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## Estate Planning for Families with Minor Children

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## ESTATE PLANNING FOR FAMILIES WITH MINOR CHILDREN

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**PARENTS WITH MINOR CHILDREN** have estate planning concerns that are different from parents of adult children. A typical concern is how to provide income for the children if one or both parents die. Another problem is how assets will be managed to provide financial resources needed by the children until they reach adulthood.

And a third worry is who will care for the children should both parents die at the same time. If a family has a handicapped child, there are additional considerations.

This guide will answer some of the estate planning questions asked by parents of minor and/or handicapped children.

### WHAT IF ONE PARENT DIES?

Mary and John Douglas have typical young-family estate-planning concerns. In their early 30s, Mary and John have two children, ages 5 and 7. Mary and John assume that if one of them died, the other would use family assets to provide for their children. They discussed the

possibility that the survivor could remarry and have more children, and they still felt comfortable leaving everything to the survivor. Their estate-planning goals were accomplished by titling their car, house, and investments in joint tenancies with rights of survivorship so that if either spouse died, the property would pass to the survivor. They also have named one another as beneficiary on their life insurance policies.

### HOW DO I NAME SOMEONE TO TAKE CARE OF MY CHILDREN?

A written will is a legal document used to nominate a guardian for minor children and a conservator of assets for them should both parents die. Guardianship provides for the children's care until they reach the age of 18. The guardian has the power and responsibility of a parent and makes decisions about the child's upbringing—schooling, religious training, and medical treatment.

Conservatorship provides for management and distribution of money and property left





to children until they reach the age of 18. One person can perform both functions, or one individual may be named as guardian and another as conservator.

Often the most difficult part of setting up a guardianship is for the parents to agree on the person to be guardian of their children. Consider choosing someone whose values, lifestyle, and childrearing beliefs are similar to yours. Discuss with your older children their preferences because South Dakota law allows youth ages 14 and over to request the court to appoint someone other than the person nominated in your will. The circuit court judge decides on guardianship based on what is in the best interest of the child.

Once your decision is made, take time to discuss all financial and child care arrangements with the conservator and guardian you have chosen. Asking someone to raise your children or to manage their assets may be an overwhelming request. Don't expect an immediate answer. Give them time to seriously consider the consequences of their acceptance.

Some friends or relatives may feel they cannot accept the added responsibility. If so, ask someone else. Attorneys recommend the naming of a backup guardian and conservator in case circumstances prevent your first choice from carrying out the obligation after your death.

Don't hesitate to re-evaluate your choice periodically, especially if personal and financial situations change for either you or the designated guardian and conservator. For example, if the guardian nominated gets divorced, gets married or has a major illness, you may wish to nominate someone else.

If you decide to change to another guardian or conservator, inform your current nominee. Then prepare either a new will or add a "codicil" (amendment) to your present will, nominating the new guardian or conservator.

### ARE THERE ALTERNATIVES TO MY CHILDREN RECEIVING THEIR INHERITANCE AT AGE 18?

South Dakota law provides for the conservator to manage inherited property until the children reach age of majority, which is 18 years. When a child reaches 18, the child receives his or her share of the property, regardless of the capability to manage it.

You may believe your 18-year-old is bright but conclude that he or she is incapable of managing \$100,000 or \$200,000 in assets. Rather than leaving the assets directly to the children and nominating a conservator to manage them until the children reach age 18, you can have the assets left in a "family" trust for the children's benefit. In your will you indicate which assets pass directly to the trust.

For example, insurance proceeds can be paid into the trust if both parents die. Savings accounts in the parents' names can be directed to the trust. The parents select and name a trustee to manage the assets. They prepare a trust agreement giving the trustee the power to manage the trust assets and use the income for the children's benefit. The trust agreement is effective upon the death of both parents. A trust can avoid the inflexibility of conservatorship that passes assets to the children at age 18. Your trust agreement can indicate any age at which the trust terminates and that age could well be beyond 18.

The trust document states how you wish the money to be spent, who should be the trustee, and when the trust should terminate so assets pass to the children. The trustee has the responsibility of following your directions for health, education, and support as outlined in the trust agreement. The trustee writes out the checks for the children's living expenses, education, and other costs. Some arrangement for trustee compensation should be made if the duties are fairly extensive.

Parents who want to encourage their children to attend college sometimes include a provision in the trust that gives children extra money and a lump sum distribution upon receipt of their bachelor's, master's, or Ph.D. degrees. If the children do not attend college, trust distribution is often deferred to a later age.

#### WHAT IF WE HAVE A MENTALLY HANDICAPPED CHILD?

When there is a family member who will never be able to care for himself or herself, estate planning is more complex and more important. Because a mentally handicapped child could outlive both parents, they need to plan for guardianship and management of assets for the child when they are gone.

One alternative is to leave everything to your other children and instruct them to care for the mentally handicapped child. But you may decide that solution would be too burdensome to the other children.

Another alternative is to leave some assets outright to the non-handicapped children and some assets in trust to provide income for the support of the mentally handicapped child. A consequence of this decision may result in the mentally handicapped child being ineligible for need-based government benefits. In addition, the income could be claimed by the State of South Dakota for reimbursement if the handicapped child has to be in a state-supported care facility.

With help from their attorney, one family developed an estate plan that leaves their assets to a "spendthrift trust" for a child who has Down's syndrome. Special wording in a spendthrift trust ensures that the assets will not be used in place of public benefits and that trust income will not make the handicapped child ineligible for government programs.

