



## **Common Misunderstandings About Seniors Law**

This article gives examples of common misunderstandings about the law.

### *1.) I need a will to avoid probate.*

Having a will does not allow you to avoid probate. Instead, a will tells the probate court how you want your probate assets divided. Whether or not your estate needs to be probated depends on how your property is held. Generally, your estate needs to be probated if you leave probate assets that exceed \$75,000 in value.

A probate asset is one that is in your name alone. Probate assets need to go through the probate process in order to get them to go from your name into another person's name. The probate court will follow the instructions in your will. If you do not have a will, the probate court will follow Minnesota state law to distribute your probate estate. State law would distribute your property to your closest living heirs. The state would only take your property if you have not left a will and they cannot locate any living heirs to inherit your estate.

Non-probate assets do not have to go through the probate process. In this case, we already know who the asset belongs to at your death. Examples of non-probate assets include: life insurance with a beneficiary designation; joint bank accounts; real estate held in joint tenancy, life estate or Transfer on Death Deed; assets with a "payable on death" or another beneficiary designation; or assets held in a trust.

### *2.) I can make decisions for my spouse, or act on their behalf, because we are married.*

While most people will look to you for guidance in matters related to your spouse, simply being married to someone does not give you legal authority to speak or act for your spouse. To make medical decisions for your spouse, or to have access your spouse's medical records, you would need to be appointed as their agent in a Health Care Directive. While you would have access to any jointly held assets, you would need to be the attorney-in-fact (the person authorized to act for another) on a Power of Attorney to manage assets that are in your spouse's name alone. As discussed above, assets that are in your spouse's name alone would have to go through probate when your spouse dies, unless the total value of your spouse's probate estate is under \$75,000. A document called an Affidavit for Collection of Personal Property would allow you to claim probate assets worth \$75,000 or less if your spouse dies.

### *3.) I need a Power of Attorney so my children will be able to handle my estate after I die.*

A Power of Attorney is not an estate planning tool. The power granted under a Power of Attorney automatically ends when the principal dies. The principal is the person who gives someone else the power to act for them in a Power of Attorney. Also, a Power of Attorney can only be used to grant someone the authority to act on your behalf in matters relating to real estate

or financial transactions. Unless specifically drafted, it does not allow someone else to make personal or medical decisions for you.

*4.) I cannot be evicted in the winter, or I am protected from eviction because I'm a senior citizen.*

You can be evicted at any time of the year, regardless of your age, if you breach your lease or fail to pay your rent. If your landlord wins in housing court and you have to leave, you can request additional time to move if it would be a hardship for you. The court may give you additional time if you are elderly or disabled. However, the law only allows the court to give you an additional seven (7) days.

*5.) I cannot be sued if I owe a debt and my only income is from Social Security.*

The fact that your income may be protected from creditors does not mean that you cannot be sued if you owe a debt. Further, the fact that you are unable to pay a debt is not a legal defense to a lawsuit. Finally, paying a small amount to a creditor each month would not prevent them from suing you. If you owe the debt, but just cannot pay it, the creditor will be able to get a Judgment (court order) against you. However, many types of retirement income are “exempt” or protected from creditors. Consult an attorney to determine if your income and assets are protected by state or federal law. If you are protected, you have the burden to prove that your income or assets are exempt (cannot be taken) from collection.

*6.) I don't need an attorney as I'm going to follow the advice my neighbor got from their attorney or I bought a generic legal document form and it looks easy enough for me to complete myself.*

Legal advice is fact specific. One small detail can change the legal advice an attorney may give you. You should not depend on legal advice that was given to another as it may not apply to you, or your situation. In addition, while a form may be easy to fill out, you will probably need legal advice to determine if it is right for you. For example, you can buy a generic Power of Attorney form, but the bank is only required to honor a Minnesota state statutory short form Power of Attorney. This is the specific form recommended by the state statute. There could be serious consequences for you if you did not know this. If your children only find out that the bank will not accept the generic Power of Attorney form after you are incompetent, it is too late for you to sign a statutory short form. You must be competent to sign a valid Power of Attorney. Your children would then have to go to court to get a guardianship or conservatorship to manage your funds or make personal decisions for you. Even if you purchase a legal document specifically designed for use in Minnesota, you should get legal advice before deciding if it is right for you. You need to know the risks and advantages involved to make an informed decision.

Updated: 11-2018

*This article is funded in part by  
the Metropolitan Area Agency on Aging under the Older Americans Act.*

*SMRLS' Senior Law Projects provide free legal assistance to low-income older people living in Washington, Dakota, Ramsey, Carver, and Scott Counties as well 28 additional counties in southern Minnesota. Residents of these counties may reach SMRLS at (651) 224-4731 Monday through Friday between the hours of 9:00 A.M. and 11:45 A.M. and 1:00 P.M. and 3:00 P.M.*