

**OFFICE OF THE STAFF JUDGE ADVOCATE
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**WILLS AND POWERS OF ATTORNEY:
Do You Need Them ... And Why?**

WILLS - Introduction

The Legal Office often gets the question: “Do I need a will?” And we often give the same answer: “Well, it depends.” In order to properly answer this question, it’s important to understand the distinction between the three types of documents that we prepare for you. The first document is the *will* itself. A will is a legal document that designates how you want your money and property (your estate) to be distributed after your death. It also specifies your wishes regarding funeral and burial arrangements, and, if you have children who are minors, it states whom you request the court to appoint as their guardian.

The second document is the *living will*. This documents contains directives concerning the termination of medical treatment. This document provides that the signer’s life shall not be artificially prolonged by extraordinary measures when there is no reasonable expectation of recovery. Finally, a *durable power of attorney* is a document that becomes effective at a later time, usually once the person giving the power is incapacitated. There are 2 types of durable powers of attorney we can draft. The first is a durable health care power of attorney. This document authorizes a third party to make health care decisions in the event you become incapacitated. Unlike a living will where your wishes are provided, this document allows another person to “step into your shoes” and make decisions concerning your medical care on your behalf. The second is a durable financial power of attorney. This document authorizes a third party to make financial decisions in the event you become incapacitated.

Other definitions and key concepts are important to fully understand the will process. Some of these definitions are detailed below.

1. **Testator.** A testator is a name given to a person who is the subject of the will. In other words, if you come into the legal office for a will, you are the testator of that will.
2. **Beneficiary.** A beneficiary is a person or organization designated to receive some or all of your assets upon your death. You can name as many beneficiaries as you like.
3. **Executor.** An executor is the person you appoint in your will to settle your estate. This person will have the administrative responsibility of paying your bills and taxes (including estate taxes), supervising the process of locating and safekeeping your assets, and making sure that the wishes expressed in your will are carried out. In essence, an executor is in charge of the estate.
4. **Probate.** Probate is a court procedure by which assets pass from a deceased person to the proper beneficiaries. A judge has the authority to validate a will and then order that the assets subject to the will be distributed.

The Importance of Having a Will

There is a big misconception that if you die without a will (“intestate”), your estate passes to the state of your legal residence. Technically this is possible, but it is saved for the last resort. For example, if you are single with no children and living parents and want everything to pass to your parents, you don’t need a will. In this scenario, the law states that your estate passes to your parents. Now, I could write for days on describing different scenarios but because the law of wills is so state specific each variation would be different from the next.

Here are some good rules of thumb for you to follow: (1) again, if you are single and wish everything to pass to your parents, you do not need a will, (2) if you are single and wish to devise real property or bequest personal property to persons other than your parents or siblings, get a will, (3) if you are married with or without children, get a will. **Remember, however, just because you feel that you do not need a will does not mean that you should not have a living will or durable power of attorney.** These documents can be prepared separately and are always highly recommended.

With that said, what actually happens if you die **without** a Will? That answer depends on which state you claim as your legal residence. While we can’t outline every state’s intestate laws here, there are a few things you should take into consideration when deciding if you need a will. First, even if you are married (with or without children), your spouse may not always inherit your entire estate. Many states have provisions that give a portion to the parents or children of the testator/testatrix. Second, if you are single and have children, state laws uniformly provide that the entire estate goes to the children. Third, if you have neither parents nor siblings, most states will exhaust all remedies in finding a person of relation to give your estate to. However, if they cannot find a relative, your estate will pass to the state. If you have any questions about the intestate laws of your state you should talk to an estate planning attorney in your state of residence.

What happens if you marry after you drafted a will while you were single, but failed to update it upon marriage? There are legal devices which allow the spouse to receive a share of your estate. Usually the surviving spouse can take about one third to one half of the estate. That share varies among the states, and so does the definition of "estate" that is used in the calculation. Also, state laws contain a very wide variety of significant details, limits, dollar allowances and exceptions. These are all involved in determining what and how much property the surviving spouse can elect to take from the deceased spouse's estate, *instead of* whatever he/she is left in the will.