The parents know that their child will never be able to make her own important decisions, so

they have nominated an older sister as guardian. The sister is well informed about the needs and care of an individual with Down's syndrome.

#### WHAT IF WE HAVE CHILDREN FROM A PREVIOUS MARRIAGE?

Parents who have children from a previous marriage may wish to assure that these children inherit property. One way this goal can be accomplished is by the parent keeping some property in his or her name only. The parents can then write separate wills or trusts to designate which children are to receive what assets and under what circumstances.

For example, a recently married couple both have children from an earlier marriage. Neither of them wants to leave everything to the surviving spouse. The wife has a 10-year-old daughter. The husband has two children, a 24-year-old daughter and a 14-year-old son. His divorce settlement requires that a stated amount of life insurance proceeds be available for his son's benefit. The couple owns no property in joint tenancy with right of survivorship except their cars. Their other assets are titled in just one name—some in her name and some in his name.

The wife's will leaves the household contents to her husband and other assets to a testamentary trust for her daughter's benefit. The trust comes into existence only at the mother's death. Her separate listing of tangible personal property that is attached to the will names her daughter to receive all jewelry. The trust is named beneficiary for life insurance proceeds.

The mother did not want to have the assets pass outright to her daughter, since there was a chance the child's biological father would be appointed conservator. The trust agreement instructs the trustee to use income and as much of the principal as necessary for the care and education of her daughter. Any assets remaining in the trust will be distributed in yearly installments starting on the daughter's



25th birthday. The trust will terminate when the daughter reaches age 30, which allows any remaining assets to be distributed and used as she wishes.

The husband's will leaves the household contents to his wife. He has also named her as beneficiary on one of his insurance policies. He leaves the coin collection to his daughter and his antique firearms to his son.

At first he considered dividing his other assets and insurance proceeds equally between his two children. However, he decided distributing the estate in equal shares may not provide adequately for each child's needs. If he died, his 14-year-old son would need more financial support than would his 24-year-old daughter, who is already on her own.

The father's will directs that all the assets designated for his children pass into a trust. The trust agreement requires that the income be used for the care and education of his son. When the son reaches age 22, the remaining assets in the trust are to be distributed equally to both children.

This couple used wills to nominate guardians for their minor children. Deciding who to nominate was even more difficult for them than it is for most people because they discussed the plans with former spouses who are, after all, still their children's biological parents.

#### **HOW DO WE PLAN FOR ESTATE TAXES?**

Two Extension fact sheets, Federal Estate Tax and Gift Taxes provide information to inform families on alternatives for achieving this goal.

The South Dakota inheritance tax was repealed by an amendment to the SD Constitution, which occurred by initiated measure, in November of 2000. As of July 1, 2001 no South Dakota inheritance tax is applied to the value of real and personal property that passes to a decedent's (person who died) beneficiaries. However, South Dakota estate tax still exists.

#### **HOW MAY I BE SURE MY MINOR CHILDREN WILL RECEIVE CHERISHED PERSONAL POSSESSIONS?**

Nearly all parents have personal heirloom possessions they want to hand down to their children. The South Dakota Uniform Probate Code contains a provision allowing a person to refer in his or her will to a separate list disposing of tangible personal property such as rings, quilts, coin collections, and so on.

The list may only be used to dispose of tangible personal property other than money. The list is not part of the will but separate from it and must identify both the items and the persons to receive them with reasonable certainty. It must either be in the handwriting of the person who wrote the will or be signed by him or her. The separate listing can be changed as new possessions are added without the formalities required for new wills or codicils. The list should be dated and signed each time a change is made. For further information, see Who Gets Grandma's Yellow Pie Plate from the SDSU Extension Website or from your local Extension office.

#### **IS AN ATTORNEY NECESSARY FOR ESTATE PLANNING WHEN OUR ESTATE IS SMALL AND WE HAVE ONLY MINOR CHILDREN?**

Estate planning attorneys can help parents with minor children plan their estate. With their legal expertise, attorneys can help parents weigh advantages and disadvantages of various estate planning tools and techniques. Often the most difficult part of the planning is for the parents to discuss preferences for their minor children's lifestyle, values, goals, and relationships before they make their appointment with the attorney.

#### **SUMMARY**

Parents with minor children face major estate planning decisions. One concern is how to provide income for the children if one or both parents die. Another challenge is how assets will be managed to provide financial resources needed by the children until they reach adulthood. And a third problem is directing who will care for their children should both parents die.

Wills and trusts can help parents achieve their estate planning goals.

Estate planning attorneys can help parents with minor and/or handicapped children weigh advantages and disadvantages of various estate planning tools and techniques. Every family is different, and each has its own estate planning situations. Often, the most difficult part of the planning for parents is to reach agreement on complex family decisions about lifestyles, values, goals, and relationships.

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This publication is not designed as a substitute for legal advice. Rather it is designed to help parents become better acquainted with some of the methods used in estate planning to provide for children. Future changes in laws cannot be predicted and statements in this guide are based solely on the laws in force on the date of this publication.

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This publication is suggested for the reading of all South Dakotans. It has been reviewed and approved by the South Dakota Bar Association and South Dakota State University faculty in the Human Development, Consumer and Family Sciences Department, College of Family and Consumer Sciences, March 2005.

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