PLANNING YOUR ESTATE

How to obtain a will

1. Complete the will worksheet.
2. Meet with an attorney to review your worksheet and discuss special concerns. An attorney will draft the will and related paperwork.
3. Review a preliminary copy of the will and notify us of any changes.
4. Return to our office for a scheduled appointment to sign the will and complete the process.

How Navy Legal can help you put your affairs in order

A Naval Legal attorney will work with you to:

- Prepare a will.
- Advise you of ways to distribute property not covered by a will.
- Prepare a living will and powers of attorney for legal and financial arrangements. See page 8 for more information on these documents.

Free—as a benefit to you

You are eligible to receive these services at **no cost** if you are an active duty service member, activated reservist, retiree, or dependent.

Disclaimer

This handout is not a substitute for legal advice from an attorney. It provides only general information for the purpose of estate planning. You should talk with a lawyer about your particular circumstances.

Contact us:

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Pacific Detachment Pearl Harbor
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(808)473-4717

Wills: What they are and what they can do for you

A will is a legal document stating how you would like your property to be distributed after your death. It also allows you to state who you would like to raise your children and manage their money if both parents die. A will is valid until you revoke it or replace it with a new will. Your will takes effect when you die.

What should I bring to my appointment?

- A completed will worksheet.
- A copy of the deed to your home or other real estate.
- A copy of any court order, including a divorce decree, that requires you to maintain life insurance or name beneficiaries upon your death

A will is only one part in planning your estate, however. You may be surprised to learn that a will does not cover all the property you own. It only covers property that is subject to probate.

Probate is the court process of approving a will and overseeing the administration of the estate, including paying debts and distributing probate property. Probate property generally means property that you own individually, for example, your clothes, your household goods, your bank account, or your car. Probating a will takes time and money. Many of your assets may not be covered by probate. This means they can be distributed without a will and without a court order. These may include life insurance policies such as your SGLI, retirement plans, and property you own jointly with someone else. See page 4 for more information about how to avoid probate.

At your appointment, we will discuss how you want all your property—even that not covered by your will or subject to probate—to be handled in the event of your death. We will provide a limited review of non-probate property to see that it will be transferred according to your wishes upon your death.

It is important that you complete the asset list in the will worksheet so that we can best advise you on possible tax issues and help you to avoid probate. If your and your spouse's assets, including life insurance and real estate, total more than $1 million, we can suggest a way to limit or avoid estate taxes.

It is also important that you let your attorney know about any special considerations that might affect your will. These may include:

- You have a blended family and want to leave property to children from your current and previous marriages.
- You want to leave property to someone who is disabled and currently receives or may receive government benefits.
- You or your spouse is not a U.S. citizen.
- You own an interest in a family-owned business or farm.
- You own real estate or other assets outside the United States.

After your initial meeting with an attorney, your will and accompanying documents will be prepared. Another appointment will be necessary for you to sign your documents. The amount of time it takes to complete and finalize your documents depends upon our schedule and your needs. The process will go more quickly if you bring a completed will worksheet to the initial meeting with your attorney.

Answers to your questions about wills

Q. What happens if I don't have a will?

A. If you die without a will, a court will apply the inheritance laws of your state of residence to determine how to divide your assets. Your assets generally will go to your next of kin, usually your spouse and children if you are married or your parents or siblings if you are single and unmarried. A will allows you to decide who gets what, rather than allowing a court to make that decision for you.

Q. What's a beneficiary? Is that different from an heir?

A. A beneficiary is someone who benefits from your will. The word heir refers to people who receive property from someone who dies without a will. Once you have executed (formally signed) your will, your beneficiaries will be entitled to your property.

Q. What do the terms estate, assets, and property mean?

A. When we ask you about property you own, we are not just talking about land or real estate. We mean it in a more general legal sense. Property includes anything of value that, when pooled together, are referred to as assets. Your assets and any debts and expenses will make up your estate.

Q. What is the death tax?

A. The death tax is another name for the estate tax, a tax imposed on all transfers of a person's property after death. In addition to the federal government, many states also impose an estate tax.