What about the children? When there are minor children, a will should always be used to name a guardian(s) of their *persons* and *property*. Alternates should also be named. This should not be done any other way. Of course, if there is a surviving parent, he/she automatically is guardian, if living in the same household. They do not need to be named as a guardian in the will. In a divorce situation, the parent with legal custody of the child(ren) should designate a guardian. Understand, however, that if somebody besides the other parent is named, this designation might not be binding; when a custodial parent dies, the non-custodial parent always has priority in seeking guardianship and custody, unless unfit. Be aware, too, that the court will probably have to approve the proposed guardian eventually, even if named in a will (unless he/she is the surviving parent, in the same household). The purpose of the will in this regard, though, is to guide the court, and to avoid family arguments over who is better qualified.

If you feel it is necessary or appropriate, two guardians can be appointed - one over the child himself, and one (presumably experienced) over the child's property. Consider carefully, however, the appropriateness of leaving money or other property outright to young children, even if a qualified guardian is available. Guardianship is a cumbersome way to manage financial affairs. Periodic reports and accounting to the court are required, and flexibility is limited by law.

What about holographic wills? Why not just write your intentions on a bar napkin? Approximately half the states recognize holographic wills, or wills that you write by hand. Of course, because you have the legal office at your disposal there really is no reason not to have a will professionally prepared. If you do decide to write your own will, you must write everything out in your own handwriting, date and sign the document, and then make sure that there is no other handwriting on the document – any marks in another person's handwriting will render the holographic will invalid. If you make a mistake or change your mind on something, don't cross anything out, because that will also invalidate the will. Be aware that a holographic will may turn out to be very expensive for your beneficiaries, since it is not unusual for special court hearings to be held to interpret what the will really says and to remedy omissions from the will.

What if I bought property while stationed overseas? Please speak with an attorney at the legal office if you have bought property while stationed here in England.

Conclusion

There is no hardened rule that says you must have a will. If you meet any of the criteria above, then we recommend executing a will to not only protect yourself and your possessions, but also for the benefit of your loved ones. Here is another rule of thumb for you: when in doubt, get a will. Stop by or call the legal office on 226-3553. Our walk-in hours for wills are Tu 0900-1200 & Th 1300-1600.

POWERS OF ATTORNEY

A Power of Attorney (POA) is a written instrument that allows you (the "principal") to authorize your agent (your "attorney-in-fact") to conduct certain business on your behalf. It is one of the strongest legal documents that you can give to another person and, as such, should not be taken lightly. There are two types of POA; "general" and "special" (or limited). A general POA gives your agent very broad powers to act on your behalf and are usually discouraged. A special POA limits your agent's authority to act only on certain matters. Every act performed by your agent within the authority of the POA is legally binding upon you. Since a POA is such a powerful document, give it only to a trustworthy person, and only when absolutely necessary. **Warning** – A third party has the right to refuse to accept a POA. When in doubt contact the business prior to getting a POA to see what requirements are necessary in order to use the POA

There is no law or regulation specifying when you must give another your power of attorney. But another person cannot normally act for you in business or legal matters without receiving your power of attorney. Thus, if you will be unable to act for yourself due to an assignment or a TDY, you should consider using a power of attorney.

1. General POA

General powers of attorney grant attorneys-in-fact broad powers and authority. They can be dangerous instruments in the hands of persons inexperienced in business matters, unstable in temperament, or anyone in whom the grantor does not have the utmost trust and confidence. The possibility of strained marital relations, particularly during an extended deployment, should be considered. The legal office recommends that if you have concerns, speak with someone from the legal office regarding the dangers of executing such a document. It's possible that a special or limited power of attorney could accomplish the purposes for which the general power is sought. Under no circumstances should a general power of attorney be drafted and executed unless it contains a specific termination date or other provisions for automatic revocation.

