attorney handling the estate work, which may include preparation of certain death tax and income tax returns. The personal representative may also charge a fee. Obtaining appropriate legal advice about the administration of the estate can help reduce costs as well as taxes. Legal counsel is also advisable in dealing with assets which pass outside of probate, such as when a living trust or property held in joint tenancy is involved.

Does probate take a long time?

In South Dakota, probate need not and normally does not take long in comparison with other states. However, the time frame may depend upon the type of assets involved and other factors. Personal representatives are accorded broad powers to accomplish the estate administration expeditiously. They are empowered to handle most details (liquidating assets, paying debts and expenses, etc.) usually without seeking court approval for each and every transaction. Personal representatives are required to prepare only an inventory of estate assets. The accounting of estate transactions to beneficiaries and heirs may be accomplished informally (not involving the court) or formally (filed with the court).

Do all of a decedent's assets go through probate?

No. Assets held in joint ownership between spouses or with others with right of survivorship pass automatically to the surviving joint owner and are not subject to probate. Bank and brokerage accounts and securities which have a payable on death (POD) or transfer on death (TOD) designation also are not subject to probate. Assets with designated beneficiaries such as life insurance policies, annuities, IRAs and various retirement plans pass to the named beneficiaries and are not subject to probate. Finally, assets held in a trust are governed by the terms of the trust rather than the decedent's will and pass outside the probate process. It is important to note that assets controlled by the decedent at death, even if not subject to probate, are still subject to all of the same death taxes as probate assets.

How does the probate process end?

The probate process ends upon receipt by the beneficiaries of their proper share of the estate and the release of the personal representative from further responsibility for the administration of the estate.

The Truth About Living Trusts

What is a living trust?

A "living trust" is a legal entity to which your assets (bank accounts, securities, house, etc.) can be transferred and managed by a person, including yourself, or corporation (such as a bank or trust company) called a "trustee". The trustee manages your assets in accordance with written instructions contained in a trust document. Living trusts can be revocable or irrevocable.

Are living trusts something new?

No. Living trusts have existed for centuries. They are more formally called "inter-vivos trusts" to distinguish them from "testamentary trusts" which are contained in wills and take effect upon death. Living trusts traditionally were and still are used for the management of assets of those requiring or desiring such services.

Why am I hearing so much about living trusts now?

Today, revocable living trusts are heavily marketed as substitutes for wills, often using exaggerated tales of costs and delays in the administration of estates under wills (sometimes called the "probate" process) as a sales tactic. Publicity has arisen from these sales activities as well as from press coverage of fines and other sanctions imposed by the South Dakota Attorney General on certain vendors of living trusts.

Do I need a revocable living trust?

The answer depends on your unique family situation, financial position and goals. In South Dakota, the benefit of creating a living trust for the sole purpose of avoiding probate is debatable. This is because in South Dakota probate entails relatively moderate cost and less time in comparison to many other states. A personal representative named in a will to administer an estate is accorded much flexibility in decision-making, and courts do not become involved in each detail of the estate administration process.

Does having a revocable living trust reduce taxes?

No. The federal estate tax treatment of assets is the same, regardless of whether assets are administered through a revocable living trust or under a will. Also, estate planning techniques designed to reduce this tax are available under wills to the same extent they are available under revocable living trusts.

What about legal fees?

Overall, legal fees may be more or less with revocable living trusts than wills. For the provisions of a living trust to control, a trust document must be prepared and your assets must be transferred to the trust during your lifetime. This often entails significant legal fees. On the other hand, a living trust may reduce or eliminate court filing fees incurred after your death with a will. After death, both trustees of living trusts and personal representatives under wills require legal advice as to the proper payment of taxes and creditors, distribution to beneficiaries, document interpretation and other issues. Also, a will is advisable even if you have a living trust to provide for the administration and distribution of assets not transferred to the trust during your lifetime. Note that the reasonableness of legal fees charged to trusts is judged by the same rules of professional responsibility as legal fees charged to estates.

Are there disadvantages to living trusts?

If assets are distributed through a living trust instead of your estate after death, beneficiaries will have no automatic legal right to the notices required for estates. Trustees of living trusts who decline to follow the procedures used by personal representatives under wills to conclude the administration of estates may remain subject indefinitely to personal liability, even after funds have been distributed. Also, while personal representatives of estates are granted broad legal authority to fully wind up a decedent's affairs, trustees of living trusts have no authority beyond the assets placed in the trust.

How do I know what I need?

The only way to be certain your specific needs and desires are met is to consult a trusted attorney or an attorney referred to you by a trusted source. High-pressure solicitations by mail or in person should be viewed with skepticism. Your financial and estate planning situation is unique and should be accorded the proper time, attention and expertise which only a properly trained and experienced attorney can provide.

Conclusion.

You have taken a lifetime to accumulate your wealth. You should takc 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.