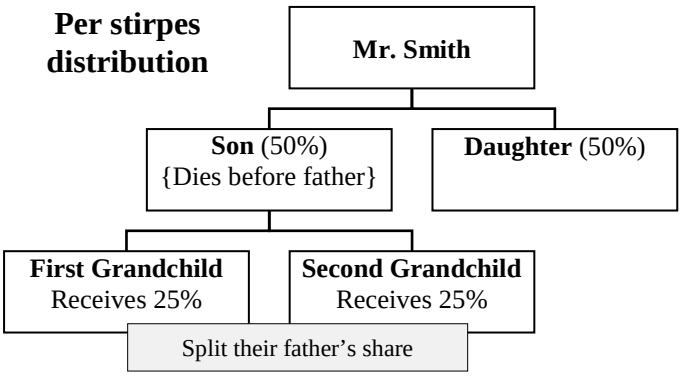
There are ways to avoid estate taxes. In calculating the taxes owed, the federal government will only look at your taxable estate. Numerous deductions and exemptions can reduce the value of your taxable estate, and therefore reduce the amount of taxes owed. We will discuss some of these tax strategies on pages 6–7.

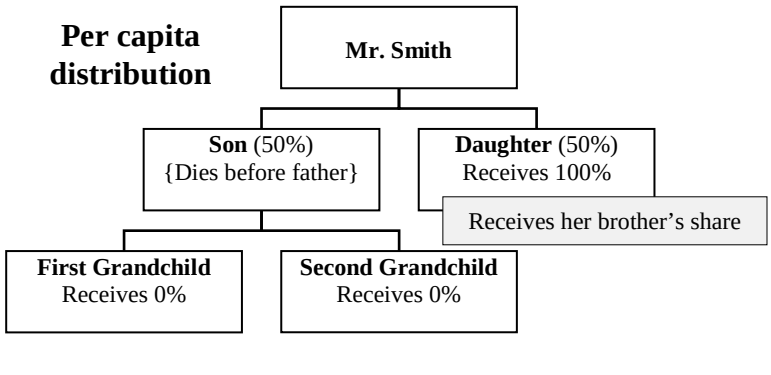
Q. How can I leave my assets to my kids and grandkids?

A. The will worksheet will walk you through creating a plan of distribution. First, you should specify who you would like to be your beneficiaries.

You will also be asked to decide whether your beneficiaries' share, if they were to die before you, should be passed on per stirpes (pronounced "per stir-peez") or per capita. Under a per stirpes distribution, your deceased beneficiary's share goes to his or her descendants. Under a per capita distribution, your beneficiary's share is divided among your surviving beneficiaries.

As an example, let's say that Mr. Smith leaves all his property to his son, who has two children, and his daughter. The diagrams below explain what happens if Mr. Smith's son dies before he does under each distribution plan.





Q. What if I want to leave someone out of my will?

A. With the exception of your spouse, you can disinherit anyone, meaning they will receive nothing from your will. If you disinherit your spouse, he or she may ask the court for the spousal elective share, a percentage of the estate as determined by law.

Q. What if I want to give specific items to someone?

A. You can list special gifts that you would like to give to family, friends, or charity. These gifts may be sentimental items such as jewelry or antiques, perhaps a car, or even money. If you would like to leave money, for example, to a charity, you should make sure your probate estate has sufficient funds to provide for that gift.

A majority of states, including Hawaii, let residents give gifts of tangible personal property using a document called a Personal Property Memorandum. This document allows you to make changes such as adding or deleting items without having to change your will, but it applies *only* to tangible personal property—not real estate, cash, money investments, or bank accounts. See the will worksheet to see if you qualify for a Personal Property Memorandum based on your state residency.

Q. Is my will still valid when I transfer to a new duty station?

A. The wills we prepare comply with federal law and are recognized by all the states. Your will does not expire when you move to a new state. Nevertheless, it will be drafted according to the laws of a particular state, most often your state of residence. This is not necessarily your military home of record. Your state of residence is where you are from—for example, where you were born and raised, where your family lives, where you vote, where your car is registered, where you intend to return after you leave military service, or where you have permanent ties. If you are not sure about your state of residence, your attorney will help you select an appropriate state for preparing your will. Please note that we do not prepare Louisiana wills.

Q. Who will represent my wishes after my death?

A. You can specify in your will who you want to act on your behalf after your death. That can be your spouse, family member, friend, or even a company that professionally manages estates.

