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Will Overview

The legal assistance attorneys at Fort Myer can assist you with planning for the disposition of your estate by preparing your will. A will is a legal document you use to dispose of your property at your death. It may also name people to do important jobs, such as administrator of your estate or guardians for your children. The maker of the will is called the testator. To be valid, a will must comply with specific legal requirements. If you die without a will, the intestacy law of the state where you were domiciled at death will determine who should receive your property. Your domicile is the state where you are a legal resident and is not necessarily the state where you resided or lived before your death.

If you leave no valid will, the estate will be divided according to the "intestacy statutes." This generally means your spouse and child(ren) inherit your property or estate. If you die without a surviving spouse or child(ren), under State law certain other blood relatives receive the estate. This division can become complicated. These same laws also specify who will be in charge of the estate (called your personal representative or executor) and guide a judge in deciding who will be guardians for children. Little flexibility in these laws exists to provide for special needs or family security -- a good case for being sure to write a will.

Not everyone needs to create their own will. Many military members do prepare a will when they are married or have young children. Legal assistance attorneys are available to help you determine if you should prepare a will.

If you have an appointment with a legal assistance attorney to draft a will, please bring your filled out copy of the will worksheet.

Probate

What Is Probate?

Probate is the procedure of settling the estate of a deceased person. The estate of one who has died consists of the property that person owned upon death. Probate re-titles a decedent's property and puts it into the designated beneficiary's name. A person's estate is probated in the "domicile" (or legal residence) of that deceased person. The legal residence means the place where one is entitled to vote, is required to pay state income taxes, and considers (through words and actions) to be his or her home. When the courts try to determine this, they often look at where a person owns a home, where the person's car is titled and registered, where one's driver's license is issued, and where a person has bank accounts.

Who Is Responsible For Probating My Estate?

If you have made a will, you have probably named such a person, called an Executor, in that document. If you have no will, the court will appoint someone, usually a family member, to be the Administrator of your estate for this purpose.

What Are The Duties Of My Executor?

The executor's duties are the same as those of the administrator. They include the obligations to:

- a. Safeguard the property and assets of the estate;
- b. Inventory (or make a list of) the property;
- c. Submit accounts or inventories to the court as required;
- d. Pay the debts and expenses of the deceased (such as funeral and burial expenses, medical expenses, and credit card bills);
- e. Pay any federal or state death taxes; and
- f. Distribute the estate to those named in the will or, if no will exists, to your heirs as designated by statute.

Who Pays For All This?

Your estate does. In general, your estate is responsible for all your debts, bills and expenses. These must be paid before any remaining assets can be given to your heirs or your beneficiaries under the will. Your executor has no duty to pay these costs out of his or her own pocket. Your executor must release enough of your assets to allow the payment of these expenses.

If I Am Appointed As Someone's Executor, Do I Get Paid?

An executor or an administrator -- can request the court to allow payment for out-of-pocket expenses, such as postage stamps, bank charges and mileage; and for services rendered as an executor or administrator unless the will directs otherwise. The amount of this latter payment will vary, of course, depending on the amount of work done, the time spent working on the estate, the complexity of the work and the size of the estate.

Does My Executor Have To Pay A Fee Or Post A Bond To Settle My Estate?

Ordinarily an executor or administrator will have to post a bond if he or she is from outside the state where the probate takes place or if he or she is administering assets for minor children. A will can waive the posting of a bond. The cost of the bond is paid by the estate.

How Does My Executor Notify My Creditors?

It is the duty of the executor or administrator to notify directly by mail any creditors who are known at the time of your death. Your executor/administrator must also place a legal notice in the local newspaper informing creditors of your death. This is done shortly after your executor/administrator has been appointed by the court to handle your estate. The newspaper notice must:

- a. Give the name of the deceased and the name and address of the executor or administrator;
- b. Be published once a week for four weeks in the locality where the deceased had his or her home; and
- c. State that all claims of creditors must be made within three months of publication of the notice (other states may have varying periods for these claims, usually three months after publication of the notice).

Once this is done, the publisher prepares an Affidavit of Publication and this is put in the court file. The executor or administrator pays for this notice with the funds of the estate.

Any claims not presented to the executor or administrator within this period need not be paid under most state laws. Those claims which are held valid and which are presented within this period, including any other debts and expenses known to the executor or Administrator, must be paid out of the available funds in the estate.

What Are The Inventories And Accounts I Must File As An Executor Or Administrator?

