Will for Single Individual   
(Optional Trust(s) for Children) (SD)

Mini-summary

This template is a complete will for use by a single individual in South Dakota. It provides for the residuary estate to pass to the testator's surviving issue, either outright or in trust. Optional distribution provisions may be used for a testator without children. This template contains practical guidance, drafting notes, and alternate and optional clauses.  
If the testator chooses to distribute the estate outright to beneficiaries, any share for a minor child will be distributed to an individual having the care or custody of a minor child at the discretion of the personal representative. Generally, this would be a conservator of the minor or a custodian of a custodial account under the Uniform Transfers to Minors Act (UTMA) or Uniform Gifts to Minors Act (UGMA). However, an individual with minor children may choose to forgo the simpler UGMA/UTMA option, and instead opt for a testamentary trust (sometimes referred to as an express trust), which can be structured as either (1) a shared "pot" trust for the benefit of the testator's children collectively, or (2) separate share trusts for each of the testator's children. Although inclusion of testamentary trusts (i.e., express trusts) makes the disposition plan significantly more complicated and costly than would otherwise be the case, the testator may be desirous of creating a long-term distribution plan or providing creditor and spendthrift protections. A testator could also use one or more testamentary trusts for adult children in lieu of an outright distribution.  
A pot trust may be desirable if the testator wants to provide for their children in a way that addresses each child's particular needs, as opposed to giving fixed fractions to each child outright or in separate trusts. A pot trust allows the trustee to treat younger surviving children much as the parent would have if providing for those children during the parent's lifetime, since parents often provide for their children in ways that may not be entirely equal. For example, one child might attend an expensive private college and another child might opt to attend a less expensive public college. Or one child may have been born many years after another child and may not have the same financial needs as the older child.  
Alternatively, separate share trusts may be desirable when the testator wants each of their children (or issue of a predeceased child) to share equally in the testator's estate, and when the testator wants to provide for management of estate assets until their children reach a certain age. Establishing individual separate share trusts, as opposed to a single pot trust, is appropriate when all of the beneficiaries have reached the age of majority. The individual trusts usually provide an equal share of principal for each child but can be modified to provide unequal shares. The trustee has discretion in providing for each beneficiary from their own trust until they attain the specified age.  
The circumstances of the testator and beneficiaries, as well as the specific intentions of the testator, may require modifications to this template. For a will for a married individual, see Will for Individual with Spouse (Optional Trust(s) for Spouse and/or Children) (SD).

# **[LAST WILL AND TESTAMENT** **OF** [[NAME OF TESTATOR]]

**Optional Cover Page:**

Dated: [[month]] [[day]], [[year]]

Prepared by:

[[drafting attorney name]]

[**OPTIONAL:** [[bar number, including state (e.g., NY12345)]]]

[[drafting attorney firm name or legal office name (if Military Instrument)]]

[[drafting attorney address]]

[[drafting attorney phone number]]

[**OPTIONAL:** [[drafting attorney email address]]]1**]**

**[Optional Military Testamentary Instrument Preamble:**

MILITARY TESTAMENTARY PREAMBLE: This is a Military Testamentary Instrument prepared pursuant to 10 U.S.C. § 1044d, and executed by a person authorized to receive legal assistance from the Military Departments. Federal law exempts this document from any requirement of form, formality, or recording that is provided for testamentary instruments under the laws of a state, the District of Columbia, or a commonwealth, territory, or possession of the United States. Federal law specifies that this document shall receive the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the jurisdiction in which it is presented for probate. It shall remain valid unless and until the Testator revokes it.2**]**

# **LAST WILL OF** [[NAME OF TESTATOR]]

I, [[name of testator]], [**OPTIONAL:** currently residing/a resident] [[at/of]] [**OPTIONAL:** city and county,] [[testator's state of residence]], do hereby make, publish, and declare this to be my Last Will and Testament, hereby revoking any and all other wills and codicils executed by me.

**[Optional Provision to Add to First Paragraph of Preamble (if Military Instrument):**

I am a [**OPTIONAL:** dependent of a] [**OPTIONAL:** retired] member of the United States Armed Forces.3, 4**]**

**[First Optional Second Paragraph of Preamble:**

I am unmarried. [**OPTIONAL:** I was previously married./I was previously married to [[name of former spouse]], who [[died on/but that marriage was terminated]] on [[date]].] [**OPTIONAL:** At the time of execution of this Will, my [[child is / children are]] [[names of child/children]].] [**OPTIONAL:** Additionally, for all purposes under this Will, my [[stepchildren/stepdaughter/stepson]], [[name(s) of stepchildren]] shall be deemed to be my [[child/children]], and [[that child's/those children's]] issue shall be deemed to be my issue regardless of the fact that I am no longer married to [[name of former spouse]]. [**OPTIONAL:** Any reference to my children shall be to [[name(s) of children and stepchildren, if applicable]], and any children after-born or adopted by me.]5**]**

**[Second Optional Second Paragraph of Preamble:**

I am unmarried. [**OPTIONAL:** I was previously married./I was previously married to [[name of former spouse]], [[who died on/but that marriage was terminated on [date]]]]. [**OPTIONAL:** I have no children living or deceased, natural or adopted.] [**OPTIONAL:** My closest living relatives are [[name and relationship of testator's heirs at law]].]6**]**

**[Optional Third Paragraph of Preamble:**

I make no provisions herein for [[name of omitted heir(s)]] [**OPTIONAL:** or [[name of omitted heir]]'s issue] [**OPTIONAL:** reason for disinheriting (e.g., "for reasons I deem good and sufficient," "because I have provided significantly for such omitted heir(s) during my lifetime," or "not for lack of love or affection")]. [**OPTIONAL:** This decision is intentional and was not made by inadvertence or mistake.]7, 8**]**

ARTICLE I. **[FUNERAL ARRANGEMENTS.**+

**First Optional Article** ARTICLE I.**:**

I direct that my funeral and burial be conducted in accordance with my agreement with [[name of funeral home]], located at [[address]]. My Personal Representative is directed to take all actions necessary to comply with this agreement.9**]**

ARTICLE I. **[DISPOSITION OF REMAINS.**

**Second Optional Article** ARTICLE I.**:**

I direct that [[instructions for burial/cremation (e.g., my body be buried in the family plot)]]. [**OPTIONAL:** I further direct [[that arrangements for my funeral be made and carried out according to the custom and ceremony of [identification of religious or other denomination] / that my funeral include a non-religious memorial service]].]10**]**

ARTICLE I. **[MILITARY HONORS [AND BURIAL FLAGS].**

**Third Optional Article** ARTICLE I. **(if Military Instrument):**

I direct that, upon my death, I be buried with full military honors. [**OPTIONAL:** I direct that the following people receive an American flag: [[name(s) of flag recipient(s)]]. I understand that the Department of Veterans Affairs may not pay for all of the flags and I direct my Personal Representative to pay for any flags not paid for by the Department of Veterans' Affairs from my Residuary Estate.]

I direct that [[instructions for burial/cremation (e.g., my body be buried at a location chosen by my Personal Representative)]]. [**OPTIONAL:** I further direct [[that arrangements for my funeral be made and carried out according to the custom and ceremony of [identification of religious or other denomination] / that my funeral include a non-religious memorial service]].]11**]**

ARTICLE I. **PAYMENT OF DEBTS, TAXES, AND EXPENSES.**

1.1. My legally enforceable debts (other than mortgage debts, unless expressly provided otherwise in this Will), funeral expenses, and expenses of the administration of my estate, shall be paid without reimbursement from any party out of my Residuary Estate, as defined below. My Personal Representative shall have complete discretion in deciding which particular properties are to be used for payment of debts, taxes, and other obligations pursuant to this paragraph.12

1.2. All estate, inheritance, legacy, succession, or other wealth transfer taxes (other than any generation-skipping transfer tax imposed by Internal Revenue Code Section 2601 et seq.) that result from my death and that are imposed by any domestic or foreign taxing authority as a result of my death, but only to the extent imposed upon property passing under my Will, together with interest and penalties on those taxes, shall be charged against and paid without apportionment out of my Residuary Estate as an administration expense. Such taxes on property not passing under this Will shall be apportioned to and paid from such property by those succeeding to such property, taking into account the provisions of any instrument governing such property, the provisions of the Internal Revenue Code and any provisions of other applicable law apportioning such taxes.

Notwithstanding the above, the following clarifications and/or modifications of the general rule set forth above shall apply:

(a) All taxes generated by my Residuary Estate shall be apportioned within my Residuary Estate to the share or shares generating the tax but shall not be apportioned between current and future interests, such as a life estate and remainder, even if one and not the other is taxable.

(b) **[Optional Section** 1.2.(b)**:**

Any generation-skipping transfer tax (other than a tax on a direct skip of property passing as part of my Residuary Estate and disposed of under this instrument prior to the disposition of my Residuary Estate) shall be charged to the property constituting the transfer in the manner provided by Internal Revenue Code Section 2603(b).13, 14**]**

ARTICLE II. **DISPOSITION OF TANGIBLE PERSONAL PROPERTY [OPTIONAL: AND SPECIFIC DEVISES].**

2.1. **[First Optional Section** 2.1.**:**

If the property is part of my estate at the time of my death, I give [[description of property (e.g., my engagement ring)]] to [[name of beneficiary and relationship to the testator]], if [[name of beneficiary]] survives me, but if [[name of beneficiary]] does not survive me, this gift shall [[lapse / be distributed to [name of contingent beneficiary]]].15**]**

2.1. **[Second Optional Section** 2.1.**:**

I may leave a handwritten note or signed memorandum identifying certain items of tangible personal property, as defined below, and the persons to whom I give such tangible personal property. If I do leave such a handwritten note or memorandum, I request my Personal Representative to distribute the tangible personal property listed therein as if the terms of the note or memorandum were fully set forth in this Will. [**OPTIONAL:** However, if no note or memorandum is found within [[number]] days of the Personal Representative's qualification, it shall be presumed that no such note or memorandum exists.]16**]**

2.1. I give and bequeath all my tangible personal property not otherwise disposed of [**OPTIONAL:** hereunder or by separate memorandum] to [[name of class or individuals receiving personal property (e.g., my children)]] [**OPTIONAL:** or whichever one or more survives me]. The term "tangible personal property" shall include, but not be limited to, my household goods, jewelry, furniture, furnishings, equipment, automobiles, art, antiques, stamp and coin collections, and other collectibles, together with all insurance policies relating thereto. The term does not include property primarily held for investment purposes, nor does it include any property held for use in a trade or business, ordinary currency and cash or bullion.

2.2. I direct that each of the aforementioned beneficiaries may select from the foregoing those items of tangible personal property they may wish to retain, and I hereby give and bequeath to each beneficiary the items selected. If my beneficiaries are unable to agree as to the recipient of any item, I authorize and direct my Personal Representative to make the decision. If, in the sole judgment of my Personal Representative, any such beneficiary is too young to make a prudent selection, I authorize my Personal Representative to make a selection on behalf of the beneficiary.17

2.3. If any of the beneficiaries is a minor at the time of delivery of any items of tangible personal property, I authorize my Personal Representative, in the Personal Representative's discretion, to deliver the items either directly to the beneficiary, or to the beneficiary's guardian, or to the person having the care and custody of the beneficiary, and a duly executed receipt from the beneficiary or guardian or other person shall constitute a complete acquittance to my Personal Representative with respect to the bequest.

2.4. My Personal Representative, in the Personal Representative's sole discretion, may sell, donate, or otherwise dispose of any items of tangible personal property not selected, and the sale proceeds, if any, shall be added to my Residuary Estate.

2.5. The expense of packing, shipping, insuring, and delivering tangible personal property to an individual under this Article at such individual's residence or place of business shall be paid by [[my Personal Representative as an administration expense / the recipient of such tangible personal property]].

**[Optional Provision to Add to Section** 2.5. **(if User Selects Administration Expense in First Sentence):**

Notwithstanding the foregoing, my Personal Representative has full authority as to the allocation of such costs and can decline any such cost if, in the Personal Representative's absolute discretion, the cost is deemed disproportionate or excessive.18**]**

2.6. If none of the aforementioned beneficiaries of my tangible personal property survives me, then my Personal Representative shall make a reasonable effort to sell such property (the extent of said reasonable effort being in the Personal Representative's sole discretion), with the proceeds of any sold items added to my Residuary Estate, and to then donate or discard any remaining property, in the Personal Representative's sole discretion.

2.7. **[First Optional Section** 2.7.**:**

I give the right, title, and interest that I may have at the time of my death in the real property that is located [**OPTIONAL:** at [[street address of real property, including city]]], in [[state of real property]], [**OPTIONAL:** (and more fully described as follows: [[legal description]] to [[name(s) of devisee(s)]]] [**OPTIONAL (if Multiple Devisees):** or whichever one or more survives me]. [**OPTIONAL (if Multiple Devisees):** Such real property shall be distributed to the aforementioned devisees [[in equal shares / in the following proportions: [proportions (e.g., 1/3 to devisee 1 and 2/3 to devisee 2)]]].] If [[name(s) of devisee(s)]] [[do/does]] not survive me, this devise shall pass as a part of my Residuary Estate. This devise includes any improvements to my residence that may be made before my death, any appurtenances to it, and my interest in any policies of insurance relating to the property. If the real property devised herein is subject to any mortgage, lien, pledge, or other encumbrance of any nature, the encumbrance is [[to be discharged by the use of funds from my Residuary Estate so that no liability is borne by the devisee / not to be paid or discharged out of any other part of my estate, and the devisee shall take the devise subject to the encumbrance]].

(a) **[Optional Section** 2.7.(a)**:**

If [[any of the devisees / the devisee]] [[are/is]] under the age of [[age]], such real property shall be held in trust for the benefit of the devisee(s) and administered as follows:

(1) The Trustee is authorized at any time and from time to time to pay to or apply for the benefit of such devisee(s) such amounts of the net income and principal of such devisee's trust [[distribution standard (e.g., "as the Trustee shall determine in the Trustee's sole discretion" or "as the Trustee may deem advisable to provide adequately for the health, support, maintenance, and education of such beneficiary")]]. [**OPTIONAL:** Such payments need not be equal, and any one or more of such devisees may be excluded from any such payments.] Additionally, the Trustee is authorized to apply so much of the net income and principal as my Trustee deems advisable for the capital improvement, repair, or periodic maintenance of the real property held herein. Any income not so paid or applied shall be accumulated and added to principal annually.

(2) This trust shall terminate upon the death of the [[devisee / last surviving devisee]] [**OPTIONAL:** or the [[youngest]] devisee attaining [[age of real estate trust termination]] years of age, whichever occurs first]. Upon the termination, [**OPTIONAL:** if [one or more of] the [[devisee/devisees]] is then living, the Trustee shall distribute the balance of the assets of such trust, as constituted upon the termination date, outright to such devisee(s). If [[such devisee is not / no such devisee is then]] living,] the Trustee shall distribute the balance of the trust assets to [[name of contingent devisee]].19, 20**]]**

2.7. **[Second Optional Section** 2.7.**:**

I give all of my interests in real property [**OPTIONAL:** not otherwise devised in this Will] that I may have at the time of my death, to [[name(s) of devisee(s) of all interests in real property]]. [**OPTIONAL (if Multiple Devisees):** or whichever one or more survives me]. [**OPTIONAL (if Multiple Devisees):** Such real property shall be distributed to the aforementioned devisees [[in equal shares / in the following proportions: [proportions (e.g., 1/3 to devisee 1 and 2/3 to devisee 2)].]]] If [[name(s) of devisee(s) of all interests in real property]] [[do/does]] not survive me, such real property shall pass as a part of my Residuary Estate. This devise includes any improvements to any real property that may be made before my death, any appurtenances to it, and my interest in any policies of insurance relating to such properties. If any such real property is subject to any mortgage, lien, pledge, or other encumbrance of any nature, the encumbrance is [[to be discharged by the use of funds from my Residuary Estate so that no liability is borne by the devisee / not to be paid or discharged out of any other part of my estate, and the devisee shall take the devise subject to the encumbrance]].

(a) **[Optional Section** 2.7.(a)**:**

If [[any of the devisees / the devisee]] [[are/is]] under the age of [[age]], such real property shall be held in trust for the benefit of the devisee(s) and administered as follows:

(1) The Trustee is authorized at any time and from time to time to pay to or apply for the benefit of such devisee(s) such amounts of the net income and principal of such devisee's trust [[distribution standard (e.g., "as the Trustee shall determine in the Trustee's sole discretion" or "as the Trustee may deem advisable to provide adequately for the health, support, maintenance, and education of such beneficiary")]]. [**OPTIONAL:** Such payments need not be equal, and any one or more of such devisees may be excluded from any such payments.] Additionally, the Trustee is authorized to apply so much of the net income and principal as my Trustee deems advisable for the capital improvement, repair, or periodic maintenance of the real property held herein. Any income not so paid or applied shall be accumulated and added to principal annually.

(2) This trust shall terminate upon the death of the [[devisee / last surviving devisee]] [**OPTIONAL:** or the [[youngest]] devisee attaining [[age of real estate trust termination]] years of age, whichever occurs first]. Upon the termination, [**OPTIONAL:** if [one or more of] the [[devisee/devisees]] is then living, the Trustee shall distribute the balance of the assets of such trust, as constituted upon the termination date, outright to such devisee(s). If [[such devisee is not / no such devisee is then]] living,] the Trustee shall distribute the balance of the trust assets to [[name of contingent devisee]].21, 22**]]**

2.7. **[Third Optional Section** 2.7.**:**

I give [[the amount of $[dollar amount] / an amount equal to [percent]% of my net estate]] to [[name(s) of beneficiary or beneficiaries]] [[if such beneficiary survives me / or whichever one or more survives me]] [**OPTIONAL (if Multiple Beneficiaries):** to be distributed [[into equal separate shares for such beneficiaries / as follows: [proportions (e.g., 1/3 to beneficiary 1, 2/3 to beneficiary 2)]]].] If [[such beneficiary does not survive me / none of the beneficiaries survive me]], then [[this gift shall lapse / I give this sum to [contingent beneficiary]]]. [**OPTIONAL:** If [[name of beneficiary or class of beneficiaries (e.g., "any of the beneficiaries")]] is under the age of [[age]], such bequest shall be held in trust and administered in accordance with the trust created in a subsequent section of this Article below.]23**]**

2.7. **[Fourth Optional Section** 2.7.**:**

Any portion of my Estate (other than real property) directed, under a preceding section of this Article, to be held in trust and retained for a beneficiary ("Beneficiary") shall be held in separate trust for the Beneficiary, and administered under the following terms and conditions:

(a) Until the Beneficiary reaches the age of [[mandatory income distribution age (e.g., 21)]] years, the Trustee may pay to such Beneficiary or apply for such Beneficiary's benefit, for any reason whatsoever, as much or all (or none) of the net income as the Trustee, in its sole discretion, shall determine. At the end of each trust year, the Trustee shall add to principal any net income not so paid or applied and thereafter the same shall be dealt with as principal for all purposes. After the Beneficiary reaches the age of [[mandatory income distribution age (e.g., 21)]] years, the Trustee shall pay to the Beneficiary, or apply for such Beneficiary's benefit, the entire net income of the trust in quarter-annual or more frequent installments as may be convenient to the Trustee.24

(b) The Trustee may pay to the Beneficiary, or apply for such Beneficiary's benefit, at any time or from time to time, as much or all of the principal of such Beneficiary's trust [[distribution standard (e.g., "for any reason whatsoever, as the Trustee shall determine in the Trustee's sole discretion" or "as the Trustee may deem advisable to provide adequately for the health, support, maintenance, and education of such beneficiary")]], without regard to the interest of any remainderman and even though any distribution of principal may terminate the trust.25

(c) The Trustee may, but need not, consider the Beneficiary's assets and income apart from the trust in exercising its discretionary power to make payments to or for the benefit of the Beneficiary.