The person you select to carry out the directions in your will is called an executor or personal representative. He or she must be an adult and may be your spouse. You may also want to select an alternate executor, in the event that the first person is unable or unwilling to manage your estate. You may also choose co-executors who have equal authority. Some states have restrictions about appointing non-residents who are not related to you to serve as executors. See the will worksheet for specifics.

A guardian is the person who will raise your children when both parents die. A court will have the final decision about guardianship, but strongly considers the person you name in your will.

A conservator or guardian of the property manages the money of your minor child. This person may or may not be the child's guardian. You can appoint an alternate conservator, who will take over in the event the first conservator cannot serve; co-conservators, who have equal authority to make decisions on the child's account; or split conservators, that is to say, a different conservator for each child. A custodian manages your child's property without a court appointment under the Uniform Transfers to Minors Act or Uniform Gift to Minors Act.

A trust is property held or managed by a person or business (such as a bank or trust company) for the benefit of another, for example, your children or a disabled family member. The person you choose to manage a trust is called a trustee.

These terms are more fully explained on page 5.

We will ask whether you want to require your executor, conservator, or trustee to be bonded. A bond is a special form of insurance that will cover losses to the estate caused by mismanagement or misuse of your property. Your representatives have a legal duty to carry out your wishes with or without a bond. A court may require a bond in some cases because of the sum of money involved or the nature of the interest involved, such as that of a child.

Q. When should I consult a private attorney?

A. Because of the laws and tax considerations involved, you should contact an attorney specializing in estate planning if you own all or part of a family business or farm, want to create a living trust, or have an estate that is unusually large or involves complex issues.

Avoiding Probate

Q. I have heard that I should avoid probate. What does this mean?

A. In general, you do want to avoid probate. Probate is the process of getting a court to approve your will after your death and to appoint someone who will manage your estate, pay your creditors, and eventually distribute your assets to your beneficiaries. Probate takes time and money. Your executor may need a court order before a financial institution will release funds or before title to your real estate can be transferred to your beneficiaries. This could take 18 months or more. Plus, it may cost 3 to 7 percent of the value of the estate to pay court, attorney, and executor fees. It can take more time and money if there is a dispute over the will. Instances where wills may need to be probated include:

- individual ownership of titled property such as a car, boat, house, or land.
- individually-owned property held in the custody of a third party, such as a bank account or an investment account.
- one's jewelry, mementos, art, or household effects that are the subject of a dispute among family members.

Q. How can I avoid probate?

A. Make sure that your assets are classified as non-probate property. There are several ways to do this:

- **Designate a beneficiary on your accounts.** Some assets require you to name a beneficiary when establishing the account such as SGLI and other life insurance plans, IRAs, Thrift Savings Plan (TSP), and other retirement plans and pensions.
- **Change individually held checking and savings accounts and investments to beneficiary accounts.** Banks call beneficiary accounts Payment on Death accounts, while brokerage firms call them Transfer on Death accounts. The process is simple and can be done with a form available from your bank or investment company that allows you to designate your beneficiary upon your death. You remain in full control of the account.
- **Own your property as a joint tenant.** This type of ownership is also known as a Joint Tenancy with Rights of Survivorship (JTWROS). Property owned as a joint tenant passes to the surviving co-owner automatically without going through probate. If you have titled property such as a car, boat, or house in your name only, you may consider transferring the title to yourself and another as joint tenants. However, please be aware that doing so means that you will lose full ownership and control over your property.
- **If you are married, own your property as tenants by the entirety.** A married couple can own property together as Husband and Wife. This type of ownership is called a Tenancy by the Entirety. The deceased spouse's interest passes automatically to the surviving spouse. This is a popular form of home ownership for married couples in Hawaii, especially as it gives the couple protection against creditors of an individual spouse.

  Another form of co-ownership that *is* subject to probate is called a Tenancy in Common. We can review your real property deeds to see whether your property is held in this way. If this is the case, the property will pass through probate.
- **Put your property in a living trust.** A living trust is a legal entity separate from you, your spouse, or beneficiaries. A living trust involves naming a trustee to own and manage your property for yourself and/or your beneficiaries and takes effect while you are living. Our legal assistance attorneys do not create living trusts although we can create trusts in your will to take effect upon your death. If you are interested in a living trust, you should consult a private attorney.