Using North Carolina as an example, when you initially apply to the Clerk's Office for appointment, you will need to fill out a preliminary inventory. This is so you can give a preliminary account or a rough estimate of the assets in the estate. Within the first three months after you are appointed, you must file a 90-Day Inventory, which is the first formal accounting of

the assets in the estate of the deceased -- real estate, cars and trucks, furniture, bank accounts, jewelry and so on. When you have completely settled the estate, you will then file a final inventory, listing the following:

- a. Amount of total assets as shown on the 90-Day Inventory you have already filed;
- b. Additional assets received by the estate since the filing of the Inventory (with description and fair market value);
- c. Expenses, debts, taxes and bills paid by the estate; and
- d. Distribution of the estate to the heirs (how and to whom).

If you haven't completed settlement of the estate within 12 months of qualifying as administrator or executor, you must file an annual inventory showing items a, b, and c, above. A simple estate can usually be closed in a year.

Can I Get Into The Safe Deposit Box Of The Deceased?

Yes - the law provides that you can have access to the safe deposit box of the person whose estate you are settling, so long as you are accompanied by an official from the bank involved. At that time, the bank official will supervise the opening of the box, inventory the contents and turn the contents which belong to the estate over to you for safekeeping. The inventory is returned to the Clerk's Office for filing.

How Do I Handle The Money Of The Deceased?

First set up an estate account at a bank as soon as you have been appointed executor or administrator. You can arrange this at any local bank. There is a small charge for printing the checks showing your name and address, your title (executor/administrator), and the name of the deceased. Having a separate account prevents the mixing or "commingling" of your own personal funds and those of the estate. With this done set up, you can deposit or transfer the funds of the deceased into this separate account. Some items, such as paychecks, insurance premium refunds or employee death benefits, may be deposited directly into the estate account.

Are Life Insurance Proceeds Part Of The Estate?

For tax purposes, life insurance proceeds are counted as part of the taxable estate if the policy was owned by the deceased. You must account for the proceeds of such a policy on the tax return (state and, if necessary, federal) of the estate. On the other hand, only life insurance proceeds payable to the estate are listed on the formal inventories filed with the Clerk. Those policies and proceeds made payable to individual beneficiaries pass by contract, outside of the estate, directly to the named beneficiary.

How Is Real Estate Handled?

You should know that any real estate owned in part or wholly by the deceased in another state will have to be separately probated in that state. This is sometimes called "ancillary probate," and it often requires hiring an attorney (or at least consulting with one) in the second state so that the land is properly transferred to the intended recipient under the laws of that state.

Personal property is only probated in the state of legal residence of the deceased. This is true regardless of where the personal property is located at the time of death. If, for example, SGT Jones is a legal resident of Texas but dies in Florida in a car accident, the personal property he has with him in Florida would still be subject to probate only in Texas.

Once I Have Paid All The Fees And Expenses And Accounted For All The Property, How Do I Close The Estate?

The steps are as follows:

A federal tax return is only required where a decedent's gross estate exceeds \$3.5 Million in 2009. For 2010, a federal tax return is only required where a decedent's gross estate exceeds \$5 Million. A state death tax return is not required unless a federal return is filed.

The next step is to distribute the estate among the heirs-at-law (if there is no will) or the designated beneficiaries (if a will has been admitted to probate). You should obtain a receipt from all heirs or beneficiaries stating that they have received their entire share of the estate of the deceased (signed, dated and witnessed).

After you have distributed or divided the property, submit those receipts along with the final inventory to the Clerk's Office. You will also need cancelled checks or "paid receipts" for all expenses, fees and bills that have been paid. Once the clerk is satisfied that you have accounted for all assets and expenses and you have properly distributed the assets and property, the estate will be closed.

What If I Have Other Questions?

See a legal assistance attorney or private attorney. Visiting a lawyer early may not only solve a problem you have, but it may also resolve or avoid a problem in the future, on this or other unrelated subjects. Our legal assistance office stands ready, willing and able to help you in these matters.

Advance Medical Directive/"Living Will"

Today, many states recognize advance medical directives (AMDs) or "*living wills*". An AMD is a document you create while healthy that expresses your desires concerning the medical treatment you wish to receive if you are incapable of making such a decision. It can also be used to designate another person to make the decision for you in such a situation. Title 10, U.S. Code, Section 1044c provides that an AMD lawfully prepared by a legal assistance attorney has full effect in all 50 states, the District of Columbia, and Puerto Rico. If you want an AMD, contact the Fort Myer legal assistance office.