(d) **[Optional Section** 2.7.(d)**:**

In addition to discretionary distributions of principal set forth in subparagraph (b)) above, the Trustee shall distribute principal to the Beneficiary as follows:

(1) When the Beneficiary reaches the age of [[age of first distribution (e.g., 25)]] years, or upon creation of the Beneficiary's trust if such Beneficiary is then at least [[age of first distribution (e.g., 25)]] years old, [[an amount equal to [amount of first distribution (e.g., 20% or one-half)] of the principal / the sum of $[dollar amount]]] shall be paid to the Beneficiary.26

(2) **[Optional Section** 2.7.(d)(2)**:**

When the Beneficiary reaches the age of [[age of second distribution (e.g., 30)]] years, [[an amount equal to [amount of second distribution (e.g., 20% or one-half)] of the remaining principal of the trust / the sum of $[dollar amount]]] shall be paid to the Beneficiary.27**]]**

(d) The trust shall terminate (unless it is terminated previously pursuant to other provisions of this Article) upon [**OPTIONAL (if Using Staged Distributions):** the first to occur of the Beneficiary's attainment of age [[age of final distribution (e.g., 35)]] years, or] the Beneficiary's death. Upon termination, [**OPTIONAL (if Using Staged Distributions):** the Trustee shall distribute the remaining trust assets to the Beneficiary. If the Beneficiary is not then living,] the Trustee shall distribute the balance of the trust assets: (1) to the Beneficiary's then-living issue [[distribution method for separate share trusts (e.g., per stirpes or per capita at each generation)]], or, if there be no such issue, (2) to my then-living issue, [[distribution method for separate share trusts (e.g., per stirpes or per capita at each generation)]].28, 29**]**

2.7. **[Fifth Optional Section** 2.7.**:**

Any portion of my Estate (other than real property) directed, under a preceding section of this Article, to be held in trust and retained for such beneficiary or beneficiaries ("Beneficiary" or "Beneficiaries"), shall be held in trust for the benefit of the Beneficiaries and administered as follows:

(a) The Trustee may pay to or apply for the benefit of any one or more of the Beneficiaries so much of the net income and principal of the trust as the Trustee deems proper to provide for such Beneficiary's health, education, maintenance, and support.

(b) The Trustee may make unequal distributions among the Beneficiaries and may make a distribution to fewer than all of them, and shall have no duty to equalize those distributions.

(c) No deduction shall be made from a Beneficiary's share of the trust estate upon the trust's division on account of any prior distribution made from the trust.

(d) The Trustee shall accumulate and add to principal any net income not distributed.30

(e) As soon as practical after the date upon which all of the Beneficiaries have attained the age of [[age of preresiduary trust termination (e.g., 25)]] years, the Trustee shall divide the trust into as many shares as there are Beneficiaries then living, and one share for the then-living descendants, collectively, of each deceased Beneficiary. The Trustee shall distribute, outright and free of trust, one share to each such living Beneficiary and one share to the living descendants, collectively, of each deceased beneficiary to be apportioned in equal shares among such deceased Beneficiary's living descendants, [[distribution method for preresiduary trust termination (e.g., per stirpes or per capita at each generation)]].31**]**

ARTICLE III **[[TRUST FOR PROCEEDS OF LIFE INSURANCE OR OTHER PAYABLE-ON-DEATH ASSET].**

**Optional Article** ARTICLE III **(if Military Instrument):**

I hereby create a trust to receive the proceeds of any life insurance policies (including a Servicemember Group Life Insurance), annuities, death benefits, unpaid pay and allowances, survivors benefits, real estate, or retirement accounts payable to the trustee of the trust created under my Last Will and Testament to the Trustee designated hereunder to be held in trust designated as the "Life Insurance Trust" for the benefit of [[name of beneficiary or beneficiaries of life insurance trust]] ("such Beneficiary" or "Beneficiaries").

3.1. **[**The Trustee shall [[divide/distribute]] the trust assets [**OPTIONAL (if Multiple Beneficiaries):** into equal separate shares / as follows: [[proportions (e.g., 1/3 to beneficiary 1, 2/3 to beneficiary 2)]], or all to the survivor of them. Each share for a Beneficiary shall be held, administered, and distributed by the Trustee, as a separate trust for such Beneficiary] in accordance with the following provisions:

(a) Until the Beneficiary reaches the age of [[mandatory income distribution age (e.g., 21)]] years, the Trustee may pay to such Beneficiary or apply for such Beneficiary's benefit, for any reason whatsoever, as much or all (or none) of the net income as the Trustee, in its sole discretion, shall determine. At the end of each trust year, the Trustee shall add to principal any net income not so paid or applied and thereafter the same shall be dealt with as principal for all purposes. After the Beneficiary reaches the age of [[mandatory income distribution age (e.g., 21)]] years, the Trustee shall pay to the Beneficiary, or apply for such Beneficiary's benefit, the entire net income of the trust in quarter-annual or more frequent installments as may be convenient to the Trustee.32

(b) The Trustee may pay to the Beneficiary, or apply for such Beneficiary's benefit, at any time or from time to time, as much or all of the principal of such Beneficiary's trust [[distribution standard for life insurance trust (e.g., "for any reason whatsoever, as the Trustee shall determine in the Trustee's sole discretion" or "as the Trustee may deem advisable to provide adequately for the health, support, maintenance, and education of such beneficiary")]], without regard to the interest of any remainderman and even though any distribution of principal may terminate the trust.

(c) The Trustee may, but need not, consider the Beneficiary's assets and income apart from the trust in exercising its discretionary power to make payments to or for the benefit of the Beneficiary.

(d) **[Optional Section** 3.1.(d)**:**

In addition to discretionary distributions of principal set forth in subparagraph (b) above, the Trustee shall distribute principal to the Beneficiary as follows:

(1) When the Beneficiary reaches the age of [[age of first distribution of life insurance trust(e.g., 25)]] years, or upon creation of the Beneficiary's trust if such Beneficiary is then at least [[age of first distribution (e.g., 25)]] years old, [[an amount equal to [amount of first distribution of life insurance trust (e.g., 20% or one-half)] of the principal / the sum of $[dollar amount]]] shall be paid to the Beneficiary.33

(2) **[Optional Section** 3.1.(d)(2)**:**

When the Beneficiary reaches the age of [[age of second distribution of life insurance trust (e.g., 30)]] years, [[an amount equal to [amount of second distribution of life insurance trust (e.g., 20% or one-half)] of the remaining principal of the trust / the sum of $[dollar amount]]] shall be paid to the Beneficiary.34, 35**]]**

(d) The trust shall terminate (unless it is terminated previously pursuant to other provisions of this Article) upon [**OPTIONAL (if Using Staged Distributions):** the first to occur of the Beneficiary's attainment of age [[age of final distribution of life insurance trust (e.g., 35)]] years, or] the Beneficiary's death. Upon termination, [**OPTIONAL (if Using Staged Distributions):** the Trustee shall distribute the remaining trust assets to the Beneficiary. If the Beneficiary is not then living,] the Trustee shall distribute the balance of the trust assets: (1) to the Beneficiary's then-living issue [[distribution method for separate share trusts (e.g., per stirpes or per capita at each generation)]], or, if there be no such issue, (2) to my then-living issue, [[distribution method for separate share trusts (e.g., per stirpes or per capita at each generation)]].36

OR

3.1. **Alternate Section** 3.1.**:**

The Life Insurance Trust shall be held, administered, and distributed as follows:

(a) The Trustee may pay to or apply for the benefit of any one or more of the Beneficiaries so much of the net income and principal of the trust as the trustee deems proper to provide for such Beneficiary's health, education, maintenance, and support.

(b) The Trustee may make unequal distributions among the Beneficiaries and may make a distribution to fewer than all of them, and shall have no duty to equalize those distributions.

(c) No deduction shall be made from a Beneficiary's share of the trust estate upon the trust's division on account of any prior distribution made from the trust.

(d) The Trustee shall accumulate and add to principal any net income not distributed.37

(e) As soon as practical after the date upon which all of the Beneficiaries have attained the age [[age of life insurance trust termination (e.g., 25)]] years, the Trustee shall divide the Life Insurance Trust into as many shares as there are Beneficiaries of the Life Insurance Trust then living, and one share for the then living descendants, collectively, of each deceased Beneficiary of the Life Insurance Trust. The Trustee shall distribute, outright and free of trust, one share to each such living Beneficiary and one share to the living descendants, collectively, of each deceased beneficiary to be apportioned in equal shares among such deceased Beneficiary's living descendants, [[distribution method for life insurance trust (e.g., per stirpes or per capita at each generation)]].38, 39**]]**

ARTICLE III. **DISPOSITION OF RESIDUARY ESTATE.**

I give, devise, and bequeath all the rest, residue, and remainder of my estate, real, personal, and mixed, of whatever kind and nature and wherever situated, of which I may die seized or possessed, or in which I may have any interest [**OPTIONAL:** or over which I may have any power of appointment or testamentary disposition, including any lapsed dispositions] (my "Residuary Estate") as follows:40

3.1. **[**My Residuary Estate shall be divided into equal separate shares so as to provide one share for each child who survives me, and one share for the issue, collectively, of any child of mine who predeceases me, to be divided [[distribution method (e.g., per capita at each generation or per stirpes)]] among such issue. Each share so provided for a child or issue of a deceased child shall be distributed outright to such beneficiary. Notwithstanding the foregoing, if any such child or issue of a deceased child is a minor at my death, such share shall be distributed in accordance with Section 3.3. below.41

OR

3.1. **First Alternate Section** 3.1.**:**

If I am survived by any children who are under the age of [[age of common share trust termination (e.g., 25)]] at my death, my Residuary Estate shall be held in trust designated as the "Common Share Trust" for the benefit of my children. If at my death, all of my children are over the age of [[age of common share trust termination (e.g., 25)]], my Residuary Estate shall be divided into equal separate shares so as to provide one share for each child who survives me, and one share for the issue, collectively, of any child of mine who predeceases me, to be divided [[distribution method (e.g., per capita at each generation or per stirpes)]] among such issue, outright and free of any trusts. The Common Share Trust, if applicable, shall be administered upon the terms set forth in this Article ARTICLE III., as follows:

(a) The Trustee may pay to or apply for the benefit of any one or more of my then living children so much of the net income and principal of the trust as the Trustee deems proper to provide for such child's health, education, maintenance, and support.42

(b) **[Optional Section** 3.1.(b)**:**

Not to limit my Trustee, but to provide guidance for the exercise of the Trustee's discretion, it is my intention that my children be nurtured, raised to maturity, and given the highest degree of education their aspirations and abilities allow. My Trustee's discretion shall also include the expenditure of funds required to allow my children to be cared for in a comfortable and convenient manner.43**]**

(b) The Trustee may make unequal distributions among my children and may make a distribution to fewer than all of them, and shall have no duty to equalize those distributions.

(c) No deduction shall be made from a child's share of the trust estate upon the trust's division on account of any prior distribution made from the trust.

(d) The Trustee shall accumulate and add to principal any net income not distributed.44

(e) As soon as practical after the date upon which all of my children have attained the age of [[age of Common Share Trust termination (e.g., 25)]] years, the Trustee shall divide the Common Share Trust into as many shares as there are beneficiaries of the Common Share Trust then living, and one share for the then living descendants, collectively, of each deceased beneficiary of the Common Share Trust. The Trustee shall distribute, outright and free of trust, one share to each such living beneficiary and one share to the living descendants, collectively, of each deceased beneficiary to be apportioned in equal shares among such deceased beneficiary's living descendants, [[distribution method for Common Share Trust (e.g., per stirpes or per capita at each generation)]].45

OR

3.1. **Second Alternate Section** 3.1.**:**

My Residuary Estate shall be divided into equal shares, with one share provided for each child of mine then living, and one share for each deceased child of mine with issue then living, to be divided [[distribution method (e.g., per stirpes or per capita at each generation)]] among such issue. Each share so provided for a child or grandchild ("such Beneficiary") shall be held, administered, and distributed by the Trustee, hereinafter named, as a separate trust for such Beneficiary in accordance with the following provisions:

(a) Until the Beneficiary reaches the age of [[mandatory income distribution age (e.g., 21)]] the Trustee may pay to such Beneficiary or apply for such Beneficiary's benefit, for any reason whatsoever, as much or all (or none) of the net income as the Trustee, in its sole discretion, shall determine. At the end of each trust year, the Trustee shall add to principal any net income not so paid or applied and thereafter the same shall be dealt with as principal for all purposes. After the Beneficiary reaches the age of [[mandatory income distribution age (e.g., 21)]] the Trustee shall pay to the Beneficiary, or apply for such Beneficiary's benefit, the entire net income of the trust in quarter-annual or more frequent installments as may be convenient to the Trustee.46

(b) The Trustee may pay to the Beneficiary, or apply for such Beneficiary's benefit, at any time or from time to time, as much or all of the principal of such Beneficiary's trust [[distribution standard (e.g., "for any reason whatsoever, as the Trustee shall determine in the Trustee's sole discretion" or "as the Trustee may deem advisable to provide adequately for the health, support, maintenance, and education of such beneficiary")]], without regard to the interest of any remainderman and even though any distribution of principal may terminate the trust.47

(c) The Trustee may, but need not, consider the Beneficiary's assets and income apart from the trust in exercising its discretionary power to make payments to or for the benefit of the Beneficiary.

(d) **[Optional Section** 3.1.(d)**:**

In addition to discretionary distributions of principal set forth in subparagraph (b) above, the Trustee may distribute principal to the Beneficiary as follows:

(1) When the Beneficiary reaches the age of [[age of first distribution (e.g., 25)]] years, or upon creation of the Beneficiary's trust if such Beneficiary is then at least [[age of first distribution (e.g., 25)]] years old, [[an amount equal to [amount of first distribution (e.g., 20% or one-half)] of the principal / the sum of $[dollar amount]]] shall be paid to the Beneficiary.48

(2) **[Optional Section** 3.1.(d)(2)**:**

When the Beneficiary reaches the age of [[age of second distribution (e.g., 30)]] years, [[an amount equal to [amount of second distribution (e.g., 20% or one-half)] of the remaining principal of the trust / the sum of $[dollar amount]]] shall be paid to the Beneficiary.49, 50**]]**

(d) The trust shall terminate (unless it is terminated previously pursuant to other provisions of this Article) upon [**OPTIONAL (if Using Staged Distributions):** the first to occur of the Beneficiary's attainment of age [[age of final distribution (e.g., 35)]] years, or] the Beneficiary's death. Upon termination, [**OPTIONAL (if Using Staged Distributions):** the Trustee shall distribute the remaining trust assets to the Beneficiary. If the Beneficiary is not then living,] the Trustee shall distribute the balance of the trust assets: (1) to the Beneficiary's then-living issue [[distribution method for separate share trusts (e.g., per stirpes or per capita at each generation)]], or, if there be no such issue, (2) to my then-living issue, [[distribution method for separate share trusts (e.g., per stirpes or per capita at each generation)]].51

OR

3.1. **Third Alternate Section** 3.1.**:**

My Residuary Estate shall be distributed to the following [[individual / individuals in equal shares]]: [[name(s) and relationship(s) to testator]]. [**OPTIONAL (if Designating Multiple Beneficiaries):** If any of the beneficiaries named in this section does not survive me, the share of the residue of my estate that such individual would have taken shall be divided equally among the surviving beneficiaries named in this section.]52

OR

3.1. **Fourth Alternate Section** 3.1.**:**

My Residuary Estate shall be distributed to the following individuals (hereinafter "Beneficiary" or "Beneficiaries") [[outright / in trust]], in the following proportions:

(a) To [[name of residuary beneficiary 1]], I give [[an amount equal to [percent]% of my Residuary Estate] / an amount equal to [fraction] of my Residuary Estate]].

(b) To [[name of residuary beneficiary 2]], I give [[an amount equal to [percent]% of my Residuary Estate] / an amount equal to [fraction] of my Residuary Estate]].

