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AFLSA/JACA
Legal Assistance Division

Basic Will Drafting and DL Wills

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Air Force Legal Services Agency



Integrity - Service - Excellence



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Topics

- **Will Drafting Concepts**
- **Client Interviews**
- **Estate Concepts**
- **The “Other” Documents**



Will Drafting Concepts: Authority

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- **10 U.S.C. 1044: authorizes legal assistance as resources permit**
- **10 U.S.C. 1044a: notary services**
- **10 U.S.C. 1044b: legal effect of military powers of attorney**
- **10 U.S.C. 1044c: legal effect of military advance medical directives**
- **DoDD 1350.4, Legal Assistance Matters**



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Will Drafting Concepts

Who doesn't need a Will?

Single, childless, junior enlisted personnel with no significant assets (other than SGLI) or real property, who have never been married, are not in line for a significant inheritance of any type and do not have any issues regarding their relationships with immediate family members.

EVERYBODY ELSE NEEDS A WILL



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Will Drafting Concepts

What happens if you don't have a will?

Intestate Succession

Property not effectively disposed of prior to death or through a will passes in accordance with the appropriate law of intestacy in effect at and in regard to those persons living at the decedent's death. Each state has its own statutes regarding intestate succession.



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Will Drafting Concepts

How does Probate work?

- Probate is the name of the process during which the deceased's assets are distributed, personal affairs are closed out and estate taxes are paid.
- Usually does not require prolonged legal proceedings but there should be an attorney involved to ensure relevant notification and accounting statutes are followed.
- Overseen by the Executor
- Cannot be avoided!



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Will Drafting Concepts

What is an Estate Plan?

- **Each is different and corresponds to the needs of the client**
- **The Attorney is only one of several participants - Accountants and Financial Planners are also involved**
- **Minimum requirement is the drafting of a will**
 - **Can Include other documents such as a Living Will, Health Care and General Power of Attorney**



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Client Interviews

The Goal: Discovery of enough information from the client so the attorney can properly articulate the client's testamentary intent and to educate the client so that they understand the documents being prepared and their effect on the estate.



Dual Representation Agreements

- **Use ensures that your clients know that they are waiving attorney-client privilege and any conflict of interest issues.**
 - Should also contain specific language stating that representation for one or both may be terminated at any time if there is the appearance of a conflict.
 - Keep signed agreement for your records.

- **May be required by your state bar**



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Client Interviews

Will Worksheets

- **Most valuable interview tool available**
- **Should be completely filled out by the client prior to seeing an attorney**
- **Should be as inclusive as possible**
- **The questionnaire is merely a starting point for more in-depth discussions.**



Barriers to Disclosure

- **Lack of preparation by client**
- **Fears about mortality**
- **The need to disclose information and confidentiality concerns**
- **Uncomfortable family relationship issues**
- **“It’s just paperwork”, “What do your other clients usually do?” and “What do you think?”**



Items to Discuss

- **Citizenship and State of Residence**
 - Spouses with Non-U.S. citizenship
 - Consider factors for legal residence of Spouses

- **Income, Assets and Potential Estate Tax Liability**
 - 2004 Unified Credit amount is \$1.5 million per person
 - The need to seek civilian estate planning assistance in certain circumstances
 - Sources of Income
 - Retirement



Items to Discuss (continued)

- **Insurance and Other Non-probate Assets**
 - SGLI and Private Insurance
 - Real Estate with right of survivorship
 - Investments with named beneficiaries
- **Family Relationships**
 - Blended Families
 - Disinheritance
 - Line of succession if named beneficiaries predecease testator



Items to Discuss (continued)

■ **Children**

- How many, how old and natural born or adopted?
- Who is going to be the Guardian and/or Trustee? Do they know?
- Former Spouses and Child Custody
- Ability and maturity to take their share of the estate
- What happens if guardian predeceases the testator - the “Oliver Twist”/“Annie”/“Cinderella” Scenario



Items to Discuss (continued)

- **What you don't do**
 - Inter-vivos Trusts (Never!)
 - Special Needs Trusts
 - Complex Estate Planning
- **The fact that this is their “Last Will and Testament”**
 - Should not make decisions simply to “fill in the blank”
 - This is their last word on issues regarding important topics such as child care, distribution of assets and personal property
 - Don't be afraid to tell the client that they need to take more time to think about their estate plan and reschedule them for another appointment.