Every adult in the United States has the legal right to consent to or refuse medical treatment, under the Patient Self-Determination Act of 1990. All medical facilities receiving Medicare or Medicaid benefits must tell their patients about this law. Making your wishes known about the treatment you would want when you're incapacitated can be very helpful to doctors and to your family. You can do that in an AMD. You may prepare one when you check into a hospital - but you are not required to have them to receive care, treatment or admission.

If you become unable to make decisions concerning your medical treatment, another person, called an "agent," may make such decisions for you. This person should know your desires concerning medical treatment, so they can act on your behalf. If no arrangements are made for medical directives and you become incapacitated, the court may appoint a guardian for you. Signing advanced medical directives doesn't take away your right to decide on treatment, if you are able to do so.

Be sure to discuss your wishes and beliefs concerning medical treatment with your doctor, family and agent. Make copies of your advance directives for your doctor's files, agent, family and, if applicable, your health care facility. Discuss the policies of your health care provider and be sure they are compatible with your own beliefs and that your wishes will be honored.

An AMD has three purposes: It gives your doctor your instructions about life sustaining procedures, artificial nourishment, and organ donation. If your doctor cannot, or will not, carry out your wishes, he or she must transfer you to a doctor who will do as you direct. The AMD you sign instructs your doctor to withhold or withdraw life-sustaining procedures in the event that at some future time, you are:

1. terminally ill, or
2. have been unconscious, comatose or otherwise incompetent for a specific period of time of no less than 48 hours, or
3. unable to make or communicate responsible decisions about your care.

"*Life sustaining procedures*" usually means any medical procedure or intervention that would only to prolong the dying process. "*Terminally ill*" usually means an incurable or irreversible condition with no possibility of recovery, as agreed upon by two doctors in writing.

An AMD can also direct your doctor to withhold or withdraw artificial nourishment if it is the only procedure being provided. If a doctor determines this will cause you pain, he/she will give you enough nourishment to alleviate pain. Through your AMD, you can direct that artificial nourishment:

1. be discontinued immediately,
2. be given to you for the time period you specify in the document, or
3. not ever be withheld.

You must clearly indicate only one of these choices in your AMD.

An AMD can be destroyed any time you change your mind. You can do this by telling someone, revoking it in writing, or by destroying the document. Let your doctor, family and anyone who has a copy of it know that you've destroyed it.

Health Care Power of Attorney

A special kind of durable power of attorney called a **Health Care Power Of Attorney (HCPA)** deals with health-care planning. In it you appoint someone else to make health-care decisions for you--including, if you wish, the decision to refuse intravenous feeding or turn off the respirator if you are brain-dead--if you become incapable of making that decision. The form can be used to make decisions about things like nursing homes, surgeries, and artificial feeding. Since it is impossible to predict every possible contingency in an advance medical directive, having both a living will and a HCPA enables you to handle other kinds of disability, or gray-area cases where it's not certain that you are terminally ill, or your doctor or state law fail to give your wishes due weight. Better to have a trusted relative or friend make the call.

Finally, despite recent changes in the law, old habits die hard, and many doctors and nurses are still reluctant to turn off life support--even if that's what the patient wants. That's why you need an advocate appointed in your HCPA to press your intentions.

Obviously, decisions so important should be discussed in advance with your agent, who should be a spouse, child or close friend. You should try to talk about various contingencies that might arise and what he or she should do in each case.

Make sure you put a copy in your medical record. Since it's so much more flexible than a living will, the HCPA is a very useful document that could save you and your family much anxiety, grief, and money.

You can revise or revoke the HCPA (or the living will) at any time, including during a terminal illness, as long as you are competent and follow the procedures set out in your state's law. When you change or revoke either document, notify the people you gave the copies to, preferably in writing.

You can discuss HCPA and living will desires with a Legal Assistance attorney.

Life Insurance

<http://www.insurance.va.gov/sgliSite/default.htm>

GUARDIANSHIP

What Is The Purpose Of Appointing A Guardian?

A guardian is appointed to assist with the personal and medical affairs, and day-to-day life, of a minor or a person impaired due to mental or physical illness or deficiency. Do not confuse “guardianship” with “conservatorship.” Conservators are appointed specifically to manage financial affairs.

Can A Guardian And A Conservator Be The Same Person?

