

Is it a Will or Isn't it? Thomas E. Simmons

What Qualifies as a Will

South Dakota law defines a “Will” as an instrument executed with “testamentary intent” in the manner prescribed by statute.¹ “Testamentary” means something made so as not to take effect until the death of the person making it.² A “Codicil” (literally, a “little Will”) is an amendment to a Will.

To make a Will, an individual must be at least eighteen years old and “of sound mind.”³ All Wills must be written; oral wills are unenforceable. South Dakota law recognizes five types of Wills which are briefly described below.

(a) “Self-Proved Wills”⁴

A self-proved Will is the type most typically drafted by attorneys. It contains the signature of the individual making the Will, the signatures of at least two witnesses, and a notary. A self-proved Will includes a sworn statement by the witnesses that they observed the individual making the Will, that he/she appeared to be at least eighteen years old, of sound mind, and signed the Will willingly. The statute describing self-proved Wills contains sample affidavit language.

(b) “Witnessed Wills”⁵

A witnessed Will must be in writing and signed by the individual making the Will along with two witnesses. There is no notary or affidavit requirement.

A witnessed Will which lacks a self-proving affidavit may result in the need to locate the witnesses so that they can testify as to their recollections about the signing ceremony. For this reason, most attorneys avoid using this form of Wills for their clients. A self-

¹ SDCL 29A-1-201(52). A Will may (1) dispose of property on or after death; (2) appoint a personal representative; (3) nominate a guardian or conservator; (4) revoke or amend a prior Will; and (5) limit or exclude persons who would inherit by intestacy. *Id.*

² Black’s Law Dictionary 6th ed. at 1474 (1990).

³ SDCL 29A-2-501. The fact that an individual is aged, weak, frail and hospitalized is not in itself evidence that the individual was not of sound mind for purposes of making a Will. *In re Melcher’s Estate*, 232 N.W.2d 442 (S.D. 1975).

⁴ SDCL 29A-2-504.

⁵ SDCL 29A-2-502(b).

proved Will actually contains sworn testimony by the witnesses on the document itself, thereby eliminating the need to call the witnesses to testify before the probate Judge at a later date.

(c) Holographic Wills⁶

A holographic (or “handwritten”) Will is valid if the signature and material portions of the document are in the individual’s handwriting. There is no notary requirement, nor any witness requirement. With holographic Wills, there can be questions about whether the individual actually intended the document to operate as a Will, and whether the document is actually in the individual’s handwriting.

(d) Writings Intended as Wills⁷

South Dakota law also recognizes that some documents may qualify as Wills even though they lack the required elements of holographic, self-proved or witnessed Wills.

An example might be a typed document purporting to be a Will with the decedent’s signature. Such an instrument would not qualify as a holographic Will since its material portions are not in the decedent’s handwriting. And it would not qualify as a witnessed or self-proved Will either. Yet there may be strong indications that the decedent intended for his wishes as expressed in the document to be honored as a valid Will.

To establish that a document qualifies as a Will even where it does not meet the statutory requirements, it must be established by “clear and convincing evidence” that the decedent intended the document to constitute a Will. This is a high evidentiary burden which is difficult to meet.

(e) Wills by Conservators⁸

Finally, South Dakota law permits a conservator to write a Will for an individual under certain circumstances. A hearing, notice to interested parties, and a court order are necessary prerequisites. A Will by a conservator must be in writing and signed by the conservator and at least two witnesses.

⁶ SDCL 29A-2-502(a).

⁷ SDCL 29A-2-503.

⁸ SDCL 29A-5-420(8).

When is a Will Revoked?

Many, many factors can affect the enforcement of the provisions of a Will. Among them are divorce, marriage and the intentional revocation of the Will.

A Will may be revoked by executing a new Will which revokes the old Will, or by the individual tearing or destroying the old Will with the intent to revoke it.⁹ Divorce generally has the effect of nullifying provisions of a Will for the benefit of the former spouse.¹⁰ And a surviving spouse who married the decedent after the execution of a Will is usually entitled to receive no less than what he or she would have received if the individual had no Will; this rule has the effect of revoking premarital Wills to a large extent.¹¹

WHERE TO FIND THE LAW

The law is generally comprised of statutes, regulations and caselaw (reported opinions by a court to specific facts). The law cited within the above discussion can be found at the links provided in the “Law” section of the ThomasESimmons.com website. South Dakota statutes are abbreviated as “SDCL” for South Dakota Codified Laws. South Dakota administrative rules are abbreviated as “SDAR.” Federal statutes are abbreviated as “USC” for United States Code.

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⁹ SDCL 29A-2-507.

¹⁰ SDCL 29A-2-804.

¹¹ SDCL 29A-2-301.

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