Q. If all my assets are non-probate, do I still need a will?

In an ideal world, you will have accounted for all your property to avoid probate. Even with the best planning, it might not be possible to do so. In this case, a will ensures that any probate assets are distributed according to your wishes, rather than according to inheritance laws.

Who will take care of my kids?

One of the primary reasons for creating a will is to tell the court who you would like to raise your children if you and your spouse die. You can also specify who you want to manage their money after you are gone.

Deciding who will raise your children

In your will you can nominate a guardian for your children. A guardian will raise your children if *both* you and your spouse die. Although the court ultimately will appoint a guardian based on the children's best interest, the judge will give considerable weight to the person nominated in your will.

Let your attorney know if you want to leave assets to:

- Children from a prior marriage or relationship
- Children or adults with physical or mental disabilities who are or may become eligible for government assistance.

If you are separated from your children's other legal parent but have custody when you die, the court will give strong preference to the other legal parent as the children's custodian unless there is a very good reason not to do so. If you want your children to be raised by your current spouse instead of the other parent, you should discuss this with your attorney.

Managing your children's money

You can choose someone to manage your children's property upon your death. The person, called a conservator (or a guardian of the property), may or may not be the children's guardian. In fact, in some instances you may not want the children's guardian to be the children's conservator. A frequent example concerns children from a previous marriage or relationship. By appointing someone else to manage the children's property, you ensure that the other parent does not control the money. A court supervises conservators, restricts how they can use the money, and requires annual reports. A conservator must turn the money over to the children once they turn 18.

Another way to manage your children's assets is through the creation of a trust. A trust is more flexible than a conservatorship and involves less court supervision. The trustee can decide how to invest the trust funds and use them for your children's maintenance, education, support, and health care (MESH). You choose at what age the children receive the trust assets, whether the assets must be paid in full or in installments, and if the children at age 21 will receive the income accumulated by the trust. If you have more than one child, you can create one trust for each child, dividing assets equally, or you can create a single trust from which the trustee draws for all the children, depending on each child's needs. A trust can be more involved than a conservatorship and require annual tax returns.

A third option—an account under the Uniform Transfer to Minors Act (UTMA) or the Uniform Gifts to Minors Act (UGMA)—provides the most flexibility and, at the same time, the most risk, because the custodian does not need to petition the court for his or her appointment and there is no court supervision. The custodian must turn the money over to the children at age 18 or 21, depending on the laws of the state (in Hawaii, the age is 21).

To determine which of these options is best for you, consider how much money you are leaving to your children, how much court supervision you want, what restrictions you want to put on how the money is used, and when you want the children to receive all the assets left to them. Even if you choose to create a trust or appoint a custodian, you should still appoint a conservator in the event that the trust cannot be established upon your death or the custodian you name is not available.

Protecting children's assets in the event of re-marriage

If you had a child with your first spouse, re-married, and then died leaving your entire estate to your second spouse, your second spouse could change his or her will after your death and leave nothing to your children from your first marriage. In such a case, you might want to set aside a portion of your estate for your children through a conservatorship or a trust.

Providing for family members with special needs

If you are leaving property to someone with a disability, you must be careful not to hurt his or her eligibility for government benefits. This can be done by creating a special needs trust. Tell your lawyer if you believe one of your beneficiaries may qualify.

	Conservatorship	**Trust**	**Custodianship under UTMA**
Children receive assets at:	Age 18	An age you choose	Either 18 or 21
Assets distributed as:	Lump sum	Lump sum or installments; interest earned can be paid as income to beneficiary at age 21	Lump sum
Assets can be used for:	Limited expenses, contingent on court approval	Maintenance, education, support and health care (MESH)	Whatever the custodian chooses

Court supervision:	Moderate to substantial	Little, if any	None

Avoiding tax traps on estates worth more than $1 million

As we discussed earlier, the federal government and many states impose an estate tax on the transfer of a deceased person's estate upon death. This estate tax is based only on the taxable estate, which is determined by subtracting any deductions or exemptions allowed for by law from the entire (or gross) estate.

The most important deduction available is the unlimited marital deduction for property passing to a surviving spouse. This deduction reduces your taxable estate to zero, eliminating all federal estate taxes. It should be noted that the unlimited marital deduction does not apply to surviving spouses who are not U.S. citizens.