It depends on the state in which you live. Some states will allow the same individual to serve as both the guardian and conservator for a minor or incapacitated person (called a ward).. Other states, such as Colorado, will not allow the same person to serve as the guardian and conservator unless the court makes an exception.

What Normally Happens When A Guardian Is Appointed?

The basic procedure provides that a clerk of court will prepare a written document evidencing the guardian’s authority to act as such. Certified copies normally are obtained and provided to interested parties such as schools, hospitals, and government agencies upon request.

Do Guardians Have Any Financial Authority Over Their Ward?

Normally, yes. Guardians normally have limited powers under state probate codes. Normally, guardians can receive and use current income for the ward’s support and maintenance, and to pay off the ward’s bills. Guardians normally may receive their ward’s Social Security benefits, disability income and similar benefits, and may be asked to assist the conservator in devising a monthly budget and financial plan. Excess money should be turned over to the conservator, trustee, or other person responsible for the ward’s overall finances.

What Responsibilities Do Guardians Have Toward The Court?

The reporting responsibilities vary depending on where you live. Generally the guardian will have to file an initial report with the court containing the ward’s condition and any of the ward’s money or assets that the guardian has control of. Subsequent annual filings may also be required. If there is a significant change in the ward’s condition or situation, or if the guardian moves, he or she should promptly notify the court without waiting for the regular time to file a report. Unlike conservators, guardians aren’t normally required to post bond or file a periodic financial accounting.

Are Guardians Normally Compensated?

Normally, guardians are entitled to reasonable compensation for their services, payable from the funds of the ward. No compensation may normally be taken, however, without a court order. This compensation is taxable income to the guardian.

When May Guardianship Be Terminated?

Guardianship may be terminated for a variety of reasons, including death of the ward, when the ward reaches the age of majority, when the ward's condition improves, or by order of the court.

TESTAMENTARY TRUSTS

A testamentary trust is a flexible estate-planning tool. It is a written legal agreement between the individual creating it and the person or institution who is named to manage the trust's assets. The individual who creates a trust is called the trustor, grantor, or creator. The trustee, or person who manages the assets, holds legal title to the assets for the benefit of one or more trust beneficiaries, who the grantor names.

Where Can I Establish A Testamentary Trust?

A testamentary trust may be established in your will. This trust lies dormant until you die and your will is probated.

Why Should I Use A Testamentary Trust In My Estate Plan?

Trusts are used for many purposes, including:

Managing assets. The responsibility of making investment decisions can be transferred to an individual or institution with investment experience.

Providing privacy. The assets, terms, and conditions of a trust are generally not subject to public inspection.

Providing for multiple beneficiaries. A trust can benefit more than one beneficiary and permit the trustee discretion in making distributions of the assets.

What Is A Testamentary Trust's Governing Document?

The written instructions listing the terms of the trust are contained in the will.

Who Are The Trust Beneficiaries?

The beneficiaries are those you intend to enjoy the income and principal of trust property. If you name alternate or contingent beneficiaries, the governing document establishes the conditions under which the beneficiaries must receive trust proceeds. When the beneficiaries are young (minors), the trust may also provide for the continued management of the trust assets until the beneficiaries reach a certain age that you can determine.

What Is The Normal Duration Of A Testamentary Trust?

Testamentary trusts have definite beginning and ending dates. Testamentary trusts begin on the date of death of the trust creator. In many trusts, the ending date is when the youngest beneficiary reaches an age specified in the governing document.

Who Should I Consider Naming As A Trustee?

Because trustees have certain fiduciary duties, consider someone who, understandably, you "trust." Consider that person's age, expertise, ability to serve, and knowledge for the beneficiary's needs.

Who Should I Contact If I Want More Information Or Want To Establish A Testamentary Trust?

Contact the Legal Assistance Office to arrange a consultation with a legal assistance attorney. The legal assistance office provides a wide range of estate planning services.

THE SURVIVOR BENEFIT PLAN

What Is The Survivor Benefit Plan, And How Does It Work?

The Survivor Benefit Plan (SBP) is an annuity paid to the surviving spouse or family member of a deceased servicemember. It's similar to insurance in that it enables retired military personnel to provide monthly income to beneficiaries after the retiree's death. The beneficiary of your SBP can be your spouse, former spouse, dependent children, or any other person with an insurable interest in your life.

How Do You Decide How Much Your Beneficiary Will Receive?

