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ALL ABOUT WILLS

1. A FEW WORDS ABOUT THIS BOOKLET

This pamphlet is intended to provide a brief overview of the law and procedure governing wills in the State of Colorado. If you need more detailed information or you are concerned about tax implications with your estate planning, we encourage you to hire a civilian lawyer. There are various Legal Referral Services in Colorado that can help in your search.

2. WILLS AND ESTATE PLANNING

Wills are the most common legal document used to express your preferences about how you want your estate distributed after your death. It communicates to others:

- How you want some or all of your property and assets to be given away, after your debts are paid. Your assets include real estate, cars, business holding, money, and personal property.
- Who you would like to be a “personal representative” (formerly known as an executor), who is the person that handles your affairs, such as paying your debts and giving away your property.
- Who you would like to be a “guardian” for a minor or disabled adult child.

3. WHO CAN MAKE A WILL?

To make a will:

- You must be 18 years or older
- You must be of “sound mind.”
- You must have “testamentary capacity” which means you know what property you own, how you want your property to be given away, you know who is in your immediate family, and that what is written in your will is truly how you want your property distributed after you die.

The information provided in this document is meant for the sole use of Active Duty service members, retirees, their families, and those individuals eligible for legal assistance. The information is general in nature and meant only to provide a brief overview of various legal matters. Rights and responsibility vary widely according to the particular set of circumstances in each case. Laws can vary across states, services, and civilian jurisdictions and laws are changed from time to time. Do not rely upon the general restatements of background information presented here without discussing your specific situation with a legal professional.

4. HOW SHOULD A WILL BE DONE?

You can handwrite a will or have it typed. Also, you must sign and date the will. If you cannot sign the will, you can tell someone to sign it when you are watching them sign. If the will is typed instead of handwritten, you must have two disinterested people sign the will as witnesses. They must certify that when you signed the will, you signed voluntarily and were of sound mind. It is best to have all signatures notarized.

5. CAN ASSETS BE GIVEN TO WHOEVER I NAME IN MY WILL?

Yes, you can give your property to whoever you wish or leave out whomever you wish, except: (1) In Colorado, the surviving spouse can choose to receive a percentage of the estate regardless of what the will says. This may not apply if a spouse receives property by other means than the will, such as life insurance proceeds. (2) A child born after the will is signed takes a share of the estate as if no will existed, unless it is made clear that you intended to exclude the child.

6. WHAT HAPPENS IF THERE IS NO WILL?

If a person dies without a will we look to the “laws of intestacy.” Intestacy literally means to die without a will. In Colorado the law provides that some or all of your estate will pass to your surviving spouse, depending upon a number of factors such as the size of your estate and whether or not all of your children are also the biological children of your surviving spouse. It may also depend upon whether you are survived by any minor children from a previous relationship. If this is true, the law states that your current spouse and your minor children from a previous relationship will share in your estate.

If you have no spouse or children, then your estate will pass to your parents, if they are still alive and if not to your siblings if they are alive. If you have no living siblings your estate goes to nieces, nephews or other surviving blood relatives. The only time your assets will go to the State of Colorado is if you die without a will and have no living blood relatives.

Depending upon your situation, it may be very simple or very complicated to determine who your lawful heirs are if you die without a will. For this reason alone, it is advisable to have a will which specifies where you want your assets to go and who should be in charge. It is important to discuss all these situations with an attorney to make sure your spouse, surviving descendants and other intended beneficiaries receive their appropriate share.

7. WHAT IS PROBATE?

When a person dies, his or her estate must go through probate, which is a process overseen by a probate court. If the decedent leaves a will directing how his or her property should be distributed after death, the probate court must determine if it should be admitted to probate and given legal effect. If the decedent dies intestate—without leaving a will—the court appoints a Personal Representative to distribute the decedent’s property according to the intestate laws of Colorado. In general, the probate process involves collecting the decedent’s assets, liquidating liabilities, paying necessary taxes, and distributing property to heirs.

8. CAN I CHANGE MY WILL?

Yes. A will can be changed, in whole or in part, as long as you are competent and not influenced by another person. An amendment to a will is called a codicil. Requirements for a codicil are the same as for writing the original will. Changes should never be made by writing on the original will itself, because this could invalidate part or all of your will.

9. HOW DO I GIVE AWAY MY PERSONAL PROPERTY?

Personal property is possessions, other than real estate, that is movable. Examples of personal property include vehicles, furniture, boats, jewelry, etc. In Colorado, you can use a separate list, known as a memorandum, to give away your personal property. However, you can only use a memorandum if you specifically mention a memorandum in your will. The memorandum is usually handwritten or typed and can then be written or rewritten at any time. It does not need to be witnessed or notarized, only signed, dated and found with your will.