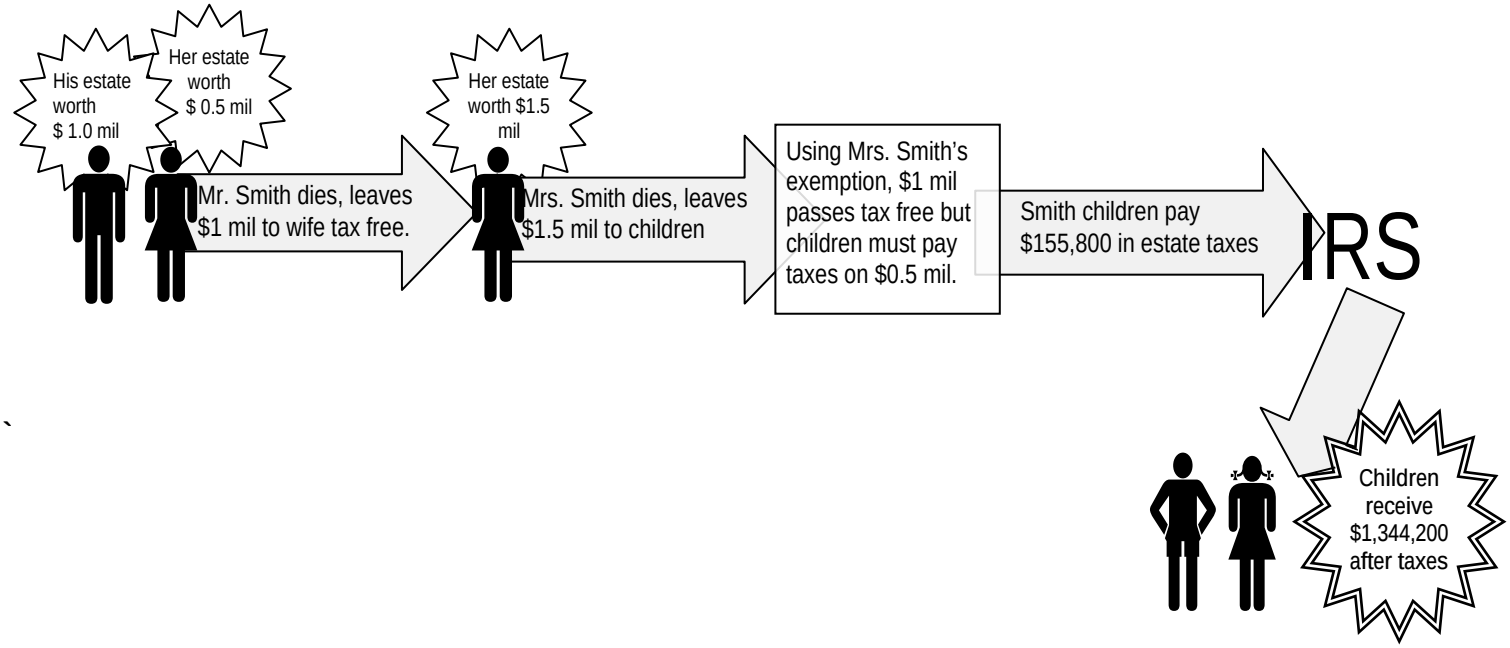
Year	Exemption
2007	$2 million
2008	$2 million
2009	$3.5 million
2010	no tax
2011 and beyond	$1 million

In addition, every individual's taxable estate is given an exemption of a certain amount by the federal government. The chart at the right shows the exemption amount. Note that the exemption will be lowered to $1 million in 2011 if Congress does not change the tax law before then. Anything above the exemption amount will be taxed at a rate between 18 percent and 45 percent.

While it may sound like a good idea to leave everything to your spouse when you die, if your combined marital estate is worth more than $1 million, doing so could result in hefty taxes when your surviving spouse passes away. Your surviving spouse can only use his or her exemption, which may be less than the value of the combined marital estate. This demonstrates the disadvantage of using the unlimited marital deduction—your own tax exemption will not be used and is therefore wasted.