To determine how much the beneficiary will receive, you must designate a "base amount," and this is based on your retired pay. The minimum base is \$300 per month, but you can select any greater amount, in \$100 increments, up to the full monthly amount of your retired pay.

The annuity for your spouse or former spouse is 55% of the base amount. Until 2004, the law stated that this would decrease to 35% of the base amount when the beneficiary reached age 62, unless you were eligible to retire on or before October 2, 1985, in which case there is a complex set of rules which establishes the annuity amount.

In the fall of 2004 this changed: under current law, this Social Security Offset will be phased-out over 3 ½ years so that it is eliminated in 2008. From October 1, 2005 until March 31, 2006, the applicable percent was 40%. From April 1, 2006 until March 31, 2007, the percent was 45%. From April 1, 2007 until March 31, 2008, was 50%. After April 1, 2008 the applicable percent was 55%, which eliminated the previous "offset" entirely.

Your cost will depend on who your beneficiary is and what base amount you select. Former spouse coverage, for example, costs 6.5% of the selected base amount, deducted from the retiree's gross retired pay.

Do I Have To Sign Up? Or Do I Have A Choice?

SBP participation is optional, but if you are on active duty and married, you will not be able to reject SBP coverage without your spouse's consent. There is also a Guard/Reserve SBP program

where once enrolled, a member of the Guard/Reserve must elect the maximum coverage unless the spouse consents to a lesser amount.

When Do I Have To Decide?

There are three points to remember:

1. If you are married and on active duty, you must make your SBP election before you retire. If you elect to participate, you cannot cancel the SBP coverage later, except under very limited circumstances.
2. If you are a Reservist, you have two chances to select SBP coverage -- first when you complete 20 years of service and again when you turn 60. However if you elect to participate at the 20-year point, you are not allowed to terminate enrollment at age 60.
3. You are only allowed one adult SBP beneficiary. You cannot reserve part for a present or future spouse and part for a former spouse. Multiple beneficiaries are only permitted if you choose "child coverage" and there is more than one child, or "spouse and child coverage."

Is This *Really* A Good Deal?

SBP is generally a good plan, but there are some situations in which it may not be the most economical plan. For example, the minimum SBP plan premium for \$300 per month as the base amount is cheaper than almost every private insurance program. But at larger amounts, SBP coverage may be more expensive than commercial insurance. Also, if you're going through a divorce and the SBP has not been designated for your soon-to-be-ex, consider "saving" the SBP for a future spouse if your soon-to-be former spouse is likely to remarry before 55, thus losing eligibility for coverage.

Commercial life insurance or a private annuity may also provide better or cheaper protection for a younger surviving spouse. But SBP is a lifetime annuity and it'll never become "too expensive," as might be the case with life insurance. For better comparison information on life insurance, check with an insurance agent who is familiar with the costs and benefits of SBP, such as a military retiree or an agent who is in the Reserves or the National Guard. The bottom line here is, "Shop around!"

I Am Divorcing My Spouse. Is There Anything I Should Know About His/Her SBP Coverage For Me?

Yes. Here are the most important points:

- First of all, it's not automatic. You must ask for it, and the two of you must agree on this coverage (or the judge must order it) for SBP to be effective.
- Secondly, it must be included in a court order and sent to DFAS (Defense Finance and Accounting Service) if you want to be sure that this option will be honored. And the order must be sent to DFAS within one year of the divorce (if by the retiree or servicemember) or within a year of the SBP order (if by the spouse).

- Finally, if retirement is approaching soon, see an SBP counselor or a legal assistance attorney now, so you can make an informed decision.

Won't This Be Taken Care Of When My Divorce Goes Through?

Not necessarily. If your divorce is in an overseas court – Germany , Japan , etc. – then the court cannot do anything about military retirement benefits, including retired pay and Survivor Benefit Plan. No order from an overseas court will be obeyed by DFAS regarding SBP. You'll have to ask a court in the U.S. to make provisions for SBP if you want to be covered.

On the other hand, you may be proceeding with a divorce in an American court. In this case, you should ask your civilian attorney to be sure to include a request for property division in the divorce papers you file with the court. Your papers should specifically ask for division of any military pension rights and coverage under the Survivor Benefit Plan in case your husband dies. If DFAS is served with the SBP order by the spouse or former spouse within a year of the entry of that U.S. court order, then it will honor that “deemed election” request, even if your husband refuses to sign an application to that effect.