(c) **[Optional Section** 3.1.(c)**:**

To [[name of residuary beneficiary 3]], I give [[an amount equal to [percent]% of my Residuary Estate] / an amount equal to [fraction] of my Residuary Estate]].53**]**

(d) **[Optional Section** 3.1.(d)**:**

To [[name of residuary beneficiary 4]], I give [[an amount equal to [percent]% of my Residuary Estate] / an amount equal to [fraction] of my Residuary Estate]].54**]**

If any of the Beneficiaries named in this section does not survive me [[by [number] days]], or fails for any other reason to take the portion of my Residuary Estate to which such Beneficiary would be entitled under the provisions of this section, then the share of my Residuary Estate that such Beneficiary would have taken shall be divided among the surviving Beneficiaries named in this section [[equally / in proportion to their respective shares in my Residuary Estate]].55**]**

3.2. **[Optional Section** 3.2.**:**

Any share provided for a Beneficiary shall be held, administered, and distributed by the Trustee, hereinafter named, as a separate trust for such Beneficiary in accordance with the following provisions:

(a) Until the Beneficiary reaches the age of [[mandatory income distribution age (e.g., 21)]] years, the Trustee may pay to such Beneficiary or apply for such Beneficiary's benefit, for any reason whatsoever, as much or all (or none) of the net income as the Trustee, in its sole discretion, shall determine. At the end of each trust year, the Trustee shall add to principal any net income not so paid or applied and thereafter the same shall be dealt with as principal for all purposes. After the Beneficiary reaches the age of [[mandatory income distribution age (e.g., 21)]] years, the Trustee shall pay to the Beneficiary, or apply for such Beneficiary's benefit, the entire net income of the trust in quarter-annual or more frequent installments as may be convenient to the Trustee.56

(b) The Trustee may pay to the Beneficiary, or apply for such Beneficiary's benefit, at any time or from time to time, as much or all of the principal of such Beneficiary's trust [[distribution standard (e.g., "for any reason whatsoever, as the Trustee shall determine in the Trustee's sole discretion" or "as the Trustee may deem advisable to provide adequately for the health, support, maintenance, and education of such beneficiary")]], without regard to the interest of any remainderman and even though any distribution of principal may terminate the trust.

(c) The Trustee may, but need not, consider the Beneficiary's assets and income apart from the trust in exercising its discretionary power to make payments to or for the benefit of the Beneficiary.

(d) **[Optional Section** 3.2.(d)**:**

In addition to discretionary distributions of principal set forth in subparagraph (b) above, the Trustee shall distribute principal to the Beneficiary as follows:

(1) When the Beneficiary reaches the age of [[age of first distribution (e.g., 25)]] years, or upon creation of the Beneficiary's trust if such Beneficiary is then at least [[age of first distribution (e.g., 25)]] years old, [[an amount equal to [amount of first distribution (e.g., 20% or one-half)] of the principal / the sum of $[dollar amount]]] shall be paid to the Beneficiary.57

(2) **[Optional Section** 3.2.(d)(2)**:**

When the Beneficiary reaches the age of [[age of second distribution (e.g., 30)]] years, [[an amount equal to [amount of second distribution (e.g., 20% or one-half)] of the remaining principal of the trust / the sum of $[dollar amount]]] shall be paid to the Beneficiary.58**]]**

(d) The trust shall terminate (unless it is terminated previously pursuant to other provisions of this Article) upon [**OPTIONAL (if Using Staged Distributions):** the first to occur of the Beneficiary's attainment of age [[age of final distribution (e.g., 35)]] years, or] the Beneficiary's death. Upon termination, [**OPTIONAL (if Using Staged Distributions):** the Trustee shall distribute any remaining trust assets to the Beneficiary. If the Beneficiary is not then living,] the Trustee shall distribute the balance of the trust assets: (1) to the Beneficiary's then living issue [[distribution method for separate share trusts (e.g., per stirpes or per capita at each generation)]], or, if there be no such issue, (2) to my then-living issue, [[distribution method for separate share trusts (e.g., per stirpes or per capita at each generation)]].59, 60**]**

3.2. **[**If, at any time, no person designated in this Will [**OPTIONAL:** (including any trust established herein)] to receive any portion of my estate is living, so that the disposition of any portion of my estate is not provided for by this Will, such property shall be distributed to the persons to whom and in the shares and proportions in which my estate would have been distributed under the laws of the State of South Dakota in effect at the time such disposition is made had I then died intestate and possessed of such property.61

OR

3.2. **Alternate Section** 3.2.**:**

If, at any time, no person designated in this Will (including any trust established herein) to receive any portion of my estate is living, so that the disposition of any portion of my estate is not provided for by this Will, such property shall be distributed to [[name of individuals/charities]]. [**OPTIONAL:** If, at the time of my death, any charity designated herein, or a successor thereto, has ceased to function and perform the services which it now conducts, or shall no longer be exempt from taxation under the provisions of the Internal Revenue Code in effect at the time of my death, such property shall be distributed to such charitable organization(s), as my Personal Representative shall select, in the Personal Representative's sole and uncontrolled discretion. The term charitable organizations shall include, but shall not be limited to, all religious, charitable, scientific, literary, or educational organizations whose tax-exempt status shall have been established under the provisions of the Internal Revenue Code.]62**]**

3.3. If at any time any beneficiary under this Will [**OPTIONAL**: or a trust created hereunder] is a minor, or it appears to the Personal Representative [**OPTIONAL**: or Trustee] that any beneficiary is incapacitated, incompetent, or for any other reason not able to receive payments or make intelligent or responsible use of the payments, then the Personal Representative [**OPTIONAL:** or Trustee], in lieu of making direct payments to the beneficiary, may continue to hold the property to which the minor is entitled, or make payments (1) to the beneficiary's conservator or guardian; (2) to the beneficiary's custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any state (including a custodian selected by the Personal Representative) to be held for the maximum period of time permitted by law; (3) to one or more suitable persons as the Personal Representative [**OPTIONAL**: or Trustee] deems proper, such as a relative of or a person residing with the beneficiary, to be used for the beneficiary's benefit; (4) to any other person, firm, or agency for services rendered or to be rendered for the beneficiary's assistance or benefit; or (5) to an account in the beneficiary's name. The receipt of payments by any of the foregoing shall constitute a sufficient discharge of the Personal Representative for all purposes.63

ARTICLE IV. **[TRUST FOR CERTAIN BENEFICIARY'S SUPPLEMENTAL NEEDS.**

**Optional Article**ARTICLE IV.**:**

In the event any one or more of my named beneficiaries is receiving or is likely to receive government assistance at the time the distribution of any portion of my estate or any testamentary trust created by this Will is to be made, the Personal Representative or Trustee may direct the beneficiary's share be paid to a supplemental needs trust for the benefit of that certain beneficiary. The primary purpose of this trust is to provide a supplemental and emergency fund to supplement any public benefits available to the beneficiary during their lifetime.

4.1. The assets of the trust shall, to the fullest extent permitted by law, be free from assignment or collection for the satisfaction of the claims of any creditors or agencies, including but not limited to governmental agencies, and no such trust assets shall be subject to the beneficiary's liabilities or creditor claims, assignment, or anticipation. If this trust were to be invaded by creditors or subject to any liens or encumbrances, or if the terms of this trust were to be applied so as to cause the beneficiary's eligibility for public benefits to be terminated, it is likely that the trust assets would be depleted before such beneficiary's death, and the purpose of this trust could not then be fulfilled.

4.2. During the lifetime of the beneficiary, the Trustee may pay to or apply for the benefit of the beneficiary as much of the net income and as much of the principal of the trust, as the Trustee, in the Trustee's sole, absolute, and unfettered discretion, from time to time deems necessary or advisable for the beneficiary's special needs. As used herein, "supplemental needs" or "special needs" refers to the maintenance of good health, comfort, safety, and welfare when, in the discretion of the Trustee, those requisites are not being provided for by any public agency, office, or department of any state of the United States, or by any person or persons with a legal obligation to support. "Supplemental needs" shall include, but not be limited to, medical and dental care, special equipment, programs of training, education, rehabilitation, travel needs, and recreation not provided for or reimbursed by public benefits. The Trustee may directly pay providers of goods and services provided that the purpose of any such expenditure is to meet the supplemental needs of the beneficiary.

4.3. Any payments or distributions from this trust to or for the benefit of the beneficiary shall supplement, not supplant, any public benefits or other private resources available. The Trustee may distribute to the beneficiary, or apply for their benefit, such amounts of the net income and principal of the trust as the Trustee in the Trustee's discretion deems necessary or advisable, but the Trustee shall not be required to make any such distributions. Any undistributed trust income shall be added to the principal.

4.4. No part of the income or principal of the trust shall be used to replace or supplant public benefits of any county or any state, federal, or other governmental agency that has a legal responsibility to serve persons with disabilities or conditions that are the same as or similar to those of the beneficiary. However, a distribution may be made by the Trustee, in the Trustee's sole discretion, to meet a need of the beneficiary for supplemental benefits not otherwise met by governmental financial assistance. The Trustee shall consider all resource and income limitations that affect the beneficiary's right to public assistance programs. The Trustee is hereby granted full and complete discretion to initiate rendering the beneficiary eligible for any such program of public benefit and is hereby granted full and complete discretion to initiate either administrative or judicial proceedings, or both, for the purpose of determining eligibility. No part of the principal or undistributed income shall be considered available to the beneficiary, and the beneficiary shall have no right to compel the Trustee to release principal or income to or otherwise to have any access to any of the trust assets.

4.5. **[Optional Section** 4.5.**:**

Further, and as an exception to the above restrictions, the Trustee may, in the Trustee's discretion, make distributions to meet beneficiary's need for food and shelter, including in-kind support and maintenance, even if such distributions may result in a disqualification, impairment, or diminution of beneficiary's receipt of or eligibility for government benefits or assistance; provided, however, before making any such distributions, the Trustee must first determine that (1) the beneficiary's needs will be better met if such distributions are made; and (2) it is in the beneficiary's best interests to suffer the consequent effect, if any, on their receipt of or eligibility for government benefits or assistance; provided, further, if the mere existence of the authority to make distributions pursuant to this sentence results in beneficiary's loss of government benefits or assistance, regardless of whether such authority is actually exercised, this Section 4.5. shall be null and void, and the Trustee's authority to make such distributions shall cease and be limited as provided above in this Section without exception. The beneficiary has no authority to direct the Trustee to make distributions for any purpose, including to pay for food or shelter needs.64**]**

4.5. The Trustee may charge the beneficiary rent for property owned or leased by the trust, but is not required to do so. The Trustee may use trust funds to pay reasonable legal fees, care management fees, taxes, and administrative expenses, and any such expenditures may be made with or without prior court approval. The Trustee may pay themself reasonable compensation in accordance with state law. The Trustee may amend the trust to ensure that the trust will not disqualify the beneficiary for public benefits. The Trustee may purchase a term life insurance policy on the life of a caretaker, naming the trust as the beneficiary of said policy. The Trustee may use trust funds to pay for the expenses of a funeral and attendant expenses.

4.6. The Trustee may, but is not required to, transfer the corpus of the trust, including principal and accrued interest, to a "pooled Trust" operating in any state in which the beneficiary resides. A pooled Trust is an entity that conforms to Title 42 of the United States Code, § 1396p(d)(4)(C), which is available to manage funds for disabled persons of any age and can provide funds for the same benefits and under the same limitations set forth herein.

4.7. Notwithstanding any other provision herein, if the existence of the trust, or any change in any law, regulation, or rule relating to the trust or the administration of the trust for the benefit of the beneficiary, should at any time have the effect of disqualifying them for any public benefits, the Trustee is authorized (but not required) to terminate the trust and distribute the trust principal and income as provided in this subsection. The Trustee may also terminate the trust in favor of the remainder beneficiaries if and when the estate becomes liable for services that would otherwise be provided through public programs. If the trust terminates prior to the death of the special needs beneficiary, the trust estate does not pass to the beneficiary but only to the remainder beneficiaries. The beneficiary has no authority to terminate the trust. The trust will terminate on the death of the beneficiary, if not earlier terminated. On any such termination, the Trustee shall distribute the trust principal and any undistributed income then remaining to [[name of remainder beneficiary]], if then living, or if [[name of remainder beneficiary]] is not then living, to the beneficiaries of my Residuary Estate in accordance with Article ARTICLE III. above.65**]**

ARTICLE IV. **DESIGNATION OF PERSONAL REPRESENTATIVES [OPTIONAL: AND TRUSTEES]**

4.1. **[**I nominate and appoint my [[relationship of Personal Representative to testator]], [[name of Personal Representative]], as Personal Representative of my Will. [**OPTIONAL:** Should [[name of Personal Representative]] be unwilling or unable to serve as Personal Representative, or shall at any point cease to serve as Personal Representative, I nominate and appoint my [[relationship of first successor Personal Representative to testator]], [[name of first successor Personal Representative]], as Personal Representative of my Will.] [**OPTIONAL:** If [[name of first successor Personal Representative]] shall be unable or unwilling to serve, I nominate and appoint my [[relationship of second successor Personal Representative to testator]], [[name of second successor Personal Representative]], as Personal Representative of my Will.] [**OPTIONAL**: If [[name of second successor Personal Representative]] shall be unable or unwilling to serve, I nominate and appoint as substitute or successor Personal Representative, [[name of individual or company].]66

OR

4.1. **Alternate Section** 4.1.**:**

I nominate my [[relationship of first co-Personal Representative, if any (e.g., my brother)]], [[name of first co-Personal Representative]], and my [[relationship of second co-Personal Representative (e.g., my sister)]], [[name of second co-Personal Representative]], as co-Personal Representatives of this Will. If either [[name of first co-Personal Representative]] or [**OPTIONAL**: [[name of second co-Personal Representative]] shall be unable or unwilling to serve, [[the remaining Personal Representative may act alone / I nominate and appoint [name of first successor co-Personal Representative] to serve with the remaining co-Personal Representative]]]. [**OPTIONAL:** If both [[name of first co-Personal Representative]] and [[name of second co-Personal Representative]] shall be unable or unwilling to service, I appoint [[name of first successor co-personal representative]] and [[name of second successor co-personal representative]] as co-Personal Representative[s] of my Will.] As used in this Will, the term "Personal Representative" includes co-Personal Representatives and any other personal representative or representatives of my estate.67**]**

4.2. **[Optional Section** 4.2.**:**

With respect to any and all trusts created hereunder:

(a) **[**I appoint my [[relationship to testator]], [[name of trustee]] as Trustee of all trusts created hereunder. [**OPTIONAL:** If for any reason [[name of trustee]] fails to become or ceases to act as Trustee, I appoint my [[relationship to testator]], [[name of successor trustee]], to serve as successor Trustee.] [**OPTIONAL:** If [[name of successor trustee]] fails to become or ceases to act as Trustee, I appoint my [[relationship to testator]], [[name of second successor trustee], to serve as successor Trustee.]]68

OR

(a) **Alternate Section** 4.2.(a)**:**

I appoint [[name of first co-trustee]] and [[name of second trustee]], or whichever one qualifies and continues to serve, as co-trustees of all trusts created by my Will. [**OPTIONAL:** If either [[name of name of first co-trustee]] or [[name of second co-trustee]] shall be unable or unwilling to serve, [[the remaining co-trustee may act alone / I nominate and appoint [name of first successor co-co-trustee] to serve with the remaining co-trustee]]].] [**OPTIONAL:** If both [[name of first co-trustee]] and [[name of second co-trustee]] shall be unable or unwilling to serve, I appoint [[name of first successor co-trustee]] and [[name of second co-trustee]] as co-trustees of my Will.]69**]**

(b) A co-Trustee may be appointed by a then serving Trustee (the "appointing Trustee") at any time when only one Trustee is serving. A co-Trustee so appointed hereunder shall serve only while the appointing Trustee serves.

(c) The last acting sole Trustee for whom there is no named successor, whether named in this instrument or named pursuant to procedures prescribed in this instrument for the selection of successors, may designate an institution with fiduciary trust powers as successor Trustee, to succeed such individual sole Trustee in the event that such Trustee shall cease to act as Trustee for any reason whatsoever.

(d) In the event of a complete vacancy in the office of Trustee of any trust under this instrument or the receipt of a notice of resignation from any Trustee such that a complete vacancy would result, then the oldest beneficiary to whom current trust income shall or may then be distributed, or the natural or legal guardians of such beneficiary, shall have the power to appoint an institution with fiduciary trust powers as Trustee of such trust.

(e) Any Trustee may resign as a Trustee hereunder without prior approval of any court, by delivering to each other Trustee, as the case may be, and to each and every adult beneficiary, a written notice of such resignation. Such resignation shall take effect upon the date stated in the notice, whereupon all duties of the resigning Trustee shall cease, other than the duty to account; a determination that an individual Trustee is incompetent shall be deemed a resignation, by said Trustee, as of the date of that determination.

(f) Each separate trust hereunder may have a different Trustee.70**]**

4.2. All Personal Representatives and Trustees, if any, shall receive reimbursement for reasonable out-of-pocket expenses incurred in performing the duties in accordance with this instrument and any trusts created hereunder.

4.3. The word Personal Representative shall mean the person or entity who qualifies as Personal Representative or administrator and indicates successor Personal Representatives. [**OPTIONAL:** The word Trustee shall mean the person who qualifies as trustee and indicates successor trustees.]

