WILL INFORMATION HANDOUT

Please note that this Information Paper only provides basic information and is not intended to serve as a substitute for personal consultations with a Legal Assistance Attorney.

1. WHAT IS A LAST WILL AND TESTAMENT?

A Last Will and Testament is the legal document which controls the disposition of your property (your estate) at death, and may provide for guardianship for your minor children after your death. A will is not effective until death. As long as you are living, your will has no effect. After your death, the "executor" you name in your will must have the will "probated" (enforced) in a probate court in your state of legal residence.

2. WHAT IS MY ESTATE?

Your estate consists of all of your property and personal belongings 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, 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 respective policy.

3. WHAT IS AN EXECUTOR?

An executor (executrix, if female) is the person who will manage and settle your estate according to the directions in your will. The job of the executor is to collect your assets and inform the court of their value, pay your last debts, and distribute the remainder of your property to the beneficiaries named in your will. Your executor, while allowed to exercise important powers in distributing your estate, is not normally allowed to do anything inconsistent with the directions in your will. An executor will have to make sure tax forms and other required notifications are properly filed. An executor can always consult an attorney for advice on how to properly discharge his duties. Many people name their surviving spouse and, alternatively, adult children as executors of their wills. It is recommended that you name one primary executor, and an alternate to serve in the event that your primary executor is unable or unwilling to serve. Some states require that an executor be a resident of the state, and all states require that an executor be at least 18 years old. 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.

4. 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 taxes, owning property, & motor vehicle registration, are some indicators of one's legal residence. Your legal residence is not necessarily the same as your "home of record." "Home of record" is a term used solely for administrative purposes in the military; it determines where your property will be shipped when you leave the service. While soldiers have the right to maintain their domicile in one state while assigned to other states pursuant to military orders, many soldiers change their domicile during the course of their military career. It is possible to have your home of record in one state and your domicile in another. 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.

5. IS MY LEGAL RESIDENCE IMPORTANT WITH REGARD TO MY WILL?

Yes, very important. Your legal residence affects where your will is probated and the amount of state inheritance or estate tax that may be paid at death.

6. TO WHOM SHOULD I LEAVE MY ESTATE?

A person who receives property through a will is a "Beneficiary." You may leave all of your property to one beneficiary, or you may divide your estate among several persons. You may designate 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 want to also select a third beneficiary in the event that both the primary and secondary beneficiaries die before you.

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

Almost, but not quite. For example, in most states, a married person cannot completely "disinherit" or exclude a spouse. Generally, you are free to give your property to whomever you desire. However, most states have laws that entitle spouses to at least part of the other spouse's estate. This "elective share" varies from state to state. 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 statutory share law in your home state, you should ask a legal assistance attorney.

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

Joint bank accounts and real property held in the names of both husband and wife, often called nonprobate assets, usually pass to the survivor by law, and not by the terms of the deceased's will.

9. 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 a will. The careful person will have a lawyer and a life insurance counselor work together on a life insurance program, as one important aspect of estate planning.

10. WHAT IS A COMMUNITY PROPERTY AGREEMENT?

Certain states are termed "community property" states. Marital property in these states is presumed to be community in nature – or owned equally by both spouses. In these states there is a document both spouses may execute called a "community property agreement". This contract basically states that upon the death of the first spouse the community property held by the first spouse vests immediately in the surviving spouse. Because it is a contract, the immediate vesting bypasses the will and thus avoids the probate process at the death of the first spouse. Please note, however, that all community property will pass to the surviving spouse. As such, community property agreements are only appropriate for those couples that have been married for a very long time; consider all of their property to be community in nature (no separate property) and who wish all such property to pass to the surviving spouse and to no other individual. Please also note that the community property agreement is executed in addition to a will and not as a will substitute. While there may be no need for a will to direct the distribution of real and personal property upon the death of the first spouse, the identification of a guardian for a minor beneficiary may also be necessary. In addition, the community property agreement is only effective upon the first spouse to die.

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

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.

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

Yes. A guardian is a person who will care for your minor children after you die. Usually the surviving parent is designated as the guardian of any minor children. By so naming the parent in the will, you can sometimes relieve him or her of any requirement to post bond through a court. You should also name an alternate guardian. This would provide for a guardian for your children in the event that the other parent dies before you, or you and the other parent die at the same time.