Warnings!! There are two important factors you should consider before you get a general power of attorney. First, remember there is no legal requirement that anyone or any institution recognize a power of attorney. Merely because your agent has your power of attorney does not mean that all businesses will allow your agent to act on your behalf. Second, even if the general power of attorney is accepted, your agent may obligate you in a way you never intended and for which you will be held accountable. The general power of attorney is very powerful and should be used sparingly.

2. Special POA

A special power of attorney is a limited power of attorney that only provides your agent the right to act for you to accomplish some specific purpose. Please see attachment for different types of Special POA's with a brief explanation. Examples include:

- a. Registering or selling your automobile or house,
- b. Paying your taxes,
- c. Shipping your household goods,
- d. Obtaining medical care for your children, and
- e. Cashing checks.

The authority of the attorney-in-fact is spelled out in the document, narrowly defining the areas in which you allow your agent to obligate you.

Income Tax -

If you want someone to file your federal income tax return for you, you must give your attorney-in-fact a special IRS power of attorney (Form 2848). You can find and download this form on the IRS web page at www.irs.gov. If you want someone to file a state income tax return for you, you must give your attorney-in-fact a special power of attorney. Your state may have a specific form as well, check with your state's Department of Revenue. A general power of attorney is not sufficient.

Real Estate –

A power of attorney for real estate transactions requires you to specifically state a legal description (contained in the deed) of the real property (along with the street address) that you want your attorney-in-fact to buy or sell on your behalf. Your special power of attorney must state that you specifically authorize your attorney-in-fact to enter into a sales contract on your behalf and should state that he or she is empowered to sell only that specific property.

If your attorney-in-fact is acting as a buyer for you, the power of attorney should state that your agent is authorized and directed to comply with the state recording statutes. Whenever a deed is signed pursuant to a power of attorney, both the deed and the power of attorney should be recorded and thus both need to be executed with the proper formalities (witnesses and notary).

3. Not a will substitute

Powers of attorney do not replace wills and do not prevent probate. Because the authority you have given your agent will terminate upon your death (or the date your agent learns of your death) the power of attorney will only serve to facilitate your business and personal affairs while you are away from home.

4. Revocation

A power of attorney is automatically revoked when: (1) your agent learns of your death, (2) the date specified in the document arrives, or (3) you affirmatively revoke or terminate the power of attorney and thus your agent's powers. To prevent misuse of a previously granted power of attorney you will need to destroy all copies of the document, including any copies held by the agent. Notice of the revocation should also be provided to your creditors. Limit the period that the power of attorney is in effect to the absolute minimum necessary to accomplish the task. Except in very unusual circumstances, no power of attorney should be granted for more than one year.

5. Special Considerations

- a. Because we are overseas, you need to be aware that the POAs that we are discussing are U.S. based POAs. Thus, any dealings and affairs you may have off base while stationed here at RAF Lakenheath will need a local POA.
- b. A POA becomes void upon the death of the principal.
- c. A POA normally is void if the principal becomes physically or mentally incapacitated. However, appropriate "durability" language may be added to the POA, which will ensure that it remains valid during any period of incapacity.
- d. Any third party has the right to refuse to accept a POA.
- e. A POA should be given for only a limited time period (such as six months during a deployment). A third party is more likely to accept a POA with a recent date than one, which is many months or years old.
- f. Many financial institutions and other businesses have their own POA'S which they prefer to be used to conduct business. It is a good idea to show your POA to all known third parties who may be dealing with your named attorney-in-fact to ensure that your POA is acceptable to them.
- g. Never give a general POA when a special POA will accomplish the mission. There is less opportunity for abuse when only limited powers are given.
- h. A special POA should be as specific as possible. For example, if you are authorizing an attorney-in-fact to sell a vehicle on your behalf, specify the vehicle, license number, vehicle identification number, the make/model/year of the vehicle, and any specific terms you will require. Your legal assistance attorney can help you tailor the POA to suit your precise needs.
- i. You may revoke a POA before its expiration date by executing a revocation of the POA. Notice of the revocation must be delivered to the attorney-in-fact, as well as to all third parties who you know relied on the POA. If possible, recover from the attorney-in-fact and destroy the original and all copies of the POA. Even though the POA has been revoked, you may be responsible to any third party who did not receive notice of the revocation.