4.4. **[**All Personal Representatives, as well as Trustees, if any, shall receive reasonable compensation for the duties performed in accordance with this instrument and any trusts created hereunder. Reasonable compensation for an individual Personal Representative or Trustee is such fees as, from time to time, are recognized in the area as ordinary and reasonable for the service performed. Reasonable compensation for a bank or trust company shall be in accordance with its published fee schedule in effect at the time the services for which the fee is charged are performed, and if no such fee schedule is in effect, such fees as, from time to time, are recognized in the area as ordinary and reasonable for the service performed.71

OR

4.4. **Alternate Section** 4.4.**:**

No individual Personal Representative or Trustee, if any, shall be entitled to or shall receive any compensation for serving hereunder.72**]**

4.5. **[First Optional Section** 4.5.**:**

None of my Personal Representatives or Trustees of trusts created under this instrument, if any, shall be required to give any bond or other security for the faithful performance of her, his, or its duties as Personal Representative or Trustee, as the case may be, in the State of South Dakota or elsewhere, unless required by court.73**]**

4.5. **[Second Optional Section** 4.5.**:**

I direct that no bond or other security be required of [[personal representatives and/or trustees for which bond is waived (e.g., "any of my adult children serving hereunder")]] for the faithful performance of any such designee's duties as Personal Representative or Trustee.74**]**

ARTICLE V. **[GUARDIANS FOR MY MINOR CHILDREN.**

**Optional Article** ARTICLE V.**:**

5.1. **[**If a guardian is necessary for any minor child(ren) of mine, I nominate and appoint my [[relationship of guardian designee to testator]], [[name of first guardian]], to be the guardian of the person and conservator of the estate of any minor child(ren) of mine. [**OPTIONAL:** If [[name of first guardian]] shall be unable or unwilling to serve, I nominate and appoint my [[relationship of successor guardian designee to testator]], [[name of successor guardian]], to be the guardian of the person and conservator of the estate of any minor child(ren) of mine.] [**OPTIONAL:** If [[name of successor guardian]] shall be unable or unwilling to serve, I nominate and appoint my [[relationship of second successor guardian designee to testator]], [[name of second successor guardian]], to be the guardian of the person and conservator of the estate of any minor child(ren) of mine.]75

OR

5.1. **First Alternate Section** 5.1.**:**

I designate my [[relationship of first guardian of person]], [[name of first guardian of person]], to serve as guardian of the person of any minor child(ren) of mine [**OPTIONAL (if appointing successors):** , my [[relationship of first alternate guardian of person]], [[name of first alternate guardian of person]], to serve as first alternate guardian of the person of any minor child(ren) of mine] [**OPTIONAL (if appointing second successor):** , and my [[relationship of second alternate guardian of person]], [[name of second alternate guardian of person]], to serve as second alternate guardian of the person of any minor child(ren) of mine]. I designate my [[relationship of first conservator of the estate]], [[name of first conservator of estate]], to serve as conservator of the estate of any minor child(ren) of mine [**OPTIONAL (if appointing successor):** , my [[relationship of first alternate conservator of estate]], [[name of first alternate conservator of the estate]], to serve as first alternate conservator of the estate of any minor child(ren) of mine] [**OPTIONAL (if appointing second successor):** , and my [[relationship of third conservator of the estate]], [[name of third conservator of the estate]], to serve as second alternate conservator of the estate of any minor child(ren) of mine].76

OR

5.1. **Second Alternate Section** 5.1.**:**

I nominate and appoint the following individuals to serve as guardians of my minor children:

(a) If a guardian is necessary for [[name of minor child 1]], I nominate and appoint my [[relationship of guardian for minor child 1]], [[name of first guardian of minor child 1]], to be the guardian of the person and conservator of the estate of [[name of minor child 1]]. [**OPTIONAL (if appointing successors):** If [[name of first guardian of minor child 1]] shall be unable or unwilling to serve, I nominate and appoint my [[relationship of successor guardian of minor child 1]], [[name of successor guardian of minor child 1]], to be the guardian of the person and conservator of the estate of [[name of minor child 1]]]

(b) If a guardian is necessary for [[name of minor child 2]], I nominate and appoint my [[relationship of guardian for minor child 2]], [[name of first guardian of minor child 2]], to be the guardian of the person and conservator of the estate of [[name of minor child 2]]. [**OPTIONAL (if appointing successors):** If [[name of first guardian of minor child 2]] shall be unable or unwilling to serve, I nominate and appoint my [[relationship of successor guardian of minor child 2]], [[name of successor guardian of minor child 2]], to be the guardian of the person and conservator of the estate of [[name of minor child 1]]].

(c) **[Optional Section** 5.1.(c)**:**

If a guardian is necessary for [[name of minor child 3]], I nominate and appoint my [[relationship of guardian for minor child 3]], [[name of first guardian of minor child 3]], to be the guardian of the person and conservator of the estate of [[name of minor child 3]]. [**OPTIONAL (if appointing successors):** If [[name of first guardian of minor child 3]] shall be unable or unwilling to serve, I nominate and appoint my [[relationship of successor guardian of minor child 3]], [[name of successor guardian of minor child 3]], to be the guardian of the person and conservator of the estate of [[name of minor child 1]]].77, 78**]**

OR

5.1. **Third Alternate Section** 5.1.**:**

I nominate and appoint the following individuals to serve as guardians of my minor children:

(a) If a guardian is necessary for [[name of minor child 1]], I nominate and appoint my [[relationship of first guardian of person]], [[name of first guardian of person]], to serve as guardian of the person of [[name of minor child 1]] [**OPTIONAL (if appointing successors):** , my [[relationship of first alternate guardian of person]], [[name of first alternate guardian of person]], to serve as first alternate guardian of the person of [[name of minor child 1]] [**OPTIONAL (if appointing second successor):** , and my [[relationship of second alternate guardian of person]], [[name of second alternate guardian of person]], to serve as second alternate guardian of the person of [[name of minor child 1]]. I designate my [[relationship of first conservator of the estate]], [[name of first conservator of estate]], to serve as conservator of the estate of [[name of minor child 1]] [**OPTIONAL (if appointing successor):** , my [[relationship of first alternate conservator of the estate]], [[name of first alternate conservator of the estate]], to serve as first alternate conservator of the estate of [[name of minor child 1]] [**OPTIONAL (if appointing second successor):** , and my [[relationship of third conservator of the estate]], [[name of third conservator of the estate]], to serve as second alternate conservator of the estate of [[name of minor child 1]]].]

(b) If a guardian is necessary for [[name of minor child 2]], I nominate and appoint my [[relationship of first guardian of person]], [[name of first guardian of person]], to serve as guardian of the person of [[name of minor child 2]] [**OPTIONAL (if appointing successors):** , my [[relationship of first alternate guardian of person]], [[name of first alternate guardian of person]], to serve as first alternate guardian of the person of [[name of minor child 2]] [**OPTIONAL (if appointing second successor):** , and my [[relationship of second alternate guardian of person]], [[name of second alternate guardian of person]], to serve as second alternate guardian of the person of [[name of minor child 2]]. I designate my [[relationship of first conservator of the estate]], [[name of first conservator of the estate]], to serve as conservator of the estate of [[name of minor child 2]] [**OPTIONAL (if appointing successor):** , my [[relationship of first alternate conservator of the estate]], [[name of first alternate conservator of the estate]], to serve as first alternate conservator of the estate of [[name of minor child 2]] [**OPTIONAL (if appointing second successor):** , and my [[relationship of third conservator of the estate]], [[name of third conservator of the estate]], to serve as second alternate conservator of the estate of [[name of minor child 2]]].]

(c) **[Optional Section** 5.1.(c)**:**

If a guardian is necessary for [[name of minor child 3]], I nominate and appoint my [[relationship of first guardian of person]], [[name of first guardian of person]], to serve as guardian of the person of [[name of minor child 3]] [**OPTIONAL (if appointing successors):** , my [[relationship of first alternate guardian of person]], [[name of first alternate guardian of person]], to serve as first alternate guardian of the person of [[name of minor child 3]] [**OPTIONAL (if appointing second successor):** , and my [[relationship of second alternate guardian of person]], [[name of second alternate guardian of person]], to serve as second alternate guardian of the person of [[name of minor child 3]]. I designate my [[relationship of first conservator of the estate]], [[name of first conservator of the estate]], to serve as conservator of the estate of [[name of minor child 3]] [**OPTIONAL (if appointing successor):** , my [[relationship of first alternate conservator of the estate]], [[name of first alternate conservator of the estate]], to serve as first alternate conservator of the estate of [[name of minor child 3]] [**OPTIONAL (if appointing second successor):** , and my [[relationship of third conservator of the estate]], [[name of third conservator of the estate]], to serve as second alternate conservator of the estate of [[name of minor child 3]]].]79, 80**]]**

5.2. I direct that no bond or other security be required in the State of South Dakota or elsewhere of [[guardian(s) or conservator(s) for which bond is waived (e.g., "any of the above-named guardians and conservators")]] for the faithful performance of any such designee's duties as guardian and/or conservator.81**]**

ARTICLE V. **POWERS OF THE PERSONAL REPRESENTATIVE [OPTIONAL: AND TRUSTEE].**

5.1. Except as specifically provided in this Will, the Personal Representative and Trustee, if any, shall have all of the powers conferred by law upon fiduciaries in every jurisdiction in which my Personal Representative or Trustee shall act, including, but not limited to, the powers granted by SDCL § 29A-3-711 and as provided by the South Dakota Trustee Powers Act (SDCL § 55-1A-1 et seq.), and shall have complete discretion to exercise each of the following powers without authorization from any court, it being my intent that these powers be construed in the broadest possible manner:

(a) With respect to any and all digital assets (as defined below), (1) to access, use and control my digital devices, including, but not limited to, desktop computers, laptop computers, tablets, peripheral storage devices, mobile telephones and smart phones (including Apple iPhones and other Apple devices), and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops with the purpose of accessing, modifying, deleting, controlling, or transferring my digital assets; (2) to access, modify, delete, control and transfer my digital assets, including, but not limited to, any and all of my emails, email accounts, digital music, digital photographs, digital videos, hotel points, airline miles, software licenses, social network accounts, file-sharing accounts, financial accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online store accounts, affiliate programs, other online accounts (including any such accounts encompassed by any Apple ID associated with my name), and similar digital items which currently exist or may exist as technology develops or such comparable items as technology develops; (3) to access any of my electronically stored information [**OPTIONAL:** and the content of any communication that has been electronically stored by the service provider for that communication or that is carried or maintained by the service provider for that communication;] and (4) to access any record or other information pertaining to me with respect to that service.

I direct that the terms used in this authorization are to be construed as broadly as possible and that this authorization of access be construed as my lawful consent under the Electronic Communications Privacy Act of 1986, as amended; the Computer Fraud and Abuse Act of 1986, as amended; the South Dakota Revised Uniform Fiduciary Access to Digital Assets Act (SDCL Chapter 55-19); and any other applicable federal or state data privacy law or criminal law. In furtherance of providing the broadest and amplest possible digital asset powers, I direct my estate to indemnify and hold harmless any Personal Representative and/or digital asset provider who relies on this power in accessing or providing the requested information, even if in violation of my own lifetime terms of service agreements or prior privacy elections with the provider.82

(b) To retain any property, real or personal, to carry on any business in which I may have an interest, and to invest and reinvest in any property, real, or personal, all as the Personal Representative or Trustee, if any, may determine, without regard to any requirement for diversification;

(c) To sell, grant options with respect to, or dispose of, any property, real or personal, for cash or on credit, with or without security, on terms that the Personal Representative or Trustee, if any, may determine;

(d) To lease any property, real or personal, for any period, on terms (including options for renewal) that the Personal Representative or Trustee, if any, may determine, and to improve or take any other action with respect to real property;

(e) To permit any income beneficiary (and the guardian of any minor income beneficiary and the family of such guardian) to use any real property or tangible personal property held hereunder for the benefit of the beneficiary, rent free or otherwise, on terms that the Personal Representative or Trustee, if any, (other than the beneficiary or guardian) may determine;

(f) To borrow money for any purpose, from others or from any Personal Representative or Trustee, if any, with or without security, and to mortgage or pledge any property, real, or personal;

(g) To employ agents, brokers, attorneys, accountants, custodians, and investment advisers (including any individual Personal Representative or Trustee, if any), and to treat their compensation as an administration expense;

(h) To sell any property, real or personal, from my estate to any trust, from any trust to my estate, or from one trust to another;

(i) To sell any property, real or personal, to any Personal Representative, Trustee, if any, or beneficiary at fair market value;

(j) To make loans to any income beneficiary, interest free or otherwise, on terms that the Personal Representative or Trustee, if any, (other than the beneficiary) may determine;

(k) To sever any trust, if applicable, into two or more separate trusts having identical terms and beneficiaries as the original trust, and to combine two or more trusts having identical terms and beneficiaries (whether or not the trusts resulted from division of a prior trust), at any time and from time to time (whether before or after funding), without approval of any court, for any administrative, tax or other purpose determined by the Trustee, if any, to be in the best interests of any beneficiary (including any remainderman) hereunder;

(l) To hold the property of any separate trusts as an undivided whole, but the separate trusts must have undivided interests, and no such holding defers the vesting of any estate in possession or otherwise;

(m) To allocate administration expenses to income or principal in proportions that the Personal Representative or Trustee, if any, may determine, to the extent this discretion is permitted under applicable law, without liability to any person for any consequences of the allocation;

(n) To allocate my generation-skipping transfer tax exemption (to the extent not otherwise allocated to lifetime transfers) among the bequests under this Will in amounts and proportions that the Personal Representative may determine, without liability to any person for any consequences resulting from the allocation;

(o) To change the situs of any trust, if applicable, at any time and from time to time, for the convenience of the beneficiaries or the Trustee, if any, or for any other reason;

(p) To treat capital gains on the books, records and tax returns of any trust as part of a distribution to a beneficiary of the trust to the extent of principal distributed to the beneficiary;

(q) **[Optional Section** 5.1.(q)**:**

To accept and receive from time to time any additional funds and assets from any source which may be given or granted to my Trustee, if any, of a trust created under this Will, and to administer and distribute such additional property as a portion of the appropriate trust, provided, however, that my Trustees shall not be required to receive the property without the Trustees' consent; and83**]**

(q) To make any distribution or division of property wholly or partly in kind, whether or not pro rata, using specific assets or undivided interests therein.84

ARTICLE VI. **[ADMINISTRATION OF TRUSTS.**

**First Optional Article** ARTICLE VI.**:**

6.1. In the administration of any trust created hereunder, I direct that:

(a) Any instrument executed by the Trustee shall bind all parties interested in the trust, including the trust beneficiaries. No person, including any insurance company and any Trustee of a retirement benefit plan, transferring property or funds to the Trustee shall be required to see to the application of such property or funds;

(b) The Trustee may release any power, authority, or discretion conferred upon the Trustee by the provisions of this instrument or by law, by providing a written release to the beneficiaries of the trust;

(c) The Trustee shall not be liable for any act performed by it in good faith or for any error of judgment or mistake of fact or law, save only for its individual acts of willful misconduct, and shall be fully protected in any course of conduct taken in good faith in accordance with the advice of counsel;

(d) A successor Trustee shall not be personally liable for any act or omission of any predecessor Trustee. Any successor Trustee acting hereunder may accept the trust assets delivered to them by or on behalf of any predecessor Trustee as constituting the entire estate, and the successor Trustee shall not be required to take any action to recover further assets or to investigate any acts done by any predecessor Trustee, nor shall any successor Trustee be required to bring any action to determine what constitutes the Estate or to obtain possession thereof. A successor Trustee may continue to hold assets received from the predecessor Trustee in the same manner as though the assets had been originally deposited with the successor under this instrument;

(e) Until the Trustee receives written notice of any death or other event upon which the right to payments from any trust hereunder may depend, the Trustee shall incur no liability for disbursements made in good faith to persons whose interests may have been affected by that event. Any notices or other communication required or permitted by this instrument to be delivered to or served on the Trustee shall be deemed received by the Trustee when personally delivered to the Trustee, or, in lieu of such personal delivery, when deposited in the United States mail, certified mail with postage prepaid, addressed to the Trustee at their business or personal address;

(f) Any person may rely on a copy or portion of this Will certified by a notary public to be a true copy or portion hereof. Anyone may rely on any statement of fact certified by anyone who appears from the original copy or portion of this Will or a certified copy or portion thereof to be a Trustee hereunder;

(g) In order to avoid the delay and expense incidental to a judicial settlement of the account, the Trustee shall not be required to render any annual accounting, any rule or statute of law to the contrary notwithstanding, and may at any time settle the account by agreement with the adult beneficiaries then entitled to the income or principal of the trust. Such persons shall represent all others interested in the trust to the greatest extent permitted by SDCL Ch. 55-18. Such settlement and discharge shall be binding upon all the persons interested in any trust, even if then under a legal disability or unborn and shall have the full force and effect of a final judgment or order of a court of competent jurisdiction in an order or proceeding for the settlement of such account in which jurisdiction was obtained of all necessary and proper parties. Nothing herein, however, shall preclude the Trustee from having its account judicially settled or providing an accounting pursuant to SDCL 55-3-45, whenever it deems advisable;85

(h) If, pursuant to the provisions of this instrument, disposition of property is made conditional upon a beneficiary surviving another person and there is an alternate disposition if the beneficiary fails to survive, that alternate disposition shall govern if the beneficiary and that other person die under such circumstances that there is no sufficient evidence that they died otherwise than simultaneously;

(i) With regard to each trust herein, the administration thereof:

(1) Each trust shall be a spendthrift trust to the maximum extent permitted by law and no interest in any trust hereunder shall be subject to a beneficiary's liabilities or creditor claims, assignment or anticipation. Notwithstanding the foregoing, no provision of this Article shall prevent the appointment of an interest in a trust through the exercise of a power of appointment;86

(2) If the Trustee shall determine that a beneficiary would not benefit as greatly from any outright distribution of trust income or principal because of the availability of the distribution to the beneficiary's creditors, the Trustee shall instead expend those amounts for the benefit of the beneficiary; this direction is intended to enable the Trustee to give the beneficiary the maximum possible benefit and enjoyment of all the trust income and principal.

