

TAKE-1

YOUR LAST WILL AND TESTAMENT

XVIII AIRBORNE CORPS LEGAL ASSISTANCE OFFICE



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1. Q. WHAT IS A LAST WILL AND TESTAMENT?

A. A Last Will and Testament is the legal document which controls the disposition of your property at death and may provide for guardianship for your children after your death. 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 by it.

2. Q. CAN MY LAST WILL AND TESTAMENT BE CHANGED?

A. 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. Executing a codicil to a will without consulting an attorney could invalidate the entire will. We recommend that you *DO NOT MAKE ANY CHANGES TO YOUR WILL* without consulting an attorney. Changes on the face of your original may make it invalid.

3. Q. WHAT IS MY STATE OF LEGAL RESIDENCE?

A. Legal residence is determined by a two-part test that includes (1) physical presence in the state, and (2) intent to permanently remain in the state. This two-part test is often difficult to apply to members of the military. Voting, paying taxes, owning property, motor vehicle registration, licensing, and so on are some factors to consider when determining one's state of 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. Q. IS MY LEGAL RESIDENCE IMPORTANT WITH REGARD TO MY WILL?

A. 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 death.

5. Q. WHAT IS MY ESTATE?

A. 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 (such as SGLI or VGLI). The proceeds of an insurance policy, although part of your estate for tax purposes in North Carolina, normally pass to the primary or secondary beneficiary designated in the policy.

6. Q. TO WHOM SHOULD I LEAVE MY ESTATE?

A. 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 of beneficiaries in the event that both the primary and secondary beneficiaries die before you.

7. Q. MAY A PERSON DISPOSE OF HIS PROPERTY IN ANY WAY?

A. Almost, but not quite. For example, in North Carolina, 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 a surviving spouse to at least part of the decedent spouse's estate, known as an elective share. This elective share generally ranges from 1/3 to 1/2 of the decedent spouse's estate. Some states, such as Louisiana, also provide shares of the estate to children of the decedent. Insurance proceeds and jointly owned property may be controlled by other provisions of the law. If you have questions concerning the elective share law in your home state, you should ask a legal assistance attorney.

8. Q. SHOULD I NAME A GUARDIAN FOR MY CHILDREN IN MY WILL?

A. 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 suitable guardians. Such factors as the 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.

9. Q. I WANT MY PARENTS TO BE THE GUARDIANS OF OUR CHILDREN AND MY SPOUSE DISAGREES. DO WE HAVE TO AGREE ON THE APPOINTMENT OF GUARDIANS?

A. It depends. As an example, if the husband's will nominates his parents and the wife's will 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 may cause undue hardship on all parties concerned as well as considerable unnecessary expense, a large part of which your estate will have to pay. On the other hand, if the parties die several years apart from one another, the guardianship clause in the second will to be probated is the only one that would be effective, so there would really be no conflict between the two wills if different secondary guardians were chosen by the husband and wife.

10. Q. WHAT IS AN EXECUTOR?

A. An executor, or personal representative, is the person who will manage and settle your estate according to the will. You should also consider naming at least one alternate executor in the event that your primary executor is unable or unwilling to act as the executor of your estate. By

the wording of your will, you can require that your executor or substitute executor be required to post bond or other security, or you can waive this requirement, thereby saving expense to your estate. The choice is yours.

11. Q. WHAT IF I WANT TO SET UP A TRUST?

A. The resources available in his office permit the drafting of simple trust agreements. Consult with your legal assistance attorney for further details.

12. Q. HOW LONG IS A WILL VALID?

A. 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 children, or even a substantial change in the nature or amount of a person's estate can affect whether your will is still adequate or the final disposition of your property upon your death. 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.

13. Q. DOES A WILL INCREASE PROBATE EXPENSE?

A. No. Probate is the legal process used to close the estate of the decedent. 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 wills 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.

14. Q. HOW LARGE AN ESTATE IS NECESSARY TO JUSTIFY A WILL?

A. Everyone who owns any real or personal property should have a will regardless of the present amount of his 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.

15. Q. WHAT HAPPENS IF YOU DO NOT HAVE A WILL?

A. When a person dies without a will (or dies *intestate*, as the law calls it) the property of the deceased is distributed according to a formula fixed by law. In other words, if you do not have a will, you do not have any say as to how your property will be divided. Take the case of a North Carolina resident dying without a will. If the person dies married but without children, then the surviving spouse receives the first \$50,000 of personal property, then splits the "remaining property" with the deceased spouse's parents (remaining property includes the value of personal property in excess of \$50,000 and all real property in the deceased spouse's probate estate). If this person dies leaving children, the surviving spouse would share the estate with the children. With no will, the surviving spouse receives the first \$30,000 of personal property and half of the remaining property when there is only one child; if there were two or more children, then the

surviving spouse receives 1/3 of the remaining property and the children 2/3 of the same. Generally, a person would prefer that all of his or her estate, if it is not large, go to the surviving spouse. Other states' intestate laws vary. If there are any children under 18, the property cannot be delivered to them outright and a guardian must be appointed for them.

16. Q. WHAT HAPPENS TO PROPERTY HELD IN THE NAMES OF BOTH HUSBAND AND WIFE?

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

17. Q. IS A LIFE INSURANCE PROGRAM A SUBSTITUTE FOR A WILL?

A. 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 distribution of life insurance proceeds at death. If the policy is payable to the estate of the insured, the payment of the proceeds may be directed by a 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.

18. Q. WHAT IF I STILL HAVE QUESTIONS REGARDING MY WILL?

A. Ask them while your legal assistance attorney is preparing your will. Be sure that you convey your wishes for the distribution of your property accurately to him or her.