

LAST WILL AND TESTAMENT



Prepared by



OFFUTT AFB LEGAL OFFICE

WHAT IS A WILL?

A Will is a document that designates how and to whom your property should be distributed upon your death. In addition, through your Will you should name the person you want to administer the distribution of your estate and any trusts you have set up. If you have minor children, you should also use your Will to appoint a guardian for them.

WHAT PROPERTY PASSES UNDER A WILL?

Generally, only property considered to be part of the "probate estate" is subject to the provisions of a Will. Property held in joint tenancy with the right of survivorship or as tenants by the entirety does not pass under a Will. In addition, life insurance proceeds, retirement survivor benefits, and annuities are not subject to a Will. Rather, these benefits are governed by the contractual arrangements entered into between the decedent and the decedent's life insurance company or employer.

SHOULD YOU HAVE A WILL?

There are many people who believe that they do not need a will because they have few assets of any value. Others harbor the belief that even without a will all of their property will pass to their spouse. There are still other

rumors that if a person dies without a valid Will, the State will take upwards of 25% of the decedent's property.

The truth is that most, if not all, States have enacted statutes that control the distribution of property of residents who die without a valid Will. Nebraska has adopted a version of the Uniform Probate Code (UPC), which has also been adopted by approximately 40 other States. The intestate provisions of the UPC provide that if you die without a Will, your property will be divided as follows:

- If you have living children, your property will be divided equally among your living children (if living, your spouse will receive a share as well);
- If you have a surviving spouse with no children, your spouse will receive all your property;
- If you have no children, your property will be divided equally between your two parents or, if only one parent is living, that parent will receive all your property;
- If you have neither children nor parents living, your property will be divided equally among your living brothers and sisters.

For most people, however, the intestate law does not accurately reflect their desires for the disposition of the property at their death nor does the decedent, under the intestate law, have any say over who will administer their estate or who will act as guardian of any minor children. Under the intestate law, if you, your spouse, and your children are killed in a common disaster, people whom you never imagined could end up being the beneficiaries of your estate.

Moreover, if you die without a valid Will, the court of your State will name an individual to distribute your property, pay the debts and taxes, and collect the property owned by you. This court-appointed person is termed an “administrator.” On the other hand, if you make a Will, you can appoint a person of your choosing to take care of these matters. This person is called an “executor” or “personal representative.”

CHANGING YOUR WILL

A Will should be reviewed periodically in order to ensure that it accurately reflects your present desires as to the disposition of property upon your death. Often circumstances change which give rise to reasons to change your Will. Such changes could be marriage, divorce, birth of children, death of guardians or beneficiaries, changes in legal residency, tax laws, or new property holdings.

To reflect these changes, you may either have a new Will drafted or add an amendment to your existing Will, called a “Codicil.” **Never attempt to change your Will by lining out parts of it or by writing in the changes.** By doing so, you could revoke your entire will and, upon your death, your estate would be

distributed according to the intestate law instead of how you wished.

CHOOSING A PERSONAL REPRESENTATIVE

It is the responsibility of the person you name as personal representative to take your Will to the proper court for probate. Probate is the process through which the courts supervise the distribution of your estate according to your wishes as expressed in your Will. Your chosen personal representative serves voluntarily. Your Will should appoint an alternative personal representative should your first choice be either unwilling or unable to accept the task. A personal representative has important responsibilities such as collecting and preserving your property, having your property appraised for tax purposes, giving legal notice to creditors, presenting an inventory of your estate to the court, and distributing your estate to those whom you have named to receive it. Consequently, the person you choose as personal representative should be trustworthy, mature, available, and capable of handling finances and property.

CHOOSING A GUARDAIN

A guardian is the person appointed by you to raise your children in the event of your death and that of your spouse. The guardian will stand in your place as parent, legally responsible for the welfare of your children. Actually, your designation of a guardian in the Will is a mere nomination. The court must approve. In doing so, the court takes jurisdiction over the guardian’s performance and exercises supervision over the use of the child’s property. Periodic reports and accounting are required.

*The information in this handout is general in nature. It is not to be used as a substitute for legal advice from an attorney regarding individual situations.