(3) All benefits granted to a beneficiary under this instrument shall be the separate property of such beneficiary (as distinguished from marital property, community property, quasi-community property or any other form of property as to which such beneficiary's spouse might have a claim or interest arising out of the marital relationship under the law of any jurisdiction, domestic or foreign). All benefits granted to a beneficiary hereunder shall also be free of any interference from, or control or marital power of, such beneficiary's spouse. For purposes of this paragraph, the term "benefits" shall include real or personal property, tangible or intangible, and the provisions of this paragraph shall apply not only to benefits actually paid to any beneficiary but also to trust property allocated to a trust in which the beneficiary possesses an interest hereunder;

(j) The fact that a Trustee is active in the investment business shall not be deemed a conflict of interest, and purchases and sales of investments may be made through a corporate Trustee or through any firm of which a corporate or individual Trustee is a partner, member, shareholder, proprietor, associate, employee, owner, subsidiary, affiliate or the like. Property of a trust hereunder may be invested in individual securities, mutual funds, partnerships, private placements or other forms of investment promoted, underwritten, managed or advised by a Trustee or such a firm;

(k) In making any allocations or distributions to any beneficiary, the Trustee may make such allocations or distributions wholly in kind or in money, or partly in kind and partly in money, and may allocate and/or distribute different property interests to distributees and may do so without making pro rata allocations or distributions of specific assets; and the choice, relative values and relative federal income tax bases of the property or money so divided, allocated or distributed shall, in the absence of fraud or bad faith, be binding and conclusive on everyone interested therein; and they shall in no event be accountable for any error of judgment or discretion in exercising the power and authority herein conferred;

(l) The title, powers, duties, immunities, and discretion herein conferred upon the Trustee shall continue after the termination of the trust until final distribution;

(m) Subject to the limitations described in the succeeding Article, and the authority to delegate powers in the paragraph immediately below, in circumstances where the Trustee is more than one individual or entity (or one of each), then the Trustee shall exercise and perform every power (including discretionary powers), authority, or duty only by the unanimous vote of all individuals and entities serving as the Trustee;

(n) Subject to the limitations described in the succeeding Article, any individual or entity serving as a Trustee may, by a signed instrument, and with the consent of any other individual or entity serving as a Trustee, delegate to that other Trustee, all or any portion of the powers, discretions, and duties vested in them by this instrument or by law, including any power, discretion, or duty which would not, absent this section, be delegable; provided, however, that this section shall not be construed to permit any power, discretion, or duty to be delegated to a Trustee who is expressly foreclosed from participating in the exercise of such power, discretion, or duty pursuant to any provision under this instrument, including but not limited to those described in the succeeding Article, or to permit the delegation of any power discretion or duty specifically reserved to a particular Trustee;

(o) The situs of the trust shall be South Dakota, and the law governing the administration the administration of the trust shall be South Dakota. In the sole and absolute discretion of the Trustee, the location of the situs of the trust may be transferred to such other jurisdiction as to provide for ease of administration and minimization of taxation. Upon any such transfer of situs, the trust may thereafter, at the election of the Trustee, be administered exclusively under the laws of (and subject, as required, to the exclusive supervision of the courts of) the jurisdiction to which it has been transferred. Accordingly, if the Trustee of any trust created hereunder elect to change the situs of any such trust, said Trustee is hereby relieved of any requirement of having to qualify in any other jurisdiction and of any requirement of having to account in any court of such other jurisdiction. Notwithstanding the above, no Trustee with a beneficial interest in the trust shall participate in any action described above;

(p) The Trustee (other than any Trustee who has a beneficial interest in the trust) may, by an instrument in writing, amend the administrative provisions (including without limitation amendments to minimize taxes, protect assets from a beneficiary's creditors and establish a beneficiary's eligibility for government benefits) of any trust created hereunder in any manner the Trustee determines in its discretion will help achieve my planning goals. The determination of the Trustee as to whether a provision is administrative, and identification of my planning goals, shall be conclusive as to all beneficiaries. No amendment under this Article may increase the class of beneficiaries or give any beneficial interest or economic benefit in any trust to any person not already a beneficiary of the trust; and

(q) The trusts created hereunder shall be perpetual to the fullest extent permitted by governing law. If any trust created hereunder is deemed to be subject to the law of a jurisdiction that has a Rule Against Perpetuities or similar rule that limits the period during which property may lawfully be held in trust, then the trust shall terminate in all events upon the expiration of the longest period that property may be held in trust hereunder under the law of such jurisdiction (including any applicable period in gross, such as twenty-one (21) years or ninety (90) years). However, if the jurisdiction has a rule against perpetuities or similar rule that applies only to certain types of property held in trust, such as real property, the foregoing sentence shall apply only to such property. If under the law of such jurisdiction the longest period that property may be held in trust may be determined (or alternatively determined) with reference to the death of the last survivor of a group of individuals who are in being at the time that the applicable period with respect to the application of the rule against perpetuities or similar rule commenced, those individuals shall consist of all of my descendants who were in being at the time such rule against perpetuities period or similar rule commenced.87

(r) **[Optional Section** 6.1.(r)**:**

Notwithstanding any provision to the contrary contained herein, if the Trustee, in the Trustee's sole and absolute discretion, shall determine that circumstances exist making it clearly contrary to the best interests of a Beneficiary hereunder to receive a distribution of income and/or principal which is otherwise required to be made hereunder, the Trustee may refrain from making all or any part of such distribution until the Trustee shall determine that such circumstances no longer exist (even if such distributions are withheld during the lifetime of the Beneficiary). Circumstances justifying the Trustee's discretion to withhold distributions would include, without limitation, the beneficiary being a defendant in serious litigation, or being involved in bankruptcy proceedings or similar financial or matrimonial difficulties, being physically, mentally, or emotionally unable to properly administer the assets to be distributed, or living under a form of government or other condition making it highly likely that the assets to be distributed would be subject to confiscation or expropriation. The Trustee shall have no liability whatsoever to any Beneficiary hereunder as a result of exercising such Trustee's discretion to withhold otherwise mandated distributions for as long as the Trustee shall deem it to be in the best interests of the Beneficiary (including until such Beneficiary's death). Notwithstanding any of the previous sections set forth hereunder, my Trustee shall not make distributions directly to a Beneficiary in the event such Beneficiary has a substance abuse problem. My Trustee will undertake such investigation and testing as they deem appropriate to determine whether such Beneficiary has a substance abuse problem. My Trustee will continue to have the discretion to make distributions on behalf of and for the benefit of any Beneficiary.88**]**

(r) The Trustee shall have the power, in the Trustee's discretion, to terminate any trust created under this Will whenever the fair market value of the trust falls below $[[dollar amount (e.g., 50,000)]], or becomes so small in relation to the costs of administration as to make continuing administration uneconomical. [**OPTIONAL:** Continuing administration shall be uneconomical if the trustee determines that, with reference to the trust fee schedules then in effect for corporate fiduciaries in the area in which the trust is being administered, the trust would be subject to the minimum trust administration fees of those fiduciaries, regardless of the value of the trust.] Upon termination, the Trustee shall distribute the principal and any accrued or undistributed net income to the income beneficiaries in proportion to their shares of the income. If no fixed amount of income is payable to specific beneficiaries, the Trustee shall distribute the principal and any accrued or undistributed net income in equal shares to those beneficiaries who would then be entitled to income payments from the trust.89**]**

ARTICLE VI. **[LIMITATION ON TRUSTEE POWERS.**

**Second Optional Article** ARTICLE VI.**:**

6.1. Notwithstanding any provision of this instrument to the contrary, the following shall apply:

(a) With respect to distributions from any trust by a Trustee:

(1) No Trustee shall have the power to make discretionary distributions of either principal or income to or for the benefit of the Trustee, the Trustee's estate, or the creditors of either, provided, however, that a Trustee who is otherwise permitted to make distributions to themself subject to an ascertainable standard for Federal tax purposes under Internal Revenue Code Section 2041(b) may exercise such power, unless such power would cause the trust property to be subject to the claims of such Trustee's creditors.

(2) No Trustee shall have the power to make discretionary distributions of either principal or income to satisfy any of the Trustee's personal legal obligations for support or other purposes;

(3) No Trustee shall have the power to make discretionary allocations in the Trustee's personal favor of receipts or expenses as between income and principal, unless such Trustee has no power to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of such Trustee's fiduciary duties; and

(4) No Trustee shall have the power to exercise any of the powers proscribed by this Section 6.1. with regard to an individual, other than the Trustee, to the extent that such individual could exercise a similar prohibited power in connection with a trust that benefits the Trustee.

(b) If any trust created under this instrument contains a power proscribed under Section 6.1., the power may be exercised by the remaining individuals and/or entities serving as the Trustee who are not so prohibited as if they were the only Trustee. Accordingly, it is my intent that any beneficiary serving as Trustee shall not participate in the discretionary distribution of any income or principal to that Trustee as a beneficiary. If there is no Trustee in office who can exercise such power, then subject to the provisions of this Article, the Trustee shall resign as Trustee, or another Trustee shall be appointed pursuant to this instrument, to exercise such proscribed power.

(c) No beneficiary of a trust, in an individual, trustee or other capacity, may appoint, or remove and appoint, a trustee who is related or subordinate to the beneficiary within the meaning of Internal Revenue Code Section 672(c).

(d) No Trustee shall have any power, incident of ownership, or right of any kind relating to any life insurance policy on their life held as part of any trust with respect to which such Trustee is acting as one of the Trustees.

(e) No holder of any special power of appointment shall have any power to appoint any property to the extent that such appointment would satisfy any legal obligations of support of such powerholder.90**]**

ARTICLE VI. **DEFINITIONS AND MISCELLANEOUS PROVISIONS.**

6.1. If any provision of this instrument, or the application of any provision to any person or circumstance, shall be held invalid, the remainder of this instrument, and all other applications thereof, shall remain in full force and effect.

6.2. For all purposes hereunder, the term "descendants" and "issue" means the biological children of the person designated and the descendants of such children, and includes any person adopted before attaining age 18 and the adopted person's descendants.

6.3. Words used in the singular may be read to include the plural or the plural may be read as the singular. Similarly, the masculine form may be read to include the feminine and neuter; the feminine may be read to include the masculine and neuter; and the neuter may be read to include the masculine and feminine.91

6.4. For all purposes hereunder, the terms "real estate," "real property," and other terms of similar import shall be deemed to include interests in personal property having appurtenant rights of occupancy of real property, including but not limited to cooperative apartments.

6.5. The term "Article" shall refer to such portion of text herein as shall be identified in its heading or caption as an "Article," including all subparagraphs or subsections within such Article. The headings which have been used throughout this Will have been inserted for administrative convenience only and do not constitute matter to be construed in interpreting this Will.

6.6. All references herein to the "Internal Revenue Code" shall be construed as references to the Internal Revenue Code of 1986, as amended.

6.7. **[Optional Section** 6.7.**:**

For all purposes hereunder, all references to a "child" or "children" of mine shall include [[name(s) of child/children]], and any children born to or adopted by me either prior hereto or after the date hereof. [**OPTIONAL:** Additionally, for all purposes under this Will, my [[stepchildren/stepdaughter/stepson]], [[name(s) of stepchildren]] shall be deemed to be my [[child/children]], and [[that child's/those children's]] issue shall be deemed to be my issue regardless of the fact that I am no longer married to [[name of former spouse]].]92**]**

6.7. For all purposes hereunder, the term "Digital Asset(s)" means an electronic record in which I have either a right or interest. The term does not include an underlying asset or liability. Digital Assets can be stored on computers (or other hardware or devices), in the cloud, or in online accounts. No matter the location, Digital Assets include, but are not limited to, online accounts (financial or otherwise), social media accounts, email, photographs and video, personal blogs, documents, computer and account passwords and other digital files that may require a username and password (or other identity verification methods) to access and manage. Digital Assets also includes any and all digital assets and devices encompassed by any Apple ID associated with my name, as I was the lawful owner and user of all devices and accounts associated with said Apple ID. For purposes of this definition, "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities, and "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. For any communication related records or data, Digital Assets means both catalogue data and the content of the communications, unless the Personal Representative's authority is limited in another article in this Will.

ARTICLE VII. **[NO-CONTEST.**

**First Optional Article** ARTICLE VII.**:**

If any beneficiary shall contest the validity of this Will or any part of it, or any trust which is a residuary legatee hereunder, if applicable, or shall institute or join in, except as a party defendant, any such contest or proceeding to prevent, hinder or delay the provisions of this Will or such trust from being carried out in accordance with its terms, not including a petition for instructions for the interpretation of this Will or such trust instituted in good faith and for probable cause, then all interests in this Will otherwise passing to such beneficiary shall be revoked and shall pass under this Will and such trust as if such beneficiary [**OPTIONAL**: and such beneficiary's issue] had predeceased me.93**]**

ARTICLE VII. **[MILITARY BENEFITS CLAUSE.**

**Second Optional Article** ARTICLE VII. **(if Military Instrument):**

I have served in the Armed Forces of the United States. I therefore request that my Personal Representative make appropriate inquiries to ascertain whether there are any benefits to which my dependents, my heirs, or I may be entitled by virtue of any military affiliation. I specifically request that my Personal Representative consult with a retired affairs officer at the nearest military installation, the Department of Veterans Affairs, and the Social Security Administration.94**]**

# **SIGNATURE AND ATTESTATION**

I, [[name of testator]], the testator, sign my name to this instrument this [[day]] day of [[month]], [[year]], and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] (signature of testator)

[[testator printed name]], Testator

We, [[name of witness 1]], [[name of witness 2]] the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as their will and that they sign it willingly (or willingly directs another to sign for them), that they executes it as their free and voluntary act for the purposes therein expressed, and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] (signature of witness 1)

[[name of witness 1]], Witness

[[witness 1 address]]

[[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]] (signature of witness 2)

[[name of witness 2]], Witness

[[witness 2 address]]95

# **[AFFIDAVIT IN PROOF OF WILL**

|  |  |  |
| --- | --- | --- |
| STATE OF SOUTH DAKOTA | ) |  |
|  | ) | , ss |
| COUNTY OF [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] | ) |  |

We [[name of testator]], [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] [[name of Witness 1]] and [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] [[name of Witness 2]], the Testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that they had signed willingly (or willingly directed another to sign for them), and that they executed it as their free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of their knowledge the testator was at that time eighteen years of age or older, of sound mind, and under no constraint or undue influence.

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]

Name of Testator

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]

Witness #1

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]

Witness #2

Subscribed, sworn to and acknowledged before me by [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] the Testator, and subscribed and sworn to before me by [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] and [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_], witnesses, on this [\_\_\_\_\_] day of [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] (signature of notary public)

[[notary public typed name]]

My Commission Expires: [[date]]

[[SEAL]]96

OR

**First Alternate Notary Certificate of Acknowledgement using Video Communication Technology:**

|  |  |
| --- | --- |
| STATE OF SOUTH DAKOTA | ) |
|  | , ss |
| COUNTY OF [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] | ) |

I, [[name of testator]], the testator, sign my name to this instrument this [\_\_\_\_\_] day of [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_], 20[\_\_], and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly, that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]

[Name of Testator]

Subscribed, sworn to and acknowledged before me by [[name of testator]], the Testator, personally known to me through dealings sufficient to provide reasonable certainty that the testator has the identity being claimed, via remote communication technology from [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] (name of city), South Dakota on this [\_\_\_\_\_] day of [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_], 20[\_\_]. I was able to identify the Testator and watch the above execution of the Will from my location at [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] (notary address) in [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] (name of city), South Dakota. Based on this technology and my personal preparation of the Last Will and Testament so signed, I am able to reasonably confirm that this document is the same document signed by the Testator in my remote presence.

Dated this [\_\_\_\_\_] day of [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_], 20[\_\_].

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] (signature of notary public)

[[notary public typed name]]

My Commission Expires: [[date]]

[[SEAL]]

Witnessed via remote communication:

|  |  |
| --- | --- |
| STATE OF SOUTH DAKOTA | ) |
|  | , ss |
| COUNTY OF [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] | ) |

We, [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] [[name of Witness 1]] and [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] [[name of Witness 2]], the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as their Last Will & Testament and that they sign it willingly, that they execute it as their free and voluntary act for the purposes therein expressed, and that each of us, in the virtual presence and hearing of the testator via video conference on this date, hereby signs this Last Will & Testament as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]

Witness #1

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]

Witness #2

Subscribed, sworn to and acknowledged before me by [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] and [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_], witnesses, in my personal presence, on this [\_\_\_\_\_] day of [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_], 20[\_\_].

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] (signature of notary public)

[[notary public typed name]]

My Commission Expires: [[date]]

[[SEAL]]97

OR

# **SELF-PROVING AFFIDAVIT**

**Second Alternate Affidavit in Proof of Will (if Military Instrument):**

**WITH THE ARMED FORCES AT** [**[location of execution of documents]**]

We, the Testator and the witnesses, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned [[10 U.S.C. § 1044a authorized notary / state-licensed notary authorized by 10 U.S.C. § 1044d(c)(2)(C)]], that in the presence of the witnesses, the Testator [[testator's name]] signed and executed the instrument as the Testator's military testamentary instrument and that the Testator had signed willingly (or willingly directed another to sign for the Testator), and that the Testator executed it as the Testator's free and voluntary act for the purposes therein expressed. It is further declared that each of the witnesses, in the presence and hearing of the Testator and the below named authorized notary, signed the military testamentary instrument as witness and that to the best of their knowledge the Testator was at that time eighteen years of age or older or emancipated, of sound mind, and under no constraint or undue influence.

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] (signature of testator)

[[testator printed name]]

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]

[[name of witness 1]], Witness

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]

[[name of witness 2]], Witness

Subscribed, sworn to and acknowledged before me by the Testator, and subscribed and sworn to before me by the above-named witnesses, this date [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_].

(Signed)

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]

[[name and official title of notary administering the oath (e.g., Notary Public, Under Authority of 10 U.S.C. § 1044a)]]

[**OPTIONAL** (if State-Licensed Notary): Commission Expires: [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]]

[**OPTIONAL (if 10 U.S.C. § 1044a Authorized Notary): Name of Notary and Position:** [[name of notary and position]]

**Grade and Branch of Service:** [[notary's grade and branch of service]]

**Command or Organization:** [[notary's command or organization]]]98**]**

1 **Drafting Note to Optional Cover Page**: This cover page contains basic details of the will (i.e., the testator's name and the date of the will) and contact information for the attorney-draftsperson. Use of a cover page is a matter of preference and not generally required. If preparing a military testamentary instrument, however, it is advisable to use a cover page (and is required if this instrument is being prepared by an Army Legal Services Officer, who must also include his or her name). While the bar number is an optional field, if the attorney-draftsman is a Naval Legal Services Officer, a bar number must be included.

2 **Drafting Note to Optional Military Testamentary Instrument Preamble**: Include this optional provision if you are providing this document and your client is eligible for legal assistance under the authority of 10 U.S.C. § 1044. Military testamentary instruments are generally exempt from the execution requirements imposed by a jurisdiction, but will be honored as if executed in accordance with the laws of the jurisdiction in which probate is sought. 10 U.S.C. § 1044d(a). To qualify as a military instrument, the will must meet all of the following execution requirements:

• The testator must either sign the will or direct another individual to sign on their behalf, and in their presence, if unable to execute the instrument personally.

• The testator must sign the will or acknowledge their signature on the will in the presence of two disinterested witnesses, each of whom attest to witnessing the testator's execution of the will.

• A military legal assistance counsel, state-licensed notary employed by a military department or Coast Guard, or individual authorized to perform notarial acts under 10 U.S.C. § 1044a must notarize the instrument.

10 U.S.C. § 1044d(c).

Further, the will must include both (1) a statement or preamble in form and content, substantially as outlined in DoD Instruction 1350.04, "Legal Assistance Matters," Effective February 3, 2022 (whs.mil) (as set forth in this optional provision); and (2) a self-proving affidavit as outlined in DoD Instruction 1350.04, "Legal Assistance Matters," Effective February 3, 2022 (whs.mil) (as set forth in Alternate Military Affidavit). The self-proving affidavit may also be attached to the will if not included within it.

3 **Drafting Note to Optional Provision to Add to First Paragraph of Preamble (if Military Instrument)**: Use this optional provision if creating a military instrument for an active or retired servicemember, or a dependent of a servicemember or retired servicemember entitled to military legal assistance under 10 U.S.C. § 1044(a).