The guardian may also be responsible for managing your children's property until they reach a certain age or ages as determined by you in your will. This property could be worth a large amount of money when you consider both the property passing under your will plus any insurance proceeds left to your children. The guardian's actions are monitored by a probate court, which is responsible for wills, estates, and matters involving minor children. You should be careful in selecting a guardian, not only because the guardian will likely manage your children's property, but also because this person will be responsible for raising your children. Select both a primary nominee for guardian and an alternate, in case your first choice is unable to serve. Also, avoid naming a couple (for example, your mom and dad) as the guardian; trouble between that couple in the future could place your children in a custody battle. Be sure to ask your nominees if they are willing to act as guardians before naming them in your will.

13. 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 that must be signed and executed in the same manner as your will. NEVER MAKE ANY CHANGES TO YOUR WILL without consulting an attorney. Changes on the face of your original may make it invalid.

14. DOES A WILL HAVE AN EXPIRATION DATE?

A properly drawn and executed will remains valid until it is changed or revoked. However, changes in circumstances after you execute your will, such as tax laws, marriage/divorce, birth of children or even a substantial change in the nature or amount of a your 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.

15. CAN MY COMMANDER ORDER ME TO GET A WILL?

No person can be required to have or sign a will. As a matter of fact, a will cannot be executed if the person executing it is being forced or coerced in any way. Married soldiers *should* have a will for several reasons. The most important is to assure that assets not jointly held with your spouse are legally transferred to your beneficiaries (generally your spouse or children) quickly. Without a will, legal transfer takes time, and may not be done in accordance with your wishes. Another good reason to have a will is to name guardians for your children. If you do not appoint a guardian in your will, a court will make that decision for you after your death.

Wills are not as essential for single soldiers who have no children if they want their parents to be their beneficiaries. Under most state laws, parents will receive their unmarried child's estate. However, if a single soldier desires to name someone other than his or her parents as beneficiaries, a will is necessary.

16. WHAT HAPPENS IF I DON'T MAKE A WILL?

When you die without a will (or die "intestate," as the law calls it), your property is distributed according to a formula fixed by state law. In other words, if you don't make a will, you don't have any say as to how your property will be divided. Take the case of a North Carolina resident dying without a will, for example. If this person dies without a will, leaving children, the surviving spouse would share the estate with the children. With no will, the surviving spouse receives the first $15,000 in value and 1/3 of the remaining estate where there is more than one child or 1/2 of the remaining estate when there is only one child. Now usually a person would prefer that all of his estate, if it is not large, go 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. A court-appointed guardian will require considerable expense and could create legal problems that might have been avoided with a will. Most important for mothers and fathers, however, is not the disposition of their property after their 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 on your part will be of great assistance to the court in determining who will receive the custody of your children.

17. WHAT IF I STILL HAVE QUESTIONS REGARDING MY WILL?

Ask questions during your initial consult with a legal assistance attorney. Be sure that you convey accurately your wishes for the distribution of your property.

For an appointment to make your last will and testament, contact your legal assistance office at DSN: 421-4152 or CIV: 0711-729-4152.

REVIEWED BY: CPT Michael Watts, Chief, Client Services
DATE: 21 July 2006

REFERENCES:

Estate Planning for Military and Family Members:

http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/Legal%20Assistance%20Home%20Page.nsf/0/334cccc03eab071a852569f0007b985b?OpenDocument

General Estate Planning information:

http://www.nafep.com/public%20info/public-info_e-p-info_tools.htm

http://money.cnn.com/pf/101/lessons/21/

http://www.finance.cch.com/text/c50s00d010.asp

Community Property Agreements:

http://www.law.seattleu.edu/accesstojustice/projects/WillsAndTrusts.pdf

http://www.atg.wa.gov/consumer/death/prepare4death.shtml

http://www.bnatax.com/tm/insights_Community.htm (good reference to state codes)

Probate:

http://library.findlaw.com/2000/Aug/1/127980.html

http://www.seniorhousingnet.com/seniors/reading_room/finance_pay/wills_faq.jhtml;$sessionid$QSMZRUPJ2BCCCCQAQUASFEY