6. Conclusion

A power of attorney allows your agent to act for you in your absence. Special POAs drafted to fit individual needs on a one-time basis or for a limited period of time are usually your best choice. Stop by or call the legal office for more guidance and help in determining whether you need a power of attorney.

OFFICE HOURS

Legal Assistance/Wills (By Appointment Only) – Tuesday 0900-1100 and Thursday 1300-1500.

POAs (No Appointment Necessary) Monday – Friday, 0830 – 1530.

For POAs and/or wills, please visit the following website and enter your information. Write down the ticket number the system generates and bring it to the legal office when you are ready to draft your documents.

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

Powers of Attorney

A. Access to bank accounts

Allows another person complete access to your bank accounts, including the ability to withdraw funds and close the account.

B. Changing Allotments

Allows another person to change your existing allotment(s) to a new amount.

C. Start Allotments

Allows another person to start an allotment from your military pay for a specified amount.

D. Stop Allotments

Allows another person to stop your existing allotment

E. Bank Loan To Purchase.

Allows another person to sign for a bank loan on your behalf for a particular purpose.

F. Execute VA Loan

Allows another person to sign VA Housing Loan paperwork on your behalf.

G. Finance (ALL)

Allows another person to act on your behalf for all matters at any Military Finance Office.

H. Finance (Pay Inquiry Only)

Allows another person to make a pay inquiry at any Military Finance Office.

I. Stocks and Mutual Funds

Allows another person to buy and sell shares of your stock and mutual fund shares.

J. Claims Property

Allows another person to sign documents affecting care, maintenance, shipment, and repair of your personal property.

K. Receive HHGs from TMO

Allows another person to receive your household goods from the military Travel Management Office.

L. Ship HHGs from TMO

Allows another person to ship your households goods through the military Travel Management Office.

M. Clear Quarters and Start BAH

Allows another person to vacate your military housing and start BAH payments.

N. Procure Rental or Leased Quarters

Allows another person to rent/lease housing on your behalf.

O. Sell Land

Allows another person to sell your unimproved land.

P. Sell House

Allows another person to sell your improved land, such as land that contains a house.

Q. Purchase House

Allows another person to purchase a house on your behalf.

R. House Sitting

Allows another person to take appropriate action to maintain your real property (land).

S. Sign For Base Housing

Allows another person to sign for your assigned military housing.

T. Legal Action With Regards to Lease

Allows another person to take legal action related to leased property on your behalf.

U. Manage Property

Allows another person to manage your rental property.

V. Operate Privately Owned Vehicle (POV)

Allows another person to manage your rental property.

W. Pickup POV at Port

Allows another person to accept and operate your vehicle at designated military vehicle processing centers.

X. Purchase a POV

Allows another person to purchase a vehicle on your behalf.

Y. Register POV

Allows another person to register, operate, and insure your vehicle with the state DMV and pass and ID office.

Z. Sell POV

Allows another person to sell your vehicle on your behalf.

AA. Ship POV

Allows another person to operate and ship your Vehicle through designated military vehicle processing centers.

BB. In Loco Parentis

Allows another person(s) to act temporarily in place of the parents.

CC. Accept Mail

Allows another person to sign for and accept your mail, including delivery carriers such as UPS and Fed EX.

DD. Medical Care

Allows another person to authorize medical care for your minor children on your behalf.

EE. Copies of Medical Records

Allows another person to receive copies of your medical records at military treatment facilities.

FF. MPF ID Cards

Allows another person to obtain ID card(s) under your sponsorship

GG. MPF and Finance

Allows another person to obtain dependent ID card(s) and to stop, start, or change an allotment.

HH. Pick-Up Mail

Allows another person to pick up your US Mail from the Post Office.

II. College Registration

Allows another person to register you for college, including securing tuition assistance.