Take the Smiths as an example. In 2011, Mr. Smith owns assets worth $1 million. His wife's assets are worth $0.5 million. Mr. Smith dies leaving Mrs. Smith everything he owns. Because of the unlimited marital deduction, Mr. Smith's estate will pass to his wife tax free. Mrs. Smith's estate is now worth $1.5 million. (The federal exemption in 2011 is $1 million.)

Using the unlimited marital deduction



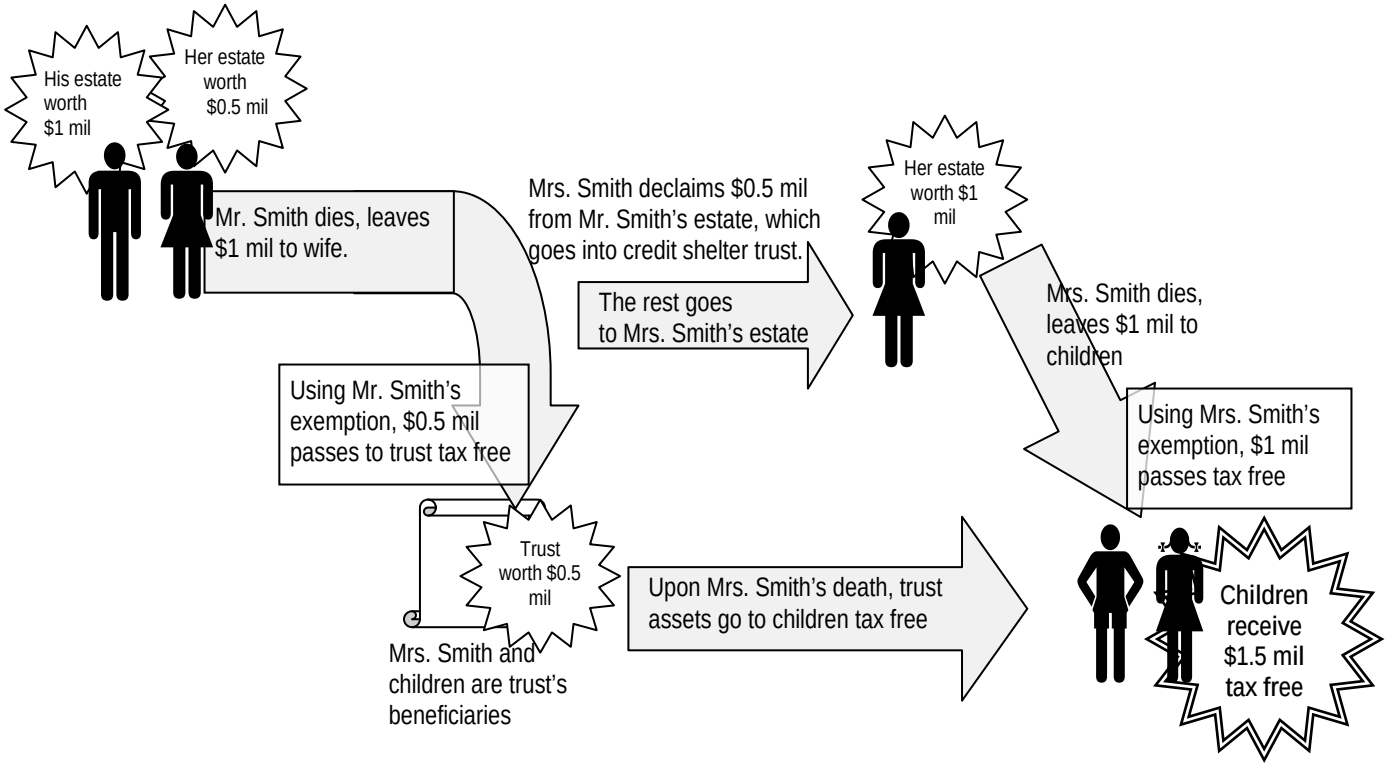
Sheltering your assets from taxes

A credit shelter trust is an estate planning tool that permits you and your spouse to use both of your exemptions to avoid taxes. Using both exemptions doubles the value of property that can transfer tax-free after both of you die.

It is our usual practice to write your will so that your spouse can choose whether or not to have a credit shelter trust created upon your death. Your spouse may decide that the size of the marital estate does not justify creating a credit shelter trust and may prefer to take your entire estate outright.

