

ANATOMY OF A WILL (Simple)

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The Last Will and Testament is a highly formalized legal document which can be very difficult to understand. This difficulty in comprehension is greatly increased with the length and complexity of the will. This article is designed to assist those not familiar with estate planning to understand a fairly simple will.

Provided below is the text of a simple will that might be prepared for a military service member with a modest estate, not subject to Federal Estate tax. (In 2008, the Federal government will tax estates that exceed two million dollars. The threshold increases to 3.5 million in 2009. There is no Federal estate tax at all in 2010. In 2011, unless the current law is changed, the threshold will go back down to one million dollars.) In this sample will, the testator gives all of his probate assets (except for a specific bequest of firearms to a friend) to his wife, if she survives him and to his children if his wife dies before he does.

The text of the sample will is in black typeface; summary explanations and additional commentary is in red.

Estate planning articles like this one may be very useful in attaining a good general understanding of a topic. However, you should discuss your estate needs with an attorney to ensure that your estate planning documents are tailored to meet your individual needs.

MILITARY TESTAMENTARY PREAMBLE: This is a MILITARY TESTAMENTARY INSTRUMENT prepared pursuant to Title 10 United States Code, Section 1044d, and executed by a person authorized to receive legal assistance from the military services. Federal law exempts this document from any requirement of form, formality, or recording that is prescribed for testamentary instruments under the laws of a state, the District of Columbia, or a territory, commonwealth or possession of the United States. Federal law specifies that this document shall be given the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the jurisdiction in which it is presented for probate. It shall remain valid unless and until the Testator revokes it.

Comment: This preamble appears on wills prepared by military legal assistance offices for persons eligible to receive military legal assistance services. Federal law provides a special protection for such wills, exempting them from any special form or format requirements of each jurisdiction.

LAST WILL AND TESTAMENT

OF

JOHN ADAMS

I, JOHN ADAMS, a resident of the State of North Carolina, make, publish and declare this to be my Last Will and Testament, revoking all wills and codicils at any time heretofore made by me. I am in the military service of the United States, currently stationed at CAMP LEJEUNE, NORTH CAROLINA.

FIRST: I direct that the expenses of my last illness and funeral, the expenses of the administration of my estate, and all estate, inheritance and similar taxes payable with respect to property included in my estate, whether or not passing under this will, and any interest or penalties thereon, shall be paid out of my residuary estate, without apportionment and with no right of reimbursement from any recipient of any such property (including reimbursement under Section 2207B of the Internal Revenue Code).

Summary: Pay the bills of my estate. No beneficiary has any claim against my estate for reimbursement if paying these bills and expenses results in the elimination or lessening of his/her gift.

Comment: The personal representative, gender neutral term for executor / executrix, is responsible for paying the debts of the estate out of the estate assets of the deceased. If the estate assets are insufficient to pay these debts, they simply don't get paid. Also, the estate creditor need not be paid unless he files a claim against the estate in the manner and within the time frame prescribed by law. Unfortunately, estate creditors sometimes attempt to mislead personal representatives and family members of the deceased into paying estate debts from their personal funds. Contact your military legal assistance officer or civilian attorney if you think that an estate creditor is trying to mislead you into paying estate bills with your personal funds.

SECOND: It is my desire that, upon my death, I be buried with full military honors at Arlington National Veteran's Cemetery.

Comment: You may, but are not required to, provide instructions as to how you wish to be buried. In this example, the testator identifies a desire to be buried with military honors at Arlington National Cemetery. In order for such burial to occur, the testator would also have to qualify under Arlington's regulations.

THIRD: I give all firearms I own at the time of my death to ANDREW JACKSON.

All other tangible personal property is given as hereafter provided with respect to my residuary estate.

Comment: This is a specific bequest of a tangible object, firearms owned at the time of death. If the beneficiary of this specific bequest dies before the maker of this will, then the firearms are distributed as per the instructions in the residuary clause at paragraph FOURTH.

FOURTH: I give all the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wherever located, that I own or to which I shall be in any manner entitled at the time of my death (collectively referred to as my "residuary estate"), as follows:

- (a) If my wife ABIGAIL ADAMS survives me, to my wife outright.
- (b) If my wife does not survive me, then to those of my children (JOHN QUINCEY ADAMS and any other children which I hereafter may have) who survive me and to the issue who survive me of those of my children who shall not survive me, per stirpes.
- (c) If my wife does not survive me and there shall be no issue of mine then living, my residuary estate shall be paid and distributed to JOHN HANCOCK if he shall survive me.
- (d) If none of the beneficiaries described above shall survive me, then I give my residuary estate to those who would take from me as if I were then to die without a will, unmarried and the absolute owner of my residuary estate, and a resident of the State of North Carolina.

Summary:

-Everything that I haven't previously identified in this will goes to my wife if she survives me. If she does not outlive me, then I give this property in equal shares to my living children.

