

## WHERE THERE'S A WILL

by Mr. Joseph M. Hamilton, ESQ.

Legal Assistance Attorney

Fort Belvoir legal Assistance Office

Where there's a will there's a way. So goes the old saying. This article is about a Last Will and Testament. This is the name of a document which is designed to pass ownership of your property to others at your death. You could say that the Will is the way to pass property to others at your death.

When property passes under your Will to minor children, complication arise. This is because a minor lacks the necessary legal competence to own or deal with property. Not to worry. There is a remedy. In addition to passing title of property, a Will can name a person to take care of your minor children and the property passing to them under your Will. Such a person is called a Guardian. A common scenario requiring a Guardian would be if both you and your spouse die together, for example in a car crash, or your spouse dies before your death.

### GUARDIANS

The Guardian named in your Will shall have physical control and custody of the children until they reach 18 and control over the property passing to them under your Will. Under Court supervision, the Guardian will have most of the obligations and responsibilities of a parent. When the child reached 18 years of age, then Guardianship ceases because the child is now an adult with full legal competency.

If you are divorced, remarried, or have a "blended family," with "his and her children," there are problems that need to be addressed in your Will because the court will normally appoint the child's natural parent- your former spouse- as guardian of the minor child's person, even if you provide otherwise in your Will. Your Legal Assistance Attorney can guide you through the tangling family ties when children have multiple sets of parents. One solution is to name a separate person as Guardian for the property only. This would give the power to manage the money in the Guardianship to someone other than your former spouse.

### TRUSTS

Because the Guardianship ends at 18 years of age, at a time when many youngsters may be unable to wisely manage large sums of money, such as the \$400,000 pay out from the Servicemembers Group Life Insurance (SGLI), you should consider naming a Trustee in your Will to manage the money until the child is 21, 25, or older. A trust avoids the former spouse problem. The Trustee, under close court supervision, will manage the trust funds following the directions you include in the trust clause in your Last Will and Testament. Although the Trustee's primary purpose is to safeguard the inheritance, the Trustee has the discretion to use the money for the beneficiary's health, education, welfare, or maintenance.

Your Legal Assistance Attorney can assist you in “pooling” or arranging for your life insurance proceeds (SGLI) to be placed in a common trust fund with your assets passing under the Will. The common trust fund can remain in a single trust until: a) all of the beneficiaries reach the “Age of Distribution” you set (e.g. 21, 25, or 30 years); or b) each beneficiary can receive his/her share when that beneficiary reaches the “Age of Distribution.” Also, you may create a trust that “sprinkles” the common trust fund among more than one minor beneficiaries. This gives the Trustee the discretion to payout trust funds to each beneficiary as each has a need; the same as you would do if you were alive. In this way, not all beneficiaries will receive equal amounts. Such an arrangement is useful where some beneficiaries (e.g. disabled child) will likely need more financial assistance over a longer period than other beneficiaries.

However, there are disadvantages. A Trust is more expensive to administer than a Guardianship. For example, after your death the Trust becomes a “tax paying entity” and the Trustee will have to file a income tax return for each year the trust is in existence. Usually, there are periodic court documents which must be filed. Extreme care must be exercised in selecting a Trustee, who will have broad powers to spend the money for your children. An unsophisticated Trustee can easily dissipate the Trust funds through poor investment choices.

In a nutshell, a Trust may be more appropriate than a Guardian if you are dealing with large amounts of money (SGLI \$400,000) and want the Trustee to be able to spend more money on one child than another. Also, the trust can extend past age 18.

#### Uniform Transfers to Minors Act

For some people, a Trust might not be necessary because of the Uniform Gifts to Minors Act (UGMA) or the Uniform Transfers to Minors Act (UTMA). These statutes permit gifts to beneficiaries under 18, or in some states age 21, to be controlled by a “Custodian,” without putting an express trust in your Will. This is ordinarily less complicated and less expensive than a Trust. Unless you have children from a prior marriage, disabled children, or a very large estate, you might prefer not to use a Trust.

However there are disadvantages. Not all states have such Acts and not all states permit such gifts to be made in a Will. There is no direct court oversight of the Custodian’s management of the account. There may be dollar limits in a few states. Usually, the money will be divided in as many equal shares as there are minor beneficiaries designated. There will be a separate account for each beneficiary. Each beneficiary will receive the remainder of his or her share as they turn 18 or 21, depending on state law.

The UGMA/UTMA was originally designed for, and works best for, gifts made during the life time of a parent to a child for the child’s ultimate benefit, while obtaining certain income tax advantages for the parent. The Act has a more limited value when used as a transfer vehicle in a Will.

Discuss these options with your Legal Assistance Attorney.