4 **Drafting Note to First Paragraph of Preamble**: Use the optional provisions to memorialize the testator's current residence or domicile. A declaration that the testator "currently resides" in a stated jurisdiction specifies the testator's current physical address, which may be either temporary or permanent. Alternatively, by stating that the testator "is a resident of" a stated jurisdiction, the testator declares that jurisdiction to be their legal residence or domicile. Although generally guided by the intent of the individual, other factors used to establish domicile include:

• Voter registration

• Car registration

• State of residency on the individual's tax returns

• Address on passport

Modern Estate Planning § 62.06. If the testator declares themself as a resident of a specified jurisdiction, it is generally advisable to draft the will in accordance with the laws of such jurisdiction.

In some circumstances, such as when there is a strong possibility the testator may move to another jurisdiction, it may be advisable to omit from the will any express statement that the testator resides in a certain state, as well as any other references to that state. The absence of express references to a certain state may reduce the risk of more than one state claiming the testator is a resident. However, if the testator owned real property in other states, an ancillary probate proceeding must be commenced in each state where real property exists in order to transfer ownership or otherwise dispose of the real property. Note, however, that the real property would not be subject to ancillary probate in another jurisdiction if, at the testator's death, the testator owned the property jointly with survivorship rights and the joint tenant is living, or in a trust.

5 **Drafting Note to First Optional Second Paragraph of Preamble**: This paragraph assumes the testator has children. If the testator does not have children, use Second Optional Second Paragraph of Preamble. Use the optional provisions if your client wishes to identify children and other beneficiaries and/or provide details regarding past marital status. If including the optional provisions regarding children, do not use Optional 6.7., which includes duplicative defined terms. Choosing to include this language in a preamble as opposed to a definitions clause, or vice versa, is purely a matter of style, but you should opt for one or the other to eliminate the potential for error and ensure there are no conflicting provisions in the document.

6 **Drafting Note to Second Optional Second Paragraph of Preamble**: This paragraph assumes the testator does not have children. Use the optional provisions if your client wishes to identify their heirs at law and/or provide details regarding past marital status. Describing the family in detail here can prevent confusion during the administration.

7 **Drafting Note to Optional Third Paragraph of Preamble**: Use this optional paragraph if the testator wishes to intentionally disinherit one or more living heirs at law. While it may be preferential to keep the testator's reasoning vague as the will could become a matter of public record, you can use the optional provision to expressly set forth the testator's reason for disinheriting the heir.

8 **Drafting Note to Preamble**: Although there is no legal requirement that the testator make any specific declaration respecting their children or other family members, such a declaration may be helpful if, after the testator's death, any person claims the right to take part of the estate as an omitted spouse or child, since the declaration may help to establish or refute the claim. Further, it can demonstrate the testator's understanding of the objects of their bounty or in clearly describing persons who are excluded. On the other hand, omitting such a declaration has no adverse impact to a properly constructed will and can avoid a potentially uncomfortable recitation of private affairs. The decision of whether or not to include such a statement is personal and entirely up to the client. You should discuss these options with your client and include only those optional clauses that they wish to include.

The definition of "child," "children," "issue," "heirs," and "descendants" includes persons who are adopted persons, persons born by artificial means, and persons born after the death of the testator. See SDCL § 29A-1-201. If a testator wishes to exclude any person covered under such categories, the will should explicitly state so. Further, if a testator wishes to broaden the definition, for example to include a stepchild in the definition of "child," use the optional language to explicitly so state.

If a child is born or adopted after the execution of the will, such child is entitled to a share as specified by statute; the general intention is to cause such child to be treated as if they were born prior to execution of the will unless the testator indicated a contrary intention. See SDCL § 29A-2-302. A person is considered a "child" of a decedent if the person was conceived prior to the decedent's death, was born within 10 months of the decedent's death, and survived 120 hours or more after birth. See SDCL §§ 29A-1-201(6) and 29A-2-302.

If the testator married after execution of the will and made no provision for the surviving spouse, such spouse may receive a share provided the testator does not indicate a contrary intention. See SDCL § 29A-2-301.

Advise testators to review their estate planning documents periodically and upon any significant change in testator's financial situation and/or family status (e.g., birth, death, adoption, divorce, or a marriage or domestic partnership registration).

9 **Drafting Note to First Optional Article** ARTICLE I.: Use this clause to direct the personal representative to consult a previously executed agreement between the testator and the funeral home prior to making the funeral arrangements.

Utilize this paragraph or one of the other optional articles to express the testator's intent regarding their post-death arrangements. While it is prudent for a testator to memorialize their funeral wishes, a recurring problem with such a provision being included in a will is that the decedent's relatives tend to move quickly with respect to post-death arrangements. The decedent's relatives may move forward with the arrangements prior to reviewing or locating the will or having it formally probated in a court proceeding as required by law. Consider including disposition of remains directions within an advance directive for practical purposes.

Absent such written directions in the will or other instrument, SDCL § 34-26-16 provides a list of persons authorized to handle the disposition of remains.

10 **Drafting Note to Second Optional Article** ARTICLE I.: Use this optional provision to memorialize the testator's wishes for a cremation or burial. You can customize this provision by providing express instructions for the testator's burial or the disposition of their ashes. Further, use the optional provision in the second sentence to memorialize the testator's preference for a religious or non-religious funeral. Modify this provision to reflect the testator's wishes. For additional information on the control of a decedent's remains in South Dakota, see SDCL § 34-26-16.

11 **Drafting Note to Third Optional Article** ARTICLE I. **(if Military Instrument)**: Use this optional provision to memorialize the testator's wishes for burial with military honors, disposition of burial flags, desire for funeral/memorial service, and disposition of remains. Customization is likely depending on the testator's wishes. In the event the testator signed another instrument memorializing their intent regarding post-death arrangements (e.g., VA Form 40-10007), ensure that the provisions do not conflict with one another.

12 **Drafting Note to Section** 1.1.: If the estate includes real property, consult with your client as to whether the beneficiary should inherit the property subject to the mortgage. Without specific language authorizing payment of any mortgage and/or security interest, a general direction to pay estate debts, as provided here, will not be deemed a direction to pay the mortgage or security interest. See In Re Finnerud's Estate, 299 N.W. 297 (S.D. 1941). If the testator does not want a beneficiary to inherit real property subject to the mortgage, the estate must have sufficient funds to pay off the mortgage before the distribution of other assets.

13 **Drafting Note to Optional Section** 1.2.(b): Use this optional provision to direct the payment of any generation-skipping transfer (GST) tax from the property generating the tax. The Internal Revenue Code imposes a GST tax on transfers to grandchildren and other more remote descendants to prevent transferors from avoiding transfer taxes by skipping a generation. For an in-depth discussion of the GST tax, see Generation-Skipping Transfer Taxation.

14 **Drafting Note to Section** 1.2.: If assets that are part of the testator's taxable estate pass other than by the testator's will, consideration should be given to whether the estate tax attributable to those assets should be paid from the residue of the estate or from some other source. This clause directs the payment of estate and other death taxes attributable to property passing outside the will by the persons who receive such property, in proportion to the value of such property compared to the total value of the estate. This provision ensures that the tax burden is fairly distributed and that the probate estate is not entirely consumed by death taxes in situations where a substantial proportion of the testator's estate will pass outside of the will.

Absent a tax apportionment provision providing otherwise, the statutory rules for apportionment of estate and other death taxes will apply. See SDCL § 29A-3-916.

The estate tax is a tax on the value of the decedent's estate before distribution to any beneficiary. For 2024, the federal exclusion amount is $13.61 million. South Dakota does not have an estate or inheritance tax.

For additional information on the federal estate tax, see Apportionment of Estate Tax and Payment of Estate Taxes.

15 **Drafting Note to First Optional Section** 2.1.: A "specific" devise or bequest is a transfer of specifically identifiable property made under a will. A "specific" devisee is entitled to an "in kind" distribution of the property so devised. See SDCL § 29A-2-606(a) and SDCL § 29A-3-906(a)(1). If property that is specifically devised is not in the decedent's estate as of the decedent's death, the specific devisee is entitled to any remaining proceeds from the sale of the property, insurance proceeds traceable to the devise, property purchased as a replacement for the specifically devised property, and other funds traceable to the specifically devised property. See SDCL § 29A-2-606.

When considering a specific devise or bequest, the testator should consider the possibility that the property will not be in the estate at the time of the testator's death and decide whether an alternate gift should be made to take effect in such an event. Further, discuss with the testator who should receive the bequest if the intended beneficiary does not survive the testator. Use the last sentence to direct the bequest to a contingent beneficiary, or alternatively, state that the bequest shall lapse. If the bequest lapses, it will be disposed of in accordance with Section 2.1. (directing the distribution of all tangible personal property not otherwise disposed of).

If the testator makes any specific gifts of property using this paragraph, include the optional clause in Section 2.1..

16 **Drafting Note to Second Optional Section** 2.1.: Use this optional provision if the testator intends to prepare a memorandum distributing items of tangible personal property. SDCL § 29A-2-513 allows the will to refer to a separate written statement to dispose of tangible personal property (other than money) that is not otherwise specifically disposed of in the will. The writing must be signed by the testator and describe the items and devisees with reasonable certainty. The writing may be prepared before or after execution of the will.

Advise your client that it is prudent to have a memorandum separate and apart from the will. This is preferable to identifying each item and each beneficiary in the will itself. The memorandum allows the testator to change their mind frequently without having to sign a codicil or new will each time. If including the last sentence to specify the date upon which it will be presumed no writing exists, it is good practice to use a short amount of time—ideally 30 days—in order to prevent an unreasonable delay in the distribution of the property.

17 **Drafting Note to Sections** 2.2.**–**2.4.: These provisions allow the beneficiaries to select keepsakes, as they may agree, with the personal representative having authority to resolve any disagreements as to which beneficiary gets what item. The personal representative is further authorized to make the selection for a minor beneficiary and to deliver the property to a guardian or custodian for that beneficiary. Unselected items are added to the residue.

18 **Drafting Note to Optional Provision to Add to Section** 2.5. **(if User Selects Administration Expense in First Sentence)**: This optional language gives the personal representative discretion to decline to bear the administrative costs of preparing and delivering tangible personal property. You should discuss options with your client regarding who should pay for these costs. Requiring beneficiaries to pay may result in a disproportionate impact on beneficiaries who live farther from the testator, but giving the personal representative discretion to decline to pay the expense may be particularly important for a decedent (particularly, a transient military client) who may live far from beneficiaries at the time of death.

19 **Drafting Note to Optional Section** 2.7.(a): Include this optional section if the testator wishes for the real property to be held in trust for the benefit of the designated individuals if they are under a specified age. Note, however, that it is generally not advisable to leave real property in trust for a minor as the trustee must have adequate funds available to maintain the property. Therefore, ensure that the testator has made sufficient arrangements to cover all carrying costs (e.g., maintenance, real estate taxes, casualty damage) for any real property held in trust. Any such trust containing real estate must be funded sufficiently to cover any and all debts and carrying costs.

Use the optional clause in subparagraph (1) to customize the trust distribution provisions. You should discuss with the client whether the trustee should have the widest latitude and discretion (i.e., sole discretion) or whether the trustee should be limited to making distributions according to an ascertainable standard, such as health, education, maintenance, and support. Such an approach limits the trustee to a certain extent but may be beneficial if the beneficiary is the trustee, or if there are tax or spendthrift reasons to limit the trustee's latitude in making distributions.

20 **Drafting Note to First Optional Section** 2.7.: Use this optional section if the testator wishes to devise a specific piece of real property to one or more designated individuals. If including the legal description of the property, confirm that description matches that of the deed or other applicable document (e.g., tax bill) and that it is properly stated in the will. Specify whether the devisee(s) will take the property subject to the mortgage. Without specific language authorizing payment of any mortgage and/or security interest, a general direction to pay estate debts, as provided here, will not be deemed a direction to pay the mortgage or security interest. See In Re Finnerud's Estate, 299 N.W. 297 (S.D. 1941). If the testator does not want a beneficiary to inherit real property subject to the mortgage, the estate must have sufficient funds to pay off the mortgage before the distribution of other assets.

21 **Drafting Note to Optional Section** 2.7.(a): Include this optional section if the testator wishes for the real property to be held in trust for the benefit of the designated individuals if they are under a specified age. Note, however, that it is generally not advisable to leave real property in trust for a minor as the trustee must have adequate funds available to maintain the property. Therefore, ensure that the testator has made sufficient arrangements to cover all carrying costs (e.g., maintenance, real estate taxes, casualty damage) for any real property held in trust. Any such trust containing real estate must be funded sufficiently to cover any and all debts and carrying costs.

Use the optional clause in subparagraph (1) to customize the trust distribution provisions. You should discuss with the client whether the trustee should have the widest latitude and discretion (i.e., sole discretion) or whether the trustee should be limited to making distributions according to an ascertainable standard, such as health, education, maintenance, and support. Such an approach limits the trustee to a certain extent but may be beneficial if the beneficiary is the trustee, or if there are tax or spendthrift reasons to limit the trustee's latitude in making distributions.

22 **Drafting Note to Second Optional Section** 2.7.: Use this optional section if the testator wishes to devise all of their real property owned at death to one or more designated individuals. As a matter of good practice, you should specify whether the testator intends to include the testator's residence as part of the real property to avoid confusion in administration. If including the legal description of the property, confirm that description matches that of the deed or other applicable document (e.g., tax bill) and that it is properly stated in the will.

Specify whether the devisee(s) will take the properties subject to any outstanding mortgage. Without specific language authorizing payment of any mortgage and/or security interest, a general direction to pay estate debts, as provided here, will not be deemed a direction to pay the mortgage or security interest. See In Re Finnerud's Estate, 299 N.W. 297 (S.D. 1941). If the testator does not want a beneficiary to inherit real property subject to the mortgage, the estate must have sufficient funds to pay off the mortgage before the distribution of other assets.

23 **Drafting Note to Third Optional Section** 2.7.: Use this optional section if the testator wishes to make a gift of a cash sum or a percentage of their estate. If gifting a cash sum, consider the possibility of the gift resulting in a disproportionate gift to the specified beneficiary based on the value of the residuary estate at the time of death. You may wish to provide a percentage of the estate instead, or otherwise adjust this paragraph, to avoid such unintended consequences.

Discuss with the testator who should receive the gift in this section if the intended beneficiary (or all of the beneficiaries) does not survive the testator. Alternative language states that the bequest shall lapse. If the gift lapses, it becomes part of the residuary estate.

Include the optional trust language in the last sentence (and either Fourth Optional Section 2.7. or Fifth Optional Section 2.7.) if the testator wishes for the bequest to be held in trust for the benefit of the designated individual(s) if they are under a specified age.

24 **Drafting Note to Section** 2.7.(a): As the trust provisions do not require the trustee to distribute all of the trust income before the beneficiary reaches the specified age, the trust may incur—and thus, need to report—taxable income. Consideration should be given to the income tax rates applicable to both the beneficiary or beneficiaries and the trust itself when determining how to distribute the trust income. For more information on the income tax implications of trusts and trust beneficiaries, see Income Taxation of Fiduciaries and Beneficiaries — Trust, Trust Administration and Taxation, and Distributable Net Income.

25 **Drafting Note to Section** 2.7.(b): This section provides for trust principal to be paid to or applied for the benefit of the beneficiary according to the distribution standard selected. Typically, you would authorize the trustee to make distributions either (1) in the trustee's sole discretion, which allows the trustee to provide for the beneficiary at times when the beneficiary may not be entitled to any distribution from the trust, but when there may be good cause to distribute trust assets for the beneficiary's benefit; or (2) subject to an ascertainable standard, such as health, education, maintenance, and support. While the former option provides the widest latitude, you should discuss with the client whether the trustee should be limited to making distributions according to an ascertainable standard. The latter approach limits the trustee to a certain extent but may be beneficial if the beneficiary is the trustee, or if there are tax or spendthrift reasons to limit the trustee's latitude in making distributions. Treas. Reg. §§ 20.2041-1(c)(2), 25.2514-1(c)(2).

26 **Drafting Note to Optional Section** 2.7.(d)(1): This section directs the trustee to distribute a specified amount, fraction, or percentage of trust principal to a beneficiary when the beneficiary attains the specified age. Customize the stages and ages by utilizing additional optional sections. Incremental distributions are popular because testators often are reluctant to have beneficiaries take their entire inheritance outright while they are at a relatively young age. When an incremental payment schedule is adopted, it is most common to provide for either two or three incremental payments.

27 **Drafting Note to Optional Section** 2.7.(d)(2): Use this optional provision (along with subparagraph (1)) to direct the trustee to distribute a specified amount, fraction, or percentage of trust principal to the beneficiary when the beneficiary attains the stated age.

28 **Drafting Note to Optional Section** 2.7.(d): Use this optional section to direct distributions of principal to trust beneficiaries upon the beneficiaries attaining specified ages. Keep in mind, however, that the beneficiaries will receive each distribution outright upon attaining the specified age. In cases where the testator knows their child will not be able to manage an inheritance prudently, a testator will want to ensure that the trust does not make a final distribution to that child upon turning the stated age. If the testator's child has a substance abuse, gambling, or marital problem, then the protections of the trust assets and the oversight of the trustee should not be allowed to evaporate. Tailor the age(s) and stages of distribution to match the client's intentions in the optional provisions.

29 **Drafting Note to Fourth Optional Section** 2.7.: Include this optional section (to establish separate trusts for the beneficiaries) if, in a prior section, the testator directed a gift of money in trust for one or more beneficiaries prior to the disposition of the residuary estate. Use the optional clauses to customize the trust distribution provisions. You should discuss with the client whether the trustee should have the widest latitude and discretion (i.e., sole discretion) or whether the trustee should be limited to making distributions according to an ascertainable standard, such as health, education, maintenance, and support. Such an approach limits the trustee to a certain extent but may be beneficial if the beneficiary is the trustee, or if there are tax or spendthrift reasons to limit the trustee's latitude in making distributions.

If the testator prefers to establish a pot trust to hold the gift for the collective benefit of the beneficiaries, rather than separate shares for the beneficiaries, use Fifth Optional Section 2.7..

30 **Drafting Note to Section** 2.7.(d): As the trust provisions do not require the trustee to distribute all of the trust income, the trust may incur—and thus, need to report—taxable income. Consideration should be given to the income tax rates applicable to both the beneficiary or beneficiaries and the trust itself when determining how to distribute the trust income. For more information on the income tax implications of trusts and trust beneficiaries, see Income Taxation of Fiduciaries and Beneficiaries — Trust, Trust Administration and Taxation, and Distributable Net Income.

