



FORT SILL LEGAL ASSISTANCE

ADVANCE MEDICAL DIRECTIVE “LIVING WILL”



A will is a written document directing how and to whom property will be distributed upon death. It must be signed by the maker of the will before attesting witnesses and completed with the formalities required by the law of the state where it is signed. A will is not enforceable, does not transfer property, and has no legal effect prior to the death of the one who signed it. A will is enforceable after death only after accepted as valid by a probate court. If property resides in multiple states, the will may have to be accepted by probate courts in each jurisdiction.

The will may name competent, trustworthy adults as the executor or personal representative to be appointed by the probate court. Once appointed, this person carries out the instructions in the deceased person's will. For example, it is the executor's responsibilities to ensure that taxes are paid by the estate and that property is collected, protected, and distributed as directed in the will. Guardians, custodians or trustees may also be named in a will to care for minor or incapacitated children and to manage their property.

Every state has laws that direct how property will be distributed when a person dies intestate (without a will). In most states the property of single individuals without children is distributed in equal shares to their biological parents (whether married or divorced) or to sisters and brothers in equal shares, if both parents are deceased. The property of married individuals with children is usually divided between the surviving spouse and children. The property of married individuals with no children may be divided between the surviving spouse and the deceased person's parents. These distributions may not be your preference. Only by executing a will can you bypass these laws and control who will inherit your property. For instance, if you wished to leave your estate to a church or a charity after your death, you could only do so through a will.

It is important to provide for minor or incapacitated children in a legally sufficient manner. It is not advisable to give property intended for children to an adult, simply relying upon his or her personal promise to use it for the benefit of children. In such an example there is no legal obligation for that person to use it for the benefit of children. Such property belongs to the adult and will not be preserved for the children for whom it was intended if that adult spends it, becomes incompetent, divorces, dies, or is successfully sued by others. Instead, a children's trust or custodianship should be created in the will to maintain ownership of their property, and a trustee or custodian named to manage the children's property until they reach adult age.

The responsibilities and legal requirements of a trust may be complex. Trustees are entitled to reasonable compensation for the time and effort spent managing a trust. As an alternative, a simplified form of trust called a custodianship under the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act may be used in the will to manage minor children's inherited property until they become adults.

Whether there is an obligation for a parent to leave anything to children is controlled by individual state law. Disinheriting children is not presumed, therefore, the intention to disinherit children and their descendants must be specifically stated in a will. Also, it is of the utmost importance to mention all of your children in your will. Unmentioned children and, in some cases, grandchildren from a deceased child may file lawsuits to contest a will that does not mention them. Such a legal fight will create delay and expense for intended beneficiaries and may result in unintended beneficiaries receiving a share of the estate assets.

The right to disinherit a spouse in a will may be very limited because state law usually protects surviving spouses. An omitted spouse may file a lawsuit to receive a portion of the estate despite language in the will excluding the spouse.

A will does not apply to or control all property owned at death. Property such as life insurance proceeds, property owned in joint tenancy or tenancy by the entireties with rights of survivorship, IRA's, certain brokerage and investment accounts, pension plans, U.S. savings bonds, and accounts and property with a "pay on death" or "transfer on death" beneficiary designation must be distributed according to the terms of ownership or contract and cannot be changed by a will. Life insurance will be controlled by a will if the insurance policy does not list a beneficiary or lists the estate as the beneficiary.

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This Information Paper provides only basic information and is not intended to serve as a substitute for personal consultation with a Legal Assistance Attorney. To schedule an appointment with a Legal Assistance Attorney, please contact the Legal Assistance Office at (580) 442-5058. The Fort Sill Legal Assistance Office is located on the 4th Floor of Building 4700 (Welcome Center) at 4700 Mow-Way Road, Fort Sill, Oklahoma 73503.