10. WHAT ELSE CAN A WILL DO BESIDES DISTRIBUTE PROPERTY?

A will can set up a trust for long-term management of assets and the protection and security of family members. In addition, you can also use your will to name the person or persons you would like to care for your minor children in the event of your death. Even if you intend to leave your estate to the same people who would receive it under the laws of intestacy, a will can simplify administration and be a lot less costly. A will can also allow you to specify different distributions to your beneficiaries.

11. IF I WANT MY ENTIRE ESTATE TO GO TO ONE PERSON, PERHAPS MY SPOUSE, CAN I USE JOINT TENANCY INSTEAD? (I have heard this avoids probate)

If your estate is not taxable, joint tenancy can be used between spouses. One example of joint tenancy is when you and your spouse, or other family member, are on the same bank account. However, between other family members, using joint tenancy for multiple assets may create unintended tax consequences or expose one joint tenant to the creditors of another. An attorney should be consulted before deciding to use joint tenancy to be sure that the necessary specific language is used and the situation is appropriate.

12. DOES A WILL DISPOSE OF ALL PROPERTY?

No. Certain types of assets automatically pass at death. Your will cannot give away property you own in joint tenancy with right of survivorship if the other joint owner survives you. In addition, your will cannot give away property that has a named beneficiary, such as a life insurance policy. Good estate planning includes the organization of these types of assets to reflect your individual wishes at death.

13. WHAT HAPPENS TO MY WILL IF I GET DIVORCED OR MARRIED?

Under Colorado law, if you get divorced after the will has been written, the ex-spouse named in the will is automatically eliminated as a beneficiary when the divorce is final.

If you marry after you have written your will, then your spouse receives the same share he or she would have received without a will unless the will makes clear the omission was intentional or if your spouse was provided for outside the will. Keep in mind that an intentional omission does not change the rights of your spouse to take a fixed share unless such rights have been relinquished in a marital agreement.

14. CAN I SAVE TAXES BY USING A WILL?

A well drafted will can save taxes if your estate is taxable. This depends on the size of your estate. It is a common misunderstanding that “avoiding probate” saves taxes. Probate and taxes are separate matters. Probate is simply the procedure for passing on assets, which is required when these assets are worth over \$50,000 or the assets include real estate. An estate is taxable when its value, including life insurance policies, is over a certain figure. An attorney or accountant can tell you if your estate is taxable.

15. IF I’VE MADE A WILL AND DO NOT WANT TO MAKE CHANGES, IS THERE ANY REASON TO HAVE IT REVIEWED? DO I NEED TO CHANGE IT IF I MOVE TO/FROM COLORADO?

Because of changes in Colorado law and federal tax law, it is prudent to have a will reviewed periodically. Colorado law states that a will is valid if it was valid in the state where it was signed, even though the will would not have been valid if it had been signed in Colorado. Most states have similar laws, so a Colorado will would not be invalid in another state. Still, it is wise to have the will reviewed when moving because of factors that could affect a will. For example: community property status, differing rules about the disposition of personal and real property, local rules affecting marital rights, etc.

16. CAN I WRITE MY OWN WILL?

Colorado generally recognizes wills that are handwritten and signed by the testator. These wills are known as holographic wills. However, the drafting of a will does require special skills, and it would be prudent to have the will drafted by an attorney. Holographic wills are frequently found to be ambiguous or defective, which causes delay, expense and litigation. Good, organized estate planning can provide you with peace of mind and leave an estate that is easy to manage for those you leave behind.

17. WHERE SHOULD I PUT MY WILL AFTER IT IS EXECUTED?

You should put your Last Will and Testament in a safe place. Many people chose to put their will in a fire safe box. Colorado law requires a decedent’s will to be “lodged” with the district court in the county in which the decedent lived within 10 days of their passing. Accordingly, it is important that whoever is the designated personal representative knows where the Last Will and Testament is located so they can comply with Colorado law.

HELPFUL CONTACT INFORMATION

El Paso County Bar Association's Lawyer Referral Service: (719) 636-1532

Colorado Legal Services: (303) 837-1321

Legal Aid Foundation of Colorado: (303) 863-9544

Metropolitan Lawyer Referral Service: (303) 831-8000

Denver Bar Association: (303) 831-1309

Other Helpful Websites:

<https://aflegalassistance.law.af.mil>

www.abanet.org/family/military

<http://coloradolegalservices.org/co/homepage.html>

<http://www.legalaidfoundation.org/legal-services/>