31 **Drafting Note to Fifth Optional Section** 2.7.: These provisions create a pot trust to hold the preresiduary distribution when one or more beneficiary is under the stated age. Tailor the age of distribution to match the client's intentions.

Advise your client that the inclusion of a trust or trust(s) for beneficiaries may result in a more complicated and costly administration. In many scenarios, especially when the testator has a modest estate or has children that do not require the spendthrift protection and oversight that a trust provides, it will generally be preferable to direct the beneficiary's inheritance outright, with the caveat that the personal representative can direct any share for a minor to third persons (e.g., custodian under UTMA/UGMA) under Section 3.3. without adhering to any specific trust provisions.

If one or more trusts are created hereunder, be sure to include Optional Section 4.2. to appoint trustees of such trust(s), as well as both First Optional Article ARTICLE VI. and Second Optional Article ARTICLE VI..

32 **Drafting Note to Section** 3.1.(a): As the trust provisions do not require the trustee to distribute all of the trust income before the beneficiary reaches the specified age, the trust may incur—and thus, need to report—taxable income. Consideration should be given to the income tax rates applicable to both the beneficiary or beneficiaries and the trust itself when determining how to distribute the trust income. For more information on the income tax implications of trusts and trust beneficiaries, see Income Taxation of Fiduciaries and Beneficiaries — Trust, Trust Administration and Taxation, and Distributable Net Income.

33 **Drafting Note to Optional Section** 3.1.(d)(1): This section directs the trustee to distribute a specified amount, fraction, or percentage of trust principal to a beneficiary when the beneficiary attains the age specified age. Customize the stages and ages by utilizing additional optional sections. Incremental distributions are popular because testators often are reluctant to have beneficiaries take their entire inheritance outright while they are at a relatively young age. When an incremental payment schedule is adopted, it is most common to provide for either two or three incremental payments.

34 **Drafting Note to Optional Section** 3.1.(d)(2): Use this optional provision (along with subparagraph (1)) to direct the trustee to distribute a specified amount, fraction, or percentage of trust principal to the beneficiary when the beneficiary attains the stated age.

35 **Drafting Note to Optional Section** 3.1.(d): Use this optional section to direct distributions of principal to trust beneficiaries upon the beneficiaries attaining specified ages. Keep in mind, however, that the beneficiaries will receive each distribution outright upon attaining the specified age. In cases where the testator knows their child will not be able to manage an inheritance prudently, a testator will want to ensure that the trust does not make a final distribution to that child upon turning the stated age. If the testator's child has a substance abuse, gambling, or marital problem, then the protections of the trust assets and the oversight of the trustee should not be allowed to evaporate. Tailor the age(s) and stages of distribution to match the client's intentions in the optional provisions.

36 **Drafting Note to Section** 3.1.: This section directs the assets of the life insurance trust into separate shares for the beneficiaries. While the trustee does have some discretion in providing for the beneficiaries, you can modify this section to direct distributions of income and principal to the beneficiary at certain ages by using the optional sections. If the testator wants staged distributions, tailor the age(s) and stages of distribution to match the client's intentions. Discuss with the testator whether they wish to grant the trustee the widest discretion, or if they prefer to limit the trustee's discretion and modify the distribution plan in subparagraph (b) accordingly.

If the testator prefers to establish a pot trust to hold the proceeds, rather than separate shares for the beneficiaries, use Alternate Section 3.1..

37 **Drafting Note to Alternate Section** 3.1.(d): As the trust provisions do not require the trustee to distribute all of the trust income, the trust may incur—and thus, need to report—taxable income. Consideration should be given to the income tax rates applicable to both the beneficiary or beneficiaries and the trust itself when determining how to distribute the trust income. For more information on the income tax implications of trusts and trust beneficiaries, see Income Taxation of Fiduciaries and Beneficiaries — Trust, Trust Administration and Taxation, and Distributable Net Income.

38 **Drafting Note to Alternate Section** 3.1.: These provisions provide for the distribution of the life insurance trust when one or more beneficiary is under the stated age. Tailor the age of distribution to match the client's intentions. If the testator wishes to divide the assets into separate share trusts for their descendants, use Section 3.1..

Advise your client that the inclusion of a trust or trust(s) for beneficiaries may result in a more complicated and costly administration. In many scenarios, especially when the testator has a modest estate or has children that do not require the spendthrift protection and oversight that a trust provides, it will generally be preferable to direct the beneficiary's inheritance outright, with the caveat that the personal representative can direct any share for a minor to third persons (e.g., custodian under UTMA/UGMA) under Section 3.3. without adhering to any specific trust provisions.

If one or more trusts are created hereunder, be sure to include Optional Section 4.2. to appoint trustees of such trust(s), as well as both First Optional Article ARTICLE VI. and Second Optional Article ARTICLE VI..

39 **Drafting Note to Optional Article** ARTICLE III **(if Military Instrument)**: In certain circumstances a testator may wish to name a testamentary trust as the beneficiary of a life insurance policy (or annuity or other payable-on-death asset), such as when the testator is providing for minor beneficiaries or children from a prior marriage. This can be accomplished by using this optional section. While this may be a viable and efficient method to provide for minor beneficiaries or children from a prior marriage, be sure to advise the testator as to any and all drawbacks to this approach. For example, by naming the testamentary trust as the beneficiary of a life insurance policy, the proceeds could become part of the testator's probate estate. Assets that are part of the probate estate will have to go through the probate process (potentially incurring additional costs and delays in receiving the proceeds), and also may become subject to the creditors of the estate. A better alternative may be to name an UTMA/UGMA custodian for the minor beneficiary on the life insurance beneficiary designation form.

40 **Drafting Note to Article** ARTICLE III.**, Introductory Paragraph**: If the testator is a donee of a power of appointment and wishes to exercise it, use the optional provision. However, you should include a specific reference to the instrument creating the power of appointment.

**Drafting Note to Article** ARTICLE III.**, Introductory Paragraph (if Military Instrument):** Note that it is not common in the military practice for a servicemember to be a donee of a power of appointment.

41 **Drafting Note to Section** 3.1.: This provision directs the residuary estate outright to the testator's living children and to the descendants of a deceased child. If any beneficiary is a minor, their share will be distributed in accordance with Section 3.3. below, which authorizes the personal representative to distribute a minor's property to an individual having care or custody of such minor or such minor's property, such as, the minor's guardian or a custodian under the applicable Uniform Gifts to Minors Act or Uniform Transfers to Minors Act. Unless the bequest to the child is nominal, consideration should be given to creating a trust or trusts for the beneficiaries. If the testator prefers to distribute the property in trust for children and other beneficiaries, use First Alternate Section 3.1. (collective pot trust) or Second Alternate Section 3.1. ((separate share trusts). If your client is considering testamentary trusts, be sure to advise that their use makes the disposition plan significantly more complicated and costly than would otherwise be the case. Be sure to discuss with the client whether the ongoing administration costs will outweigh any potential benefit. If the testator has no living children or grandchildren, use Third Alternate Section 3.1.. If the testator wishes to dispose of the residue of the estate in unequal shares—either outright or in trust—to one or more named beneficiaries, use Fourth Alternate Section 3.1..

The testator must select the distribution method for which a predeceased child's descendants will inherit the property. Note that while both "per stirpes" and "per capita at each generation" are commonly used, the resulting distribution for beneficiaries could vary greatly depending on the method used. To distinguish between the two rules, consider the following example: The testator had three children: A, B, and C, but B and C passed away before the testator. B had two children: B1 and B2. C had three children: C1, C2, and C3. Under the "per stirpes" rule, distribution would divide the estate into three equal parts for the children, with the deceased child's issue taking the deceased child's share. Thus: 1/3 to A, 1/6 each to B1 and B2, and 1/9 each to C1, C2, and C3. Under the "per capita at each generation" rule, A would still get 1/3, but B1, B2, C1, C2, and C3 would all equally share the remaining 2/3. Explain these dispositive schemes to your clients, determine their wishes, and select a distribution method accordingly.

Visualization of Example of Per Stirpes vs. Per Capita at Each Generation

42 **Drafting Note to First Alternate Section** 3.1.(a): This section allows the trustee discretion to sprinkle trust income and principal among the beneficiaries, subject to an ascertainable standard (i.e., health, education, maintenance, and support). If the trustee is also a beneficiary who may receive distributions, it is important to limit the power to an ascertainable standard for gift and estate tax purposes, to prevent the trustee from having a general power of appointment. Such limitations are addressed in Second Optional Article ARTICLE VI. below.

43 **Drafting Note to Optional Section** 3.1.(b): Use this optional provision to provide additional guidance to the trustee in making distributions of income and principal to the beneficiaries.

44 **Drafting Note to First Alternate Section** 3.1.(d): As the trust provisions do not require the trustee to distribute all of the trust income, the trust may incur—and thus, need to report—taxable income. Consideration should be given to the income tax rates applicable to both the beneficiary or beneficiaries and the trust itself when determining how to distribute the trust income. For more information on the income tax implications of trusts and trust beneficiaries, see Income Taxation of Fiduciaries and Beneficiaries — Trust, Trust Administration and Taxation, and Distributable Net Income.

45 **Drafting Note to First Alternate Section** 3.1.: These provisions provide for the distribution of the pot trust when one or more beneficiary is under the stated age. Tailor the age of distribution to match the client's intentions. If the testator wishes to divide the assets into separate share trusts for their descendants, use Second Alternate Section 3.1.. If the testator has no living children or grandchildren, use Third Alternate Section 3.1.. If the testator wishes to dispose of the residue of the estate in unequal shares—either outright or in trust—to one or more named beneficiaries, use Fourth Alternate Section 3.1..

Advise your client that the inclusion of a trust or trust(s) for beneficiaries may result in a more complicated and costly administration as testamentary trusts are subject to the supervision of the probate court. See SDCL § 21-22-1 et seq. In many scenarios, especially when the testator has a modest estate or has children that do not require the spendthrift protection and oversight that a trust provides, it will generally be preferable to direct the beneficiary's inheritance outright, with the caveat that the personal representative can direct any share for a minor to third persons (e.g., custodian under UTMA/UGMA) under Section 3.3. without adhering to any specific trust provisions.

If one or more trusts are created hereunder, be sure to include Optional Section 4.2. to appoint trustees of such trust(s), as well as both First Optional Article ARTICLE VI. and Second Optional Article ARTICLE VI..

46 **Drafting Note to Second Alternate Section** 3.1.(a): As the trust provisions do not require the trustee to distribute all of the trust income before the beneficiary reaches the specified age, the trust may incur—and thus, need to report—taxable income. Consideration should be given to the income tax rates applicable to both the beneficiary or beneficiaries and the trust itself when determining how to distribute the trust income. For more information on the income tax implications of trusts and trust beneficiaries, see Income Taxation of Fiduciaries and Beneficiaries — Trust, Trust Administration and Taxation, and Distributable Net Income.

47 **Drafting Note to Section** 3.1.(b): This section provides for trust principal to be paid to or applied for the benefit of the beneficiary according to the distribution standard selected. Typically, you would authorize the trustee to make distributions either (1) in the trustee's sole discretion, which allows the trustee to provide for the beneficiary at times when the beneficiary may not be entitled to any distribution from the trust, but when there may be good cause to distribute trust assets for the beneficiary's benefit; or (2) subject to an ascertainable standard, such as health, education, maintenance, and support. While the former option provides the widest latitude, you should discuss with the client whether the trustee should be limited to making distributions according to an ascertainable standard. The latter approach limits the trustee to a certain extent but may be beneficial if the beneficiary is the trustee, or if there are tax or spendthrift reasons to limit the trustee's latitude in making distributions. Treas. Reg. §§ 20.2041-1(c)(2), 25.2514-1(c)(2).

48 **Drafting Note to Optional Section** 3.1.(d)(1): This section directs the trustee to distribute a specified amount, fraction, or percentage of trust principal to a beneficiary when the beneficiary attains the specified age. Customize the stages and ages by utilizing additional optional sections. Incremental distributions are popular because testators often are reluctant to have beneficiaries take their entire inheritance outright while they are at a relatively young age. By requiring that a portion of the inheritance be retained in trust for a time, the testator may think it more likely that the beneficiary will have gained maturity and financial experience by the time they receives the full amount of their inheritance. When an incremental payment schedule is adopted, it is most common to provide for either two or three incremental payments.

49 **Drafting Note to Optional Section** 3.1.(d)(2): Use this optional provision (along with subparagraph (1)) to direct the trustee to distribute a specified amount, fraction, or percentage of trust principal to the beneficiary when the beneficiary attains the stated age.

50 **Drafting Note to Optional Section** 3.1.(d): Use this optional section to direct distributions of principal to trust beneficiaries upon the beneficiaries attaining specified ages. Keep in mind, however, that the beneficiaries will receive each distribution outright upon attaining the specified age. In cases where the testator knows their child will not be able to manage an inheritance prudently, a testator will want to ensure that the trust does not make a final distribution to that child upon turning the stated age. If the testator's child has a substance abuse, gambling, or marital problem, then the protections of the trust assets and the oversight of the trustee should not be allowed to evaporate. Tailor the age(s) and stages of distribution to match the client's intentions in the optional provisions.

51 **Drafting Note to Second Alternate Section** 3.1.: This alternate section directs the assets into equal separate trust shares for the testator's children. While the trustee does have some discretion in providing for the beneficiaries, you can modify this section to direct distributions of income and principal to the beneficiary at certain ages by using the optional sections. If the testator wants staged distributions, tailor the age(s) and stages of distribution to match the client's intentions. Discuss with the testator whether they wish to grant the trustee the widest discretion, or if they prefer to limit the trustee's discretion and modify the distribution plan in subparagraph (b) accordingly.

Advise your client that the inclusion of a trust or trust(s) for a beneficiary may result in a more complicated and costly administration as testamentary trusts are subject to the supervision of the probate court. See, e.g., SDCL § 21-22-1 et seq. In many scenarios, especially when the testator has a modest estate or has children that do not require the spendthrift protection and oversight that a trust provides, it may be preferable to direct the beneficiary's inheritance outright, with the caveat that the personal representative can direct any share for a minor to third persons (e.g., custodian under UTMA/UGMA) under Section 3.3. without adhering to any specific trust provisions. Note that in the absence of a trust, however, there will be less control over the property and the beneficiary will receive the property in a lump sum at a relatively early age. You should discuss the benefits and burdens of including testamentary trusts so that your client can make an informed decision.

If using staged distributions, keep in mind that the beneficiary will receive each distribution outright upon attaining the specified age. In cases where the testator knows their child will not be able to manage an inheritance prudently, a testator will want to ensure that the trust does not make a final distribution to that child upon turning the stated age. If the testator's child has a substance abuse, gambling, or marital problem, then the protections of the trust assets and the oversight of the trustee should not be allowed to evaporate.

If the testator wishes to provide unequal shares to their children, use Fourth Alternate Section 3.1..

In order to provide for the administration of the trust(s) created under this article, include Optional Section 4.2. to appoint trustees of such trust(s), as well as both First Optional Article ARTICLE VI. and Second Optional Article ARTICLE VI..

52 **Drafting Note to Third Alternate Section** 3.1.: Use this alternate paragraph when the testator has no living children or grandchildren. This alternate paragraph disposes of the residue of the testator's estate in equal shares to one or more named beneficiaries. Take care to ensure that the pattern of distribution specified in the will reflects the testator's wishes.

53 **Drafting Note to Second Optional Section** 3.1.(c): Use this optional provision to dispose of the residue to three or more beneficiaries.

54 **Drafting Note to Optional Section** 3.1.(d): Use this optional provision (in addition to Optional Section (c)) to dispose of the residue to four or more beneficiaries.

55 **Drafting Note to Fourth Alternate Section** 3.1.: This alternate paragraph disposes of the residue of the testator's estate in unequal shares—either outright or in trust—to one or more named beneficiaries. Take care to ensure that the total of all fractional interests equal 100%. If directing the distribution to trusts for the beneficiary, include Optional Section 3.2..

56 **Drafting Note to Section** 3.2.(a): As the trust provisions do not require the trustee to distribute all of the trust income before the beneficiary reaches the specified age, the trust may incur—and thus, need to report—taxable income. Consideration should be given to the income tax rates applicable to both the beneficiary or beneficiaries and the trust itself when determining how to distribute the trust income. For more information on the income tax implications of trusts and trust beneficiaries, see Income Taxation of Fiduciaries and Beneficiaries — Trust, Trust Administration and Taxation, and Distributable Net Income.

57 **Drafting Note to Optional Section** 3.2.(d)(1): This section directs the trustee to distribute a specified amount, fraction, or percentage of trust principal to a beneficiary when the beneficiary attains the specified age. Customize the stages and ages by utilizing additional optional sections. Incremental distributions are popular because testators often are reluctant to have beneficiaries take their entire inheritance outright while they are at a relatively young age. By requiring that a portion of the inheritance be retained in trust for a time, the testator may think it more likely that the beneficiary will have gained maturity and financial experience by the time they receive the full amount of their inheritance. When an incremental payment schedule is adopted, it is most common to provide for either two or three incremental payments.

58 **Drafting Note to Optional Section** 3.2.(d)(2): Use this optional provision (along with optional Section 3.2.(d)(1)) to direct the trustee to distribute a specified amount, fraction, or percentage of trust principal to the beneficiary when the beneficiary attains the stated age.

59 **Drafting Note to Optional Section** 3.2.(d): Use this optional section to create staged distributions. Include the optional subparagraphs to create the testator's desired number of stages and tailor the age(s) accordingly. When using staged distributions, keep in mind that the beneficiary will receive each distribution outright upon attaining the specified age.

60 **Drafting Note to Optional Section** 3.2.: Discuss with the testator whether they want staged distributions for the beneficiaries, or alternatively, wishes to retain the assets in trust for the beneficiaries' lifetime. If the testator wants staged distributions, use Optional Section 3.2.(d) and tailor the age(s) and stages of distribution to match the client's intentions. Discuss with the testator whether they wish to grant the trustee the widest discretion, or if they prefer to limit the trustee's discretion and modify the distribution plan in subparagraph (b) accordingly.

If using staged distributions, keep in mind that the beneficiary will receive each distribution outright upon attaining the specified age. In cases where the testator knows their child will not be able to manage an inheritance prudently, a testator will want to ensure that the trust does not make a final distribution to that child upon turning the stated age. If the testator's child has a substance abuse, gambling, or marital problem, then the protections of the trust assets and the oversight of the trustee should not be allowed to evaporate.