Fiduciary Duty

- **A duty to act for someone's duty or benefit, while subordinating one's personal interests to that of the other person.**
 - Imposes certain legal obligations on the fiduciary, including prohibitions against utilizing assets in the fiduciary's care in a speculative or other wise imprudent manner.
- **Includes such relationships as executor, administrator, trustee, guardian**
- **Beneficiaries of the fiduciary duty may seek damages caused by a breach of this duty.**



Executors

- **The individual who oversees the implementation of the testator’s testamentary intent.**
- **Has a fiduciary duty to the estate**
- **Must comply with state laws regarding notification of parties with an interest in the estate, asset distribution and provides a “final accounting” of estate assets.**
- **May be a person or an institution.**
 - **No family relationship is necessary**
 - **Certain states have requirements that executors be state residents**
 - **Successors are highly recommended**



Guardians

■ **Guardian of the Person**

- Person with physical custody of a minor child
- Should always be included when minor children are at issue and an alternate should be named as well
- Include even if the parents are divorced – the juvenile court will look at the best interest of the child

■ **Guardian of the Property**

- May be the same as the Guardian of the Person
- Oversees child(ren)'s assets until they reach 18

■ **Uniform Gifts/Transfers to Minors Act**

- Allows the transfer of any type of property to a custodianship overseen by guardian for the benefit of a minor child.



Types of Bequests/Devises

- A Bequest is a gift of tangible/personal property while a Devise is a gift of real estate. The 4 types are:
 - **Specific** - Transfers a specific item to a beneficiary
 - **Demonstrative** - Transfers a specific sum from a specific source to a beneficiary
 - **General** - Derived from the general assets of the estate
 - Not dependant on the existence in the estate of the particular thing bequeathed or devised
 - **Residual** - The balance of the probate estate after payment of administration costs, debts, taxes, specific, demonstrative and general legacies.
 - Always included in a will
 - Use percentages rather than specific amounts



Ademption and Abatement

- **Ademption** – A bequest adeems when the testator sells or disposes of it during his or her lifetime; occurs with specific or demonstrative legacies
- **Abatement** – A bequest abates when it is used to pay for estate debts or costs
 - Usually accomplished according to priorities set by state statute and generally in the following order:
 - Property outside the will
 - Residual estate
 - General bequests
 - Specific bequests

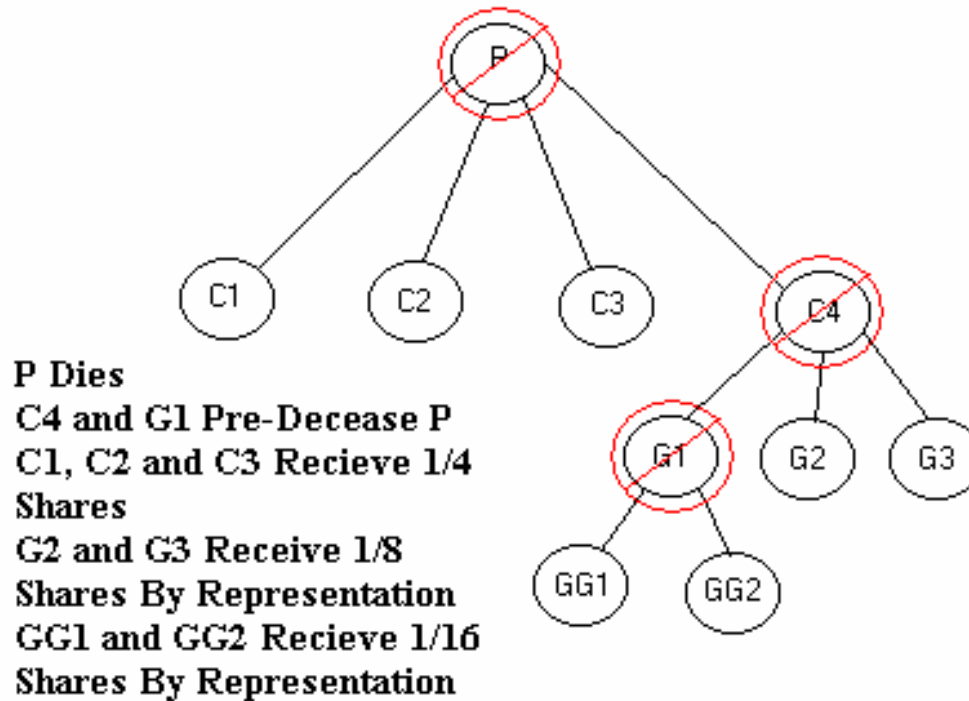


Per Capita vs. Per Stirpes (continued)

- **Per Stirpes – Division of the intestate estate where a class of distributees take the share which their deceased would have been entitled to, had he or she lived, taking thus by their right of representing such ancestor, and not as so many individuals.**



Per Capita vs. Per Stirpes (continued)





