

YOUR LAST WILL AND TESTAMENT

Complete the will questionnaire prior to your appointment. The questionnaire is available at the DLIFLC Legal Assistance Office, (831) 242-5083/5084.

The following relates to the general law of wills. Specific state laws may differ slightly.

- 1. WHAT IS A LAST WILL AND TESTAMENT?** A Last Will and Testament is the legal document which controls the disposition of your property upon death and may provide for guardianship of any minor children. A will is not effective until death. As long as you are living, your will has no effect and no property or rights to property are transferred.
- 2. CAN MY LAST WILL AND TESTAMENT BE CHANGED?** Yes. Changes to a will are made by drafting a new will and destroying the old one, or by adding a “Codicil.” A Codicil is a legal document which must be signed and executed in the same manner as your will. However, we recommend creating a new will. **NEVER MAKE ANY CHANGES TO YOUR WILL WITHOUT CONSULTING AN ATTORNEY.** Changes on the face of your original may make it invalid.
- 3. WHAT IS MY 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 state taxes, owning property, motor vehicle registration are just some indicators of one’s legal residence. You cannot be a “Citizen at Large.” If you are a naturalized U.S. Citizen, you are generally considered to be a resident of the state in which you were naturalized.
- 4. IS MY LEGAL RESIDENCE IMPORTANT WITH REGARD TO MY WILL?** Yes. Your legal residence may affect where your will is probated and the amount of state inheritance or estate tax that may be paid at the time of your death.
- 5. WHAT IS MY ESTATE?** Your estate consists of all of your property and personal belongings which you own or are entitled to possess at the time of your death. This includes: real and personal property, cash, savings and checking accounts, stocks, bonds, real estate, automobiles, etc. Although the proceeds of insurance policies may be considered part of your estate in some states, a will does not change the designated beneficiaries of an insurance policy. The proceeds of an insurance policy, although part of your estate for tax purposes, will normally pass to the primary or secondary beneficiary designated on the face of the policy.
- 6. TO WHOM SHOULD I LEAVE MY ESTATE?** A person who receives property through a will is known as a beneficiary. You may leave all of your property to one beneficiary, or you may wish to divide your estate among several persons. You may state in your will that several different items of property or sums of money shall go to different persons. In any event, you should decide on at least two levels of beneficiaries: **PRIMARY BENEFICIARIES** – those who will inherit your property upon your death; and **SECONDARY BENEFICIARIES** – those who will inherit your property in the event the primary beneficiaries die before you. You may even want to select a third-level beneficiary in the event that both the primary and secondary

beneficiaries die before you. Most married persons leave all of their property to their spouse and, if the spouse does not outlive them, then to their children.

7. MAY A PERSON DISPOSE OF PROPERTY IN ANY WAY? Almost, but not quite. For example, a married person cannot completely exclude a spouse. Generally, you are free to give your property to whomever you desire. 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. Insurance proceeds and jointly owned property may be controlled by other provisions of the law. If you have questions concerning the statutory share law in your home state, you should ask the legal assistance attorney.

8. SHOULD I NAME A GUARDIAN FOR MY MINOR CHILDREN IN MY WILL? Yes. A guardian should be named in a will to ensure that the children and their estates are cared for in the event that both parents should die. Your guardian should be chosen with extreme care as this person will be charged with the duty of raising your children and managing their legal affairs. Do not automatically assume that your parents or any other relative will be a suitable guardian. Such factors as; age of the guardian, age of the children, religion, social status, economics, and relation of the proposed guardian to the children, if any, should be considered in making your decision. Additionally, a substitute guardian should be chosen with the same care as the primary guardian just in case the primary guardian cannot serve in that capacity. Ultimately, a will nominates a guardian; it is up to the court to make the final decision on guardianship if the natural parents are deceased. Your choice, while not absolutely binding on the court, is highly persuasive.

9. I WANT MY PARENTS TO BE THE SECONDARY GUARDIANS OF OUR CHILDREN AND MY SPOUSE DISAGREES. DO WE HAVE TO AGREE ON THE APPOINTMENT OF A SUBSTITUTE GUARDIAN? It depends. The guardianship provision is normally effective when both parents die at or about the same time. As an example, if one spouse's will nominates his/her parents and the other spouse nominates his/her parents and both spouses die at or about the same time, the court will have to decide who is the proper party to be the guardian. That will cause undue hardship on all parties concerned, as well as, considerable unnecessary expense, which your estate will have to pay. On the other hand, if each of the parents die several years apart from one another, the guardianship clause in the second will to be probated is the only one that will be in effect, so there would be no conflict between the two wills.

10. WHAT IS AN EXECUTOR/EXECUTRIX? An executor (executrix, if female) or "personal representative" is the person who will manage and settle your estate according to the will. You should also consider naming a substitute executor or executrix in the event that the named executor or executrix is unable or unwilling to act.

