

WILL PREPARATION HANDOUT

There are many things to think about when preparing your will. This handout will assist in your completion of the will worksheet provided to you by the Fort Hamilton Legal Assistance Office.

LEGAL RESIDENCE: Your legal residence is the state in which you have your true, fixed and permanent home and to which, if you are temporarily absent, you intend to return. Voting, paying taxes, owning property, motor vehicle registration and so on, are some indicators of one's legal residence. If you are a citizen of the United States, you must be a legal resident of some state. You cannot be a citizen at large. If you are a naturalized U.S. citizen, you are considered to be a resident of the state in which you were naturalized. Your legal residence may affect where your will is probated and the amount of state inheritance or estate tax paid at death.

PER STIRPES VS. PER CAPITA: There are two ways to leave your estate to your children: per stripes and per capita. For example, if you are not survived by your spouse but you are survived by two children, then each child would get 50% of your estate. Suppose one child died before you and left a child (your grandchild). If you want the deceased child's share to be inherited by the grandchild, then the share passes per stripes. If you want the surviving child to get the entire estate (thus shutting out the deceased child's children), then the estate passes per capita. Feel free to discuss with your attorney the benefits of each scheme. If you do not indicate either, then we will assume you intend per stripes distribution (as it is most common).

DISINHERITANCE: You are generally free to dispose of your estate as you wish. However, most states have laws which entitle spouses to at least part of the other spouse's estate. This 'statutory share' ranges generally from 1/3 to 1/2 of the other spouse's estate. Some states, such as Louisiana, also provide shares of the estate to children of the decedent.

SPECIFIC BEQUESTS: A specific bequest is a gift of a particular item to a certain person, charity, or corporation. You should describe the item with as much specificity as possible. In most cases, it is best to just leave the personal property as a whole to one or more persons (called beneficiaries). If more than one person, they can divide the property as they agree, or if they cannot agree, as your executor determines. You may also want to leave a letter of instruction.

RESIDUARY ESTATE: The residuary estate is everything that you did not specifically give as a specific bequest or dispose of outside of the will. For most people, this is the bulk of their property. The first beneficiary (or beneficiaries) will receive everything (except your specific bequests). Generally, the second beneficiary gets nothing unless all the people listed as first beneficiaries die before you do. Usually, your spouse is listed as the first beneficiary and your children are listed as your second beneficiaries.

EXECUTOR/PERSONAL REPRESENTATIVE: An Executor (called a personal representative in some states) is the person who will see that your estate is distributed according to the will. Because this person will often be required to file your will in your local Probate Court, it is preferable that the Executor live in or near the state where the bulk of your property is located. Your executor is entitled to receive a fee for his/her services out of the proceeds of the estate. He/she may also have to hire someone else (like a probate attorney) to meet the Probate Court's requirements. Those costs are generally also paid out of the proceeds of your estate.

SPECIAL CONCERNS REGARDING MINOR CHILDREN – There are two issues you should be concerned about if you die and your children are still minors: who will raise them (guardian), and who will handle the property or money they inherit (trustee).

Guardians – The person you designate to raise your children should you and the children's other parent die, is called the Guardian. This person should be the person who will best take care of your children. Generally, the surviving natural parent will be determined to be the Guardian of his or her children unless there is a good reason to deny that parent guardianship. You may designate another person to be Guardian of your children in the event that the surviving natural parent is unfit or unable to be Guardian. Both parents should agree on the appointment of a guardian and alternate guardian. As an example, if the husband's will nominates his parent and the wife's nominates her parents and both husband and wife die at or about the same time, then the court will have to decide who is the proper party to be the children's guardian. That will cause undue hardship on all parties' concerned as well as considerable unnecessary expense, a large part of which your estate will have to pay.

Trustees – If your children are minors, they are not able to have control over any money they inherit until they reach the age of majority (18) or any age after 18 that you deem appropriate (age 21 in some states). Until that time either the Guardian will handle their money for them, or a Trustee will handle the money for the children's benefit. In the case where the Guardian and Trustee are separate people, the Guardian must request permission from the Trustee to receive money for the children. However, this may allow both side of the children's family to stay involved and ensure that more than one person is involved in your children's welfare. Your trustee should be financially responsible and able to invest and manage money or be willing to hire professional assistance (which cost will be paid from the trust funds).

Types of Trusts – Trusts provide a good method for coordinating your life insurance with your will, but you will usually have to do a change of beneficiary on your life insurance in order to ensure that the proceeds are properly funneled into your trust. Please ask your attorney for details on this.

Unitary Trust – There are two types of trusts for minor children available in your Legal Assistance Office. The first is called a single, unitary, or 'pot' trust. There is where all the money goes into one 'pot' for all the children until the youngest reaches a specified age. Upon the youngest child reaching that age, any money left is divided in equal shares. This is most similar to what families do when the parents are alive, and this best ensures that sufficient funds are available to meet the needs and expenses of all children, including the youngest.

Separate Trust – The other type of trust is a separate trust. This is where the money is divided as of the day of your death, and the only money available for a particular child is the money in their trust fund. A guardian or trustee cannot take money from a sibling's (brother or sister) to meet a child's needs or extraordinary expenses. There may also be increased expense as each trust incurs separate costs of administration. This option is generally only best in large estates, or where there are children from more than one relationship and you are concerned that your trustee would not treat all the children fairly.

OTHER FACTORS TO CONSIDER:

PROPERTY THAT DOES NOT PASS BY A WILL: Some property is normally not considered part of your probate estate and thus does not pass by will.