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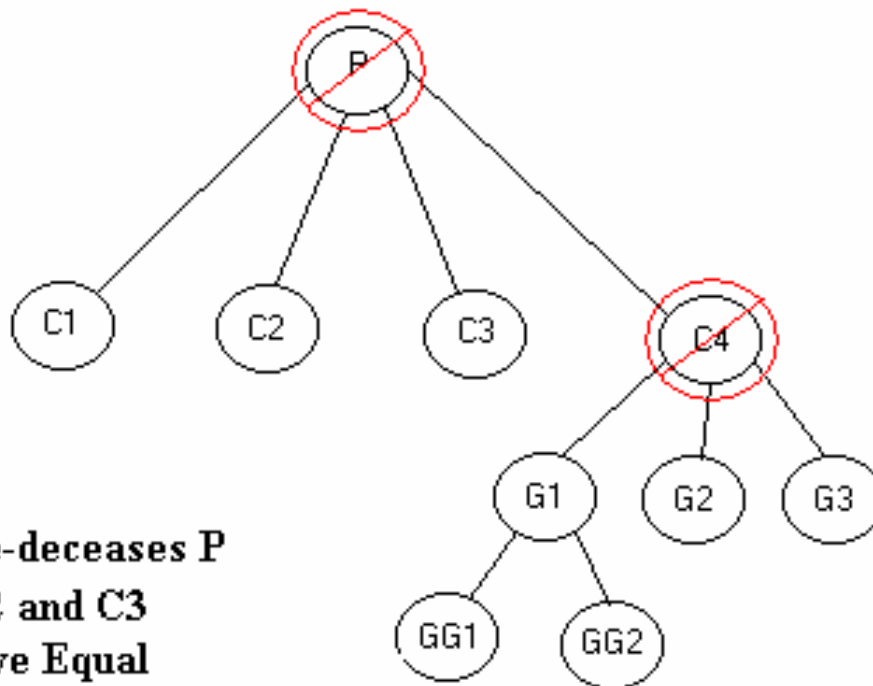
Will Concepts

Per Capita vs. Per Stirpes

- Per Capita – Distribution of assets equally among surviving persons in the first degree of relationship without reference to right of representation.



Per Capita vs. Per Stirpes (continued)



P Dies
C4 Pre-deceases P
C1, C2 and C3
Receive Equal
Shares of P's Estate



Estate Tax

■ **Federal Estate Taxes**

- Apply to estates containing \$1.5 million or more
- Clients may pass an unlimited amount of assets to a spouse, however, taxes will be assessed when those assets are passed to children or other beneficiaries.
- Estates in excess of the Federal Estate Tax threshold are considered complex and beyond the scope of legal assistance

■ **Include current or actual assessed value of all assets when calculating tax liability**

- Include only the equity of items subject to liens
- Don't use values based on what assets may sell for

■ **All states except Nevada have some form of estate tax**



Testamentary Trusts

- **Will drafting tool used for asset preservation and management.**
- **Create a fiduciary duty between the Trustee and the beneficiary.**
- **May be imposed on an estate in the form of a “Constructive Trust” if not expressly included in the will.**
- **Established upon the death of the testator and funded with decedent’s probate assets.**



Simultaneous Death

- **Most states have enacted the Uniform Simultaneous Death Act.**
- **Provides that where the beneficiary and the testator die simultaneously or very near in time they are deemed to have predeceased each other for the purposes of probate.**
 - Joint assets will be divided evenly and distributed in accordance with each other's will or applicable intestacy statutes.
 - When drafting wills, "mirror image" documents eliminate many problems associated with this event, especially regarding Guardianship.



The “Marital Share”

- **Almost every jurisdiction allows a surviving spouse to claim a portion of the estate of a decedent despite a valid will attempting to dispose of it to others.**
 - Also known as “forced share”, dower/courtesy share or community property share.
- **Varies from state to state**
- **“Married” includes clients separated pending divorce.**
 - Probate law requires a final judgment of divorce to eliminate spousal rights.



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Will Concepts

- **Military Testamentary Instrument Language**
 - Required by 10 U.S.C. §1044d
 - Effective in all jurisdictions



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The “Other” Documents

Living Will

Health Care Power of Attorney (HCPOA)

Springing Durable General Power of Attorney (SDGPOA)

These are important documents with serious consequences – make sure that your client understands what they are and what they do!



The “Other” Documents

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Living Wills

- **An affirmative statement on the part of your client that if they are incapacitated and being kept alive indefinitely via artificial life support, they desire that life support be terminated.**
- **This document, as an affirmative statement on the part of your client, may result in individuals who they may want to make decisions regarding termination of life support, not being consulted.**

If your client does not understand this, has not given any thought to the consequences of this document or specifically wants family involvement in the decision to terminate life support, **DO NOT** give them a Living Will.



The “Other” Documents

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HCPOA

- **Allows your client to appoint an attorney-in-fact to make all health care treatment decisions for them if they are incapacitated.**
 - Often contains blanks for specific preferences of the grantor.
- **If a Living Will exists, that document will take precedence over the HCPOA and the attorney-in-fact will not be able to make decisions regarding the termination of life support.**



The “Other” Documents

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SDGPOA

- **Allows the appointment of an attorney-in-fact to take care of client’s personal affairs in the event of incapacity.**
 - Contains similar provisions to ordinary GPOAs
 - Springing in nature with no expiration date
 - Contains Durable language
 - Requires an affidavit from attorney-in-fact attesting to incapacity of grantor.
 - Not to be used for TDYs, Deployments, etc. - only for incapacity.



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Questions?



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Training Opportunities:
Navy Estate Planning Seminar annually