If, however, it appears that taxes will be an issue, your spouse can choose to disclaim or refuse to accept some or all of your assets. Whatever property is disclaimed will fund the credit shelter trust. Your spouse can disclaim up to the amount of your exemption without having to pay estate taxes.

Using a credit shelter trust



Whatever property is disclaimed by the surviving spouse is used to fund the credit shelter trust, which can shelter up to the amount of your exemption tax free. Your spouse and children are named the beneficiaries of the trust. During your spouse's life, he or she may receive the interest income earned, MESH payments, and 5 percent or $5,000 a year (whichever is greater) of the trust's principal. Upon your spouse's death, your children will receive the remainder of the trust. Your spouse can also serve as a trustee of the credit shelter trust, provided a co-trustee is appointed.

Note: Foreign spouses do not qualify for the unlimited marital deduction. Therefore, a credit shelter trust is an especially important tax-avoidance tool for surviving spouses who are not U.S. citizens.

What do I do with my will now that I have one?

In your final appointment at our office, you will execute your will. This process involves taking an oath affirming the accuracy of the information in the document and signing it in the presence of witnesses.

Once executed, your new will revokes all previous wills. You will be given the original copy of your will. Once you have received it, you should take proper care of it. Here are some guidelines:

Keep it safe but accessible

The person you have selected to manage your estate upon your death, otherwise known as the executor or personal representative, must be able to locate your will.

We recommend that you keep your will in a fireproof box. Your freezer can double as a fireproof box, once you have placed your will inside a sealable freezer bag. A bank's safety-deposit box is not recommended, unless someone other than you can access it.

Do not travel with your will, and never keep it onboard a naval vessel or aircraft.

Don't accidentally invalidate it

Do not write notes or make marks on your will. You will invalidate your will by doing so.

If you must make copies of your will, do not unstaple the pages to feed them through the copy machine's document feeder. Removing the staples may invalidate the entire will. Fold each page back and lay the will face down on the copier.

Keep it current

You may need to change your will after important events, such as the birth or adoption of a child, marriage or divorce, or if you would like to change a beneficiary. A will is valid until you revoke it.

Documents relating to medical decisions

Although they are not part of your will, we can draft the following documents when we discuss your estate plan with you:

A living will

Also called an advanced medical directive, this document tells doctors whether you want artificial life support if you are facing a terminal, incurable medical condition and whether you want to donate your organs or body for transplants or research.

Each state has different conditions that trigger the living will and the extent of medical care that may be withdrawn. You should review the language of the living will to ensure that it reflects your choice of discontinuing life support. A living will is effective until revoked.

A medical power of attorney

You can retain a medical power of attorney (or durable power of attorney for health care) in addition to or instead of a living will. This document lets you appoint someone to make medical decisions for you if you cannot make them on your own. You can designate an agent who will speak and act on your behalf in obtaining health care if you are incapacitated. It also gives your agent access to your medical information.

A medical power of attorney and a living will are very similar and, if you have both, will contain the same language about your desires for life support or organ donation. The major difference between the documents is that a living will instructs your health care providers while a medical power of attorney appoints and instructs your agent.

A financial power of attorney

A financial power of attorney (or durable general power of attorney) authorizes your agent to manage your personal and financial affairs—for example, file tax returns, pay bills, or sell real estate—if you should become incapacitated because of an illness or accident and unable to handle these matters on your own

This document gives your agent a great deal of authority, which he or she may abuse to profit at your expense. You should be careful who you select as your agent.

Q. Why do I need a financial power of attorney if I already have a general power of attorney?

A financial power of attorney differs from the powers of attorney we prepare for you when, for instance, you're deploying.

(1) A general power of attorney takes effect immediately but expires when you become incapacitated. A financial power of attorney takes effect *only* when a doctor determines you are incapacitated and can no longer make decisions.

(2) A general power of attorney prepared by our office expires after a year. A financial power of attorney does not expire. It remains valid throughout your lifetime. It will last as long as you are alive and until you recover from your condition and revoke it.

If you are deploying and need a general or specific power of attorney to take effect now, please see the Receptionist. A notary is available to complete these documents Mon. – Fri., 8–11:30 a.m. and 1–3 p.m.