



## FORT SILL LEGAL ASSISTANCE



# ESTATE PLANNING FREQUENTLY ASKED QUESTIONS

*People often dread making decisions about death and put off estate planning. However, great peace of mind comes from knowing you made arrangements that will make the process work smoothly when the time comes. Your Legal Assistance Office is available to help Servicemembers, family members, and retirees and their spouses with this process. These questions should help you start thinking about what arrangements you want to make.*

### **Q: Must I make a will?**

A: No one is required to have a will. However, a will is necessary if you wish to direct who receives your property (particularly if you want someone unrelated to you to inherit), who will handle the administration of getting your debts paid and your property transferred, or who will serve as guardian of your minor children. Also, many of us have assets which cannot be controlled by a will. For instance, life insurance proceeds will go to the beneficiary named for that policy and is not controlled by the terms of the will. Also, a home that is held in joint tenancy with rights of survivorship will pass automatically to the surviving joint tenant regardless of what the will might say.

### **Q: What happens if I die without a will?**

A: In legal terms, anyone who dies without a will is said to have died intestate. Each state has a law that sets the order in which family members will inherit based on the degree of family relationship to the deceased. This does not mean that your state of residency will receive your property; it simply means the state law will dictate which of your relatives will be entitled to share the assets you leave behind.

### **Q: What is a living trust?**

A: A trust is a written legal document that enables a person to transfer ownership of property to the trust (which is a separate legal entity somewhat like an artificial person). This means that the one who established the trust no longer owns the property and that the property will not be part of the probate estate once death occurs. Instead, the property in the trust will transfer according to the directions in the trust instrument. A trustee is named in the document to manage and terminate the trust under the guidelines set out in the trust document. There are many types of trusts, to include revocable, irrevocable, special needs, generation skipping trusts, and charitable trusts. Each type of trust will have different terms and provisions. The Legal Assistance Office does not draft living trusts.

### **Q: Do trusts have to be created while I am alive?**

A: No, the living trust is simply one kind of trust. It is possible to have a will prepared that directs the creation of a trust at your death. Instead of property being inherited by a

natural person, the mentioned assets will transfer to the new trust. This type of trust is referred to as a testamentary trust. Such a trust can be used to hold assets for multiple generations or to control assets after a child beneficiary reaches the age of majority. The Legal Assistance Office is available to assist with this process.

**Q: Does a trust avoid taxes?**

A: Tax considerations will vary on the type of trust created. For instance, a revocable living trust (the type often heard about in advertisements) will not affect what is included in the **taxable estate** of the deceased. Nor are estate taxes always due when a person dies regardless of whether the deceased died intestate (without a will), with a will, or with a trust. Whether estate taxes are due will depend on state and federal law at the time of death, the size of the estate, and the relationship of the deceased and beneficiary. As for income tax, either the creator of the trust or the trust itself will have to file and pay income taxes depending upon the type of trust and the current tax laws. It is possible that there may be no tax consequences to the creation of a trust and seeking the advice of a tax professional is suggested.

**Q: If my spouse and I own our home as joint tenants, is probate necessary when one of us dies?**

A: If your deed states that you own the home as joint tenants with rights of survivorship, probate is not necessary because the surviving joint tenant automatically becomes entitled to sole ownership. However, it is necessary to establish proper records of who died and who survived so that clear title to the property exists. Oklahoma requires the surviving joint tenancy owner to file an affidavit with the county clerk's office. No court filings are required, and the documents are easy to obtain and prepare. For deaths of a joint tenant that occur after January 1, 2010, Oklahoma tax releases are no longer required. Legal Assistance is available to assist the surviving joint tenant who is military, retired military, or an eligible dependent.

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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.**