Life Insurance – Life insurance proceeds are usually not passed through your will, unless the policy is made payable to your estate. Life insurance is payable to the beneficiary named in the insurance policy. The proceeds of an insurance policy, however, are part of your estate for tax purposes under federal and most states laws.

Right of Survivorship – Property held with right of survivorship becomes the property of the survivor automatically, without the need for probating a will.

Other Property – Bank accounts may have been established with “Pay on Death” (POD) or other provisions that determine who is entitled to receive the money in an account, regardless of the provisions of a will. Vehicles or other titled property may be titled with “Transfer on Death” or “Title on Death” (TOD) to a specific person. Some investments and titles to real property are often held with right of survivorship provisions that dispose of that property outside of the will. Real estate may also be affected by homestead rights that cannot be defeated by a will. Many retirement plans specifically designate beneficiaries. Therefore, before talking to an attorney about a will, you should survey your assets to determine how they are titled and held and whether they will be disposed of outside your will.

NON-BINDING LETTER OF INSTRUCTION: A Letter of Instruction is not legally binding, but tells your heirs what you intended. For example, you may want a sister to get a certain ring that you own, even though she shares your total estate with other people. This can be accomplished simply by writing a list of each item and the person to whom you wish it be given.

Other instructions may include burial or cremation requests, nonbinding suggestions of how money is to be spent for college or to benefit other relatives, etc.) or any other purpose you might have which you are willing to leave to the discretion of your executors and beneficiaries.

This letter should be attached with a paper clip to your will. It may be revised or discarded whenever you wish. Sign it and get it witnessed by 2 disinterested parties. The witnesses cannot be a beneficiary or someone related to you.

ONCE YOUR WILL IS COMPLETED, KEEP IN MIND THE FOLLOWING:

WHEN SHOULD MY WILL BE REVIEWED?

Changes in your family, finances, your state of residence, certain state or tax laws, or your intentions with respect to your property may make it advisable to change your will from time to time. It is recommended you have your attorney review your will periodically or in the event of any such change in circumstances.

HOW DO I CHANGE MY WILL?

Changes to a will are made by drafting a new will and destroying the old one. **NEVER MAKE ANY CHANGES TO YOUR WILL WITHOUT CONSULTING AN ATTORNEY FIRST!!**

Changes on your original could make it invalid. DO NOT write on the original for any reason. DO NOT remove the original staples and/or other binding on the original for any reason.

HOW DO I REVOKE MY WILL?

The best way to revoke your Last Will and Testament is to execute a new will that states words to the effect that you revoke all prior wills. You may also revoke a will by tearing, burning, destroying, or writing on the will. If you revoke your will, you should attempt to retrieve any copies of your will you revoke. Although a copy of a will typically cannot be probated, copies of

wills may cause confusion for your loved ones and/or cause confusion in the Probate Court. Should you revoke your will, you should execute a new will as soon as possible to avoid dying intestate.

HOW SHOULD I STORE MY WILL?

Only the original notarized will is legally sufficient to express your desires as to the disposition of your estate. Probate Courts will not typically recognize a copy. Courts typically will only probate the ORIGINAL will. It is therefore important that you safeguard your will and other legal documents. The basic goal is to store your will in a place which is fireproof, waterproof, secure, and where surviving relatives or friends may easily locate it and have ready access to it. Any place which meets these criteria would be adequate. Consider one or more of the following locations for storage of your will, insurance policies, and other important documents:

1. A safe deposit box in a financial institution. Some state laws allow for the removal of wills, insurance policies, and burial plot deed from a safe deposit box in the presence of a bank officer or by order of a court. However, some institutions will lock down a safe deposit box upon learning of your death, therefore making access to your will impossible until after the Court probates your estate. Ask the institution where your safe deposit box is located for the rules concerning safe deposit boxes.

2. A safe or other fireproof, waterproof locking container in your home. Ensure that a person you trust knows where to locate the key and/or the combination to the locking container.

3. File with the Clerk of the Court that administers estates in your county, typically a probate court. Some states have a Register of Wills or County Recorder where you may file your will for safekeeping.

There are some additional safeguards you should take in order to ensure that your will is not lost or destroyed. Do not travel with your will on an aircraft. If the aircraft should crash your will may be lost or destroyed. You should not ship your will or any other legal documents in your household goods or hold baggage; you run the risk of it being lost or destroyed during shipment or storage. If you are relocating or traveling and wish to safeguard your will during your travels or overseas assignment, then you may wish to store your will and other important legal documents in a safe deposit box or leave them with one of your personal representatives.

WHAT SHOULD I DO WITH COPIES OF MY WILL?

Copies are not a legal substitute for the original Will. If you make a copy, you should write "COPY" in large print on every page of the copy. Copies may cause legal problems for your survivors. You may choose to keep the copy for your personal reference, particularly if you do not have immediate access to the original. The only other people to whom you should provide a copy is your Personal Representative and the children's guardian.

Scanning your will. Should you wish to scan your will or other documents, use a copy of your will or other legal documents so you do not disturb the original staples or binding of your original documents. If you absolutely need to scan the original, fold back the pages, ensuring to leave the staples and/or binding intact. Removing the staples, re-stapling, or changing the original will or legal document in any way may invalidate the will or revoke the will / legal document.

Contact the Fort Hamilton Legal Office at 718-630-4743 should you have any additional questions or concerns about your will or if you need to schedule an appointment.