11. WHAT IF I WANT TO SET UP A TRUST? The resources available in this office permit the drafting of a simple children's trust. Astute planning requires looking beyond your children's minority to give a sufficiently large estate to fund a college education, pay off a mortgage, help start a business, or provide some means of financial security to your children.

The legal assistance attorney will prepare the trust you require and show how to fund it with life insurance proceeds or other assets. During your appointment you will be asked the age each child should receive his/her share of the remaining trust proceeds in a lump sum and whom you designate as primary and alternate trustee to manage the trust assets. The trustee need not be the same person as the guardian. The Legal Assistance Office does not prepare "Living Trusts", one purpose of which is to avoid federal estate taxes on large estates. If your assets, including life insurance, less debts exceeds \$1,000,000 you should consult an estate planning attorney.

12. WHAT IS PROBATE? A court procedure by which a will is proved valid or invalid. Probate proceedings also address the administration of your estate, taxes, and the guardianship of your children.

13. HOW LONG IS A WILL VALID? A properly drawn and executed will remains valid until it is changed or revoked. However, changes in circumstances after a will has been made, such as; tax laws, marriage, birth of a child, or even a substantial change in the nature or amount of a person's estate, can affect whether your will is still adequate or whether your property will still pass in the manner you chose. All changes in circumstances require a careful analysis and reconsideration of the provisions of a will and may make it wise to change the will, with the help of your legal assistance attorney.

14. DOES A WILL INCREASE PROBATE EXPENSE? No. It usually costs less to administer an estate when a person leaves a will than when there is no will. A properly drafted will may reduce the expense of administration in a number of ways. Provisions can be placed in a will which take full advantage of the federal and state tax laws. Drawing a will can avoid the expense of posting bond or appointing a guardian for your children. A will can save money for you and your family if it is properly drafted.

15. HOW LARGE AN ESTATE IS NECESSARY TO JUSTIFY A WILL? Everyone who owns any real or personal property should consider having a will regardless of the present amount of the estate. Your estate grows daily in value through the repayment of mortgages, appreciation of real estate, stocks and other securities, inheritances from relatives, and other factors.

16. I AM SINGLE WITHOUT CHILDREN, DO I NEED A WILL? The attorney may advise you on this matter but the question must be answered by you. For some, the intestacy laws are adequate. Generally, under these laws, your property passes to your surviving parents and, if none, to your siblings.

17. WHAT HAPPENS WHEN YOU DON'T MAKE A WILL? When a person dies without a will or intestate, the property of the deceased is distributed according to a formula fixed by law. In other words, if you don't have a will, you don't have any say as to how your property will be divided. The disadvantage in a number of states is that if a person dies intestate and has children, the surviving spouse will share the estate with the children. Usually a person would prefer that all of his/her estate, if it is not large, go to the surviving spouse. If there are any children under 18, the property cannot be delivered to them and a guardian must be appointed for them, even though the other parent survives. A guardian will require considerable expense and may create

legal problems that might have been avoided with a will. Most important for parents, however, is not the disposition of their property after death but rather the proper care and custody of their minor children. Grandparents, other family members and godparents do not automatically receive custody of children who do not have a surviving parent. Your will should specify the individual, as well as an alternate, you would like to designate as the guardian of your children. This decision will be of great assistance to the court in determining who will receive the custody of your children.

18. WHAT HAPPENS TO PROPERTY HELD IN THE NAMES OF BOTH SPOUSES?

Joint bank accounts and real property held in the names of both spouses with right to survivorship usually pass to the survivor by law and not by the terms of the deceased's will. There are many cases, however, in which it is not to your advantage to hold property in this manner.

19. IS A LIFE INSURANCE PROGRAM A SUBSTITUTE FOR A WILL? No. Life insurance is only one kind of property which a person may own. If a life insurance policy is payable to an individual, the will of the insured has no effect on the proceeds. If the policy is payable to the estate of the insured, the payment of the proceeds may be directed by the will. The careful person will have a lawyer and life insurance counselor work together on a life insurance program, as one important aspect of estate planning.

20. WHAT DO I BRING TO MY WILL APPOINTMENT? The completed will questionnaire, the last page of which is a worksheet for an Advance Medical Directive (living will) and Durable Health Care Power of Attorney. It is advisable to also bring in your previous will and/or trust, prenuptial or postnuptial agreement, real estate deeds, and divorce decree that mentions pension, insurance, or other property rights.

21. WHO DO I BRING TO MY WILL APPOINTMENT? A will is created only for the person present at the interview. If both you and your spouse wish to have wills prepared, you must both be present for the interview. Children are welcome.

22. WHAT IF I STILL HAVE QUESTIONS REGARDING MY WILL? The legal assistance attorney will also answer any question you may have at the time of your appointment. Be sure that you convey accurately to the attorney your wishes for the distribution of your property.

23. HOW DO I GET THE PROCESS STARTED? Call the Legal Assistance Office at (831) 242-5083/5084 for an appointment.

Prepared by the Presidio of Monterey Defense Language Institute Legal Assistance Office

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