Advise your client that the inclusion of a trust or trust(s) for a beneficiary may result in a more complicated and costly administration. In many scenarios, especially when the testator has a modest estate or has children that do not require the spendthrift protection and oversight that a trust provides, it may be preferable to direct the beneficiary's inheritance outright, with the caveat that the personal representative can direct any share for a minor to third persons (e.g., custodian under UTMA/UGMA) without adhering to any specific trust provisions. Note that in the absence of a trust, however, there will be less control over the property and the beneficiary will receive the property in a lump sum at a relatively early age. You should discuss the benefits and burdens of including testamentary trusts so that your client can make an informed decision.

61 **Drafting Note to Section** 3.2.: For purposes of determining the testator's intestate heirs, see SDCL § 29A-2-101–103. You should consult with your client about whether they want their assets distributed via intestacy in the unlikely event that all devisees and legatees fail. If that is not the testator's wishes, use Alternate Section 3.2. or modify the paragraph in accordance with their wishes. Some degree of customization may be necessary.

62 **Drafting Note to Alternate Section** 3.2.: Use this alternate section to designate one or more individuals or charities as the contingent beneficiary of the testator's estate, rather than their heirs at law. It is important to identify contingent beneficiaries, so you should consult the client about their wishes, and draft appropriate language to reflect those wishes.

If designating a charity, it is always important to contact the charity directly to determine the correct corporate name to avoid any ambiguity.

63 **Drafting Note to Section** 3.3.: This provision grants the personal representative and trustee, if applicable, the power to make distributions to third persons for the benefit of minor or incapacitated beneficiaries without adhering to any specific trust provisions. It provides for continued management of an inheritance for such beneficiary and its inclusion in the will may obviate the need to appoint a conservator for a minor or an incapacitated adult beneficiary. South Dakota law provides some discretion to the personal representative concerning distributions designed for individuals under a disability, whether a minor or otherwise. SDCL § 29A-3-915.

64 **Drafting Note to Optional Section** 4.5.: Use this optional section to authorize the trustee to make distributions from trust income and principal for food and shelter. Note that the trust limits the authority of the trustee to make such distributions only if there is no loss of public benefit or if the loss is outweighed by the benefit to be received by the beneficiary. Further, the optional provision makes the distribution power and language of the trust itself null and void if it results in loss of benefits. As such distributions for food and shelter may result in a reduction or disqualification of benefits, discuss with your client whether to include this provision. See Tax, Estate & Financial Planning for the Elderly § 7.08.

65 **Drafting Note to Optional Article** ARTICLE IV.: Use this optional article to enable the trustee to direct a disabled beneficiary's inheritance to a supplemental benefits trust. A supplemental benefits trust restricts distributions so as to not disqualify the beneficiary from receiving other forms of public assistance.

Note, however, that it may be unadvisable or impractical to direct the proceeds from a retirement or pension plan to a testamentary supplemental benefits trust. Additionally, proceeds from a Survivor Benefit Plan (SBP), if applicable, cannot fund a third-party trust (including a testamentary supplemental benefits trust); rather, such SBP proceeds can only be directed to a first-party trust. Therefore, if the testator is close to retirement or in retirement, they should consult with the plan administrator when creating their estate plan.

66 **Drafting Note to Section** 4.1.: This clause nominates a primary personal representative, and one or more (optional) alternate persons (including an optional provision nominating a trust company or bank) to serve as substitute or successor personal representatives. Every will should nominate a series of personal representatives or provide a means by which successors can be designated in the event that the office of personal representative becomes vacant. It is also possible to name co-personal representatives, in which case the will should indicate if the co-personal representatives must act together. Co-personal representatives may be appropriate if, for example, a testator wants one of their children to have an official role in the settling of the testator's estate, but feels that the estate would be best served by having someone else officially involved, someone who may be younger and/or more able to handle the many tasks associated with settling an estate. Or, a testator may have several children they want to name as personal representative and feels that family harmony will be best preserved by the children serving jointly as co-personal representatives. Use Alternate Section 4.1. to appoint co-personal representatives.

In order to qualify as a personal representative in South Dakota, an individual must not be (1) under the age of 18, (2) found incompetent or unsuitable by the court, or (3) a corporation not authorized to act in a fiduciary capacity in the state. See SDCL § 29A-3-203. South Dakota does not impose any special obligations or requirements on out-of-state personal representatives.

Prior to appointing a corporate fiduciary, contact the bank or trust company to see whether it has its own internal guidelines and preferred standard language. If you have not previously worked with the proposed corporate fiduciary, you should make inquiries with their vice president of business development, relationship manager, or legal department to agree on language prior to execution.

67 **Drafting Note to Alternate Section** 4.1.: In certain situations, it may be advisable to appoint co-executors, for example:

• To provide an internal system of checks and balances for the estate, thereby assuring that no one person can exercise sole control over the estate

• To ensure that important estate administration decisions are made with the benefit of more than one opinion –or–

• To provide the estate the benefits of institutional financial management and experience, along with the personal touch provided by a family member

These advantages should be balanced against the inconvenience that may result from requiring the estate to operate with more than one personal representative. When there are two personal representatives, South Dakota law requires that they act in concurrence unless the will specifies to the contrary. When there are more than two co-personal representatives, a majority must concur unless the will provides to the contrary. SDCL § 29A-3-717. Be sure to state whether an unable or unwilling co-personal representative should be replaced or the remaining co-personal representative(s) shall serve alone.

68 **Drafting Note to Optional Section** 4.2.(a): If the testator wishes to appoint co-trustees to serve, use Alternate Section 4.2.(a).

69 **Drafting Note to Alternate Section** 4.2.(a): If the testator appoints three or more co-trustees, they may act by majority decision unless the trust states otherwise. If the testator appoints two co-trustees, they must act unanimously unless the trust states otherwise. SDCL § 55-4-3.

70 **Drafting Note to Optional Section** 4.2.: Use this optional section if the will directs assets to a trust for one or more beneficiaries. If the testator wishes to appoint co-trustees to serve, use Alternate Section 4.2.(a).

71 **Drafting Note to Section** 4.4.: Instead of relying on "reasonable compensation," it is possible to fix personal representative and trustee compensation for duties performed; for example, compensation may be equal to a certain percentage of the estate or of trust income. It is also possible to disallow compensation, but discuss such a decision thoughtfully with the clients so that designated personal representatives and trustees are not discouraged from serving because of the lack of compensation. Note, however, that almost all corporate fiduciaries require compensation in order to serve in a fiduciary capacity. Before selecting a corporate trustee, your client should investigate the fees charged by the corporate trustee.

Use Alternate Section 4.4. to disallow compensation for an individual executor or trustee.

72 **Drafting Note to Alternate Section** 4.4.: Use this alternate section if the testator does not want an individual serving as personal representative or trustee to receive compensation.

73 **Drafting Note to First Optional Section** 4.5.: Bond is required of a personal representative unless (a) the will expressly waives the requirement; (b) all heirs/devisees file a written waiver of the bond requirement; (c) the personal representative is a bank or trust company qualified to do business in South Dakota; or (d) the court concludes bond is not in the best interests of the estate. See SDCL § 29A-3-603. A will provision waiving the requirement of a bond will save the expense of bond premiums, and it is common to include such a bond waiver in the will. If the proposed fiduciary is the sole beneficiary under the will, or if the proposed fiduciary is a person in whom the testator has confidence and trust, the bond may be safely waived. While waiver provisions are commonly used, carefully consider whether or not the bond requirement should be waived. Bonds protect the estate and those interested in it against losses attributable to malfeasance or nonfeasance by the fiduciary.

Use Second Optional Section 4.5. to waive bond only for specific appointees.

74 **Drafting Note to Second Optional Section** 4.5.: Use this optional provision to waive the statutory bond requirements only for the specified appointees; however, despite any such waiver, the court may still require the appointee to post bond.

75 **Drafting Note to Section** 5.1.: This section presumes that the same individual will be appointed as guardian of the person and conservator of the estate of all minor children of the testator. If the testator wishes to appoint different individuals for these roles, use First Alternate Section 5.1.. If the testator wishes to appoint different guardians for each child, use Second Alternate Section 5.1.. If different individuals will serve as guardian of the person and conservator of the estate of the respective children, use Third Alternate Section 5.1..

76 **Drafting Note to First Alternate Section** 5.1.: Use the alternate section if the testator wishes to name different individuals as the guardians of the persons and conservator of the estates of the children. While parents commonly designate the same individual to serve in both guardianship roles, there are circumstances where this may not be ideal, such as when the preferred guardian of the person is related to the child but does not manage money well. In that circumstance, parents often divide the guardianship duties between the individuals most suited to each role. For example, parents may appoint a relative as the guardian of the child's person and a professional money manager as the guardian of the child's estate.

77 **Drafting Note to Optional Section** 5.1.(c): Use this optional section if the testator has more than two children and wishes to appoint different guardians for each child.

78 **Drafting Note to Second Alternate Section** 5.1.: Use this alternate section if the testator has multiple children and wishes to appoint different guardians for each child. If different individuals will serve as guardian of the person and conservator of the estate of the respective children, use Third Alternate Section 5.1..

79 **Drafting Note to Optional Section** 5.1.(c): Use this optional section if the testator has more than two children and wishes to appoint different guardians for each child.

80 **Drafting Note to Third Alternate Section** 5.1.: Use this alternate section if the testator has multiple children and wishes to appoint different guardians to serve as guardian of the person and conservator of the estate of the respective children.

81 **Drafting Note to Optional Article** ARTICLE V.: Either a guardian or a conservator (or both) may be nominated in the parent's will. See SDCL § 29A-5-202. The procedures for court confirmation or appointment of a guardian and conservator are set forth in SDCL § 29A-5 et seq. It is best to name at least one alternate guardian if the primary guardian is unable or unwilling to serve. When preparing their wills, parents often find naming a guardian to be the most challenging part of the process. However, it is important that they do so, and it is best if they discuss the issue with the people they seek to appoint, to make sure those people will serve if called upon.

A testator may also name separate people to serve as guardian of the person and of the property of the minor by using First Alternate Section 5.1. . While this may be a more cumbersome approach, it is appropriate if the person the client wishes their children to live with and be raised by is not the best person to manage the financial affairs of the minor child. If the testator has created a trust to hold funds for the testator's minor children, appointment of a separate conservator is likely unnecessary.

Section 5.2. waives the statutory bond requirements for the specified guardians. South Dakota law does not permit a court to require a guardian to post a bond unless "good cause" exists to do so. SDCL § 29A-5-111. The court must determine whether a bond for a conservator is necessary by looking at the factors enumerated in SDCL § 29A-5-111.

82 **Drafting Note to Section** 5.1.(a): This section authorizes the personal representative and trustee to access and manage digital assets, which have become a significant component of many estates. See SDCL Chapter 55-19. The most common digital assets are email accounts with internet service providers, social media accounts, and a wide variety of digitized materials such as photographs that reside only in the "cloud" —that is, on servers maintained by commercial providers. While most digital assets do not have commercial value, fiduciaries operating in a digital world without paper statements must have access to email accounts to properly carry out their duties. Similarly, the decedent's social media accounts may contain relevant information and probably should be terminated once their owner is dead, with or without some sort of public announcement of the death.

Include the last optional provision if the testator wishes to provide the personal representative with access to the content of the communication (i.e., the substance or meaning of the communication as defined in SDCL § 55-19-1). Consult with the client about their desire to expand or limit this authority expressly in the will. Some clients will not want to give their appointed fiduciaries unlimited access to their electronic records and communications and may wish to limit or remove such access. Discuss this provision with client and tailor it accordingly.

83 **Drafting Note to Optional Section** 5.1.(q): Use this optional section if the will directs assets to a trust for one or more beneficiaries.

84 **Drafting Note to Article** ARTICLE V.: Depending on the complexity of the estate and client preferences, fiduciary authority can be set forth explicitly as above or incorporated by reference by citing the South Dakota Trustee Powers Act. See SDCL § 55-1A-1 et seq. The Act automatically applies without regard to date of execution of the instrument. If the testator wishes to withhold or limit any of the powers, appropriate revisions should be made to the applicable clause in this paragraph. But give careful consideration to providing the fiduciary with powers of sufficient breadth and flexibility to enable the fiduciary to manage the problems and circumstances that may arise during the administration of the estate.

85 **Drafting Note to First Optional Article** ARTICLE VI.**, Section** 6.1.(g): Every jurisdiction has its own set of rules with respect to trustee reporting. In South Dakota, a testamentary trust is a "court trust" subject to court supervision and trustee accounting requirements. See SDCL § 21-22-1 et seq.

86 **Drafting Note to First Optional Article** ARTICLE VI.**, Section** 6.1.(i)(1): This provision ensures that a beneficiary's creditors cannot access the assets of the estate, or a trust funded thereby, while the assets are still held in trust. For the financial protection of the beneficiaries, it is recommended that each trust and will contain a spendthrift clause to prevent the beneficiaries from pledging the assets of the trust to their creditors. Doing so will preserve the assets in accordance with the client's wishes and relieve the personal representatives and trustees of unnecessary administrative burdens and litigation.

87 **Drafting Note to First Optional Article** ARTICLE VI.**, Section** 6.1.(q): This provision protects against inadvertent violation of the rule against perpetuities. While including a perpetuities savings clause may be good practice, South Dakota has abolished the rule against perpetuities. See SDCL § 43-5-8.

88 **Drafting Note to First Optional Article** ARTICLE VI.**, Optional Section** 6.1.(r): Use this clause to give the trustee the right to refrain from making an otherwise required distribution, when it would not be in the beneficiary's best interests to make such distribution.

89 **Drafting Note to First Optional Article** ARTICLE VI.: Use this optional article if the will directs assets to a trust for one or more beneficiaries.

90 **Drafting Note to Second Optional Article** ARTICLE VI.: Use this optional article if the will directs assets to a trust for one or more beneficiaries.

91 **Drafting Note to Section** 6.3.: This provision may help reduce the possibility of misinterpretation of any will provision that uses terms such as "he," "she," "they," "it," "his," "her," "their," or similar terms denoting number or gender. It may be helpful if the will fails to use the appropriate pronoun or adjective in any will provision.

92 **Drafting Note to Optional Section** 6.7.: Use this optional section to define the testator's child or children if not defined in the will's preamble. The definition of "child," "children," "issue," "heirs," and "descendants" includes persons who are adopted persons, persons born by artificial means, and persons born after the death of the testator. See SDCL § 29A-1-201. If a testator wishes to exclude any person covered under such categories, the will should explicitly state so. Further, if a testator wishes to broaden the definition, for example to include a stepchild in the definition of "child," include the optional second sentence to explicitly so state.

93 **Drafting Note to First Optional Article** ARTICLE VII.: This clause, also known as an in terrorem clause, is included to deter beneficiaries from challenging the testator's wishes as memorialized in this will. No-contest clauses are unenforceable if the contesting individual has probable cause for instituting the proceeding. See SDCL § 29A-2-517. Advise your client that if the will is invalidated because the testator lacked testamentary capacity, was unduly influenced, or failed to properly execute the will, the no-contest provision will not be enforced (i.e., party who initiated the challenge will not forfeit their share of the estate).

This clause would only deter an individual who is a beneficiary under the will. An heir at law who has been completely omitted as a beneficiary and who seeks to challenge the will would not be deterred by a no-contest clause since they stand to receive nothing from the will unless they pursue legal action. Consult with the client about the likelihood of a beneficiary or omitted heir at law disputing the will and consider leaving that individual or individuals some form of bequest or disposition which will discourage litigation.

94 **Drafting Note to Second Optional Article** ARTICLE VII. **(if Military Instrument)**: Use this clause to direct the personal representative to inquire as to the existence of any military benefits. Note, however, that if any such benefit(s) is payable on death, it will not be distributed pursuant to the terms of the will. Advise your client to continuously review and update if necessary, the beneficiary designations of such military benefits.

95 **Drafting Note to Execution and Attestation**: In South Dakota, a will must be in writing signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction and signed by two individuals in the testator's presence and in the presence of each other. SDCL § 29A-2-502(b). South Dakota law also permits holographic wills which do not have to be witnessed, as long as the signature and all material portions of the document are in the testator's handwriting. SDCL § 29A-2-502(a).

Any individual generally competent to be a witness may act as a witness to a will. The signing of a will by an interested witness does not invalidate the will or any provision of it. See SDCL § 29A-2-505. However, the better practice is to avoid having heirs or devisees of the testator serve as witnesses.

96 **Drafting Note to Affidavit in Proof of Will**: A will has to be proven to be admitted to probate. South Dakota law specifically allows for a will to be proven through the use of a self-proving affidavit signed by the testator and the witnesses either at the time of the execution of the will, or thereafter. See SDCL § 29A-2-504. As a best practice, an attestation clause included in the will as noted above should be signed by the testator and the witnesses at the time of execution. A statutory form for proving the will post-execution can be found at SDCL § 29A-2-504(b). Use the first alternate notary certificate of acknowledgement using video communication technology for remote notarizations. Use the second alternate military self-proving affidavit if drafting a military testamentary instrument. 10 U.S.C. § 1044d.

97 **Drafting Note to First Alternate Notary Certificate of Acknowledgement using Video Communication Technology**: Pursuant to SDCL § 18-1-11.1, a notarial officer in South Dakota, while located in South Dakota, may perform a notarial act executed on a tangible document by a person not in the physical presence of the notarial officer, but observed by the notarial officer through means of video communication technology. The person signing the document, however, must be physically present in South Dakota. To validly notarize a document remotely, the notarial officer must (1) Have personal knowledge of the identity of a person through dealings sufficient to provide reasonable certainty that the person has the identity being claimed; (2) Affix the notarial officer's signature to the original tangible document executed by the person; (3) Indicate in the notarial certificate the remote location of the person executing the document which must be in South Dakota; (4) Indicate in the notarial certificate that the notarial act involved a statement made or a signature executed by a person not in the physical presence of the notarial officer, but appearing by means of video communication technology; and (5) Be able reasonably to confirm that the document before the notarial officer is the same document in which the person made the statement or on which the person executed a signature.

98 **Drafting Note to Second Alternate Affidavit in Proof of Will (if Military Instrument)**: Use of this military self-proving affidavit is required if drafting a military testamentary instrument. 10 U.S.C. § 1044d.