-If my wife dies before I do and so does one of my children, then that deceased child's share shall be distributed amongst that child's living children (my grandchildren). [This is the meaning of the term "per stirpes"]

-If my wife dies before I do and I don't have any children or grandchildren, then my residuary estate goes to John Hancock if he survives me. If John Hancock does not survive me, then look to the law of North Carolina to see who is next in the statutory pecking that would be used if I died intestate, that is, without a will.

Comment:

-Life insurance proceeds, including SGLI proceeds, pass outside of the will. The proceeds will go to the beneficiary designated in SGLI beneficiary designation form. You can prepare a will with a life insurance trust, and then fill out the insurance beneficiary election form in such a way as to

pour the proceeds into the trust; however, the details are beyond the scope of this simple will explanation.

-Real estate that is jointly owned *with right of survivorship* passes to the surviving joint owner by operation of law, regardless of what the will says. For example, when a married couple purchases real estate, they will almost always own the property jointly, with right of survivorship. [The only way to tell for certain whether there is a right of survivorship is to review the deed.] When one spouse dies, the other spouse becomes the sole owner of such realty by operation of law. Thus, even if your will directs that your uncle receive all of your real estate, upon your death, your spouse will become the owner of realty jointly owned with her with right of survivorship.

FIFTH: If any property of my estate vests in absolute ownership in a minor or incompetent, my personal representative, at any time and without court authorization, may: distribute the whole or any part of such property to the beneficiary; or use the whole or any part for the health, education, maintenance and support of the beneficiary; or distribute the whole or any part to a guardian, committee or other legal representative of the beneficiary, or to a custodian for the beneficiary under any gifts to minors or transfers to minors act, or to the person or persons with whom the beneficiary resides. Evidence of any such distribution or the receipt therefor executed by the person to whom the distribution is made shall be a full discharge of my personal representative from any liability with respect thereto, even though my personal representative may be such person. If such beneficiary is a minor, my personal representative may defer the distribution of the whole or any part of such property until the beneficiary attains the age of eighteen (18) years, and may hold the same as a separate fund for the beneficiary with all of the powers described in Article SEVENTH hereof. If the beneficiary dies before attaining said age, any balance shall be paid and distributed to the estate of the beneficiary.

Summary: If a minor is going to take from this will, then my personal representative will hold or distribute that gift, in whole, or in part, to the minor as he sees fit, until the beneficiary reaches the age of 18. [This situation might arise, for example, if one or more children are minors at the time of the testator's death and the testator's spouse predeceases him.] Once the beneficiary reaches the age of 18, the beneficiary gets the remainder of his gift outright.

SIXTH: I appoint my wife ABIGAIL ADAMS to be my personal representative. If my wife does not survive me, or shall fail to qualify for any reason as my personal representative, or having qualified shall die, resign or cease to act for any reason as my personal representative, I appoint THOMAS JEFFERSON as my personal representative. I direct that no personal representative shall be required to file or furnish any bond, surety or other security in any jurisdiction.

Comment: Typically, the testator's spouse is identified as the personal representative. The personal representative is responsible for probating the will; that is, having the court declare it valid. The personal representative ensures that debts of the estate that must be paid are paid. The personal representative pays such debts out of estate assets, not his own funds. The personal representative ensures that necessary expenses of the estate are paid, that the property is inventoried, and that the property is distributed in accordance with the will.

Although not required, naming an alternate personal representative is beneficial, especially when the testator has minor children. The alternate takes on the duties of personal representative if the spouse cannot or does not wish to take on the responsibility. In this will, if the spouse dies before the testator, the alternate personal representative manages the estate gifts to minor children until those minor beneficiaries reach the age of 18.

SEVENTH: I grant to my personal representative all powers conferred upon personal representatives and executors wherever my personal representative may act. I also grant to my personal representative power to retain, sell at public or private sale, exchange, grant options on, invest and reinvest, and otherwise deal with any kind of property, real or personal, for cash or on credit; to borrow money and encumber or pledge any property to secure loans; to pay any legacy or distribute, divide or partition property in cash or in kind, or partly in kind, and to allocate different kinds of property, disproportionate amounts of property and undivided interests in property among any parts, funds or shares; to determine the fair valuation of property, with or without regard to tax basis; to exercise all powers of an absolute owner of property; to compromise and release claims with or without consideration; and to employ attorneys, accountants and other persons for services or advice. The term "personal representative" wherever used herein shall mean the personal representatives, executors, executor, executrix or administrator in office from time to time.

Summary: I give my personal representative very broad authority over my property to help him carry out my instructions.

Comment: Providing such broad authority makes it easier for the personal representative to administer the estate and lessens the likelihood that the personal representative will have to go back to the court to act for permission to take certain actions with respect to your property. For example, instead of specifying which beneficiaries receive the antique chairs, the garden tools, and the automobiles, the personal representative has the authority to sell those items and give cash to the beneficiaries instead.

EIGHTH: I direct that for purposes of this will a beneficiary shall be deemed to predecease me unless such beneficiary survives me by more than thirty days. The terms "child," "children" and "issue" as used in this will include children and issue hereafter born.

Beneficiaries have to outlive me by at least thirty days in order to get anything out of this will.

Comment: The testator and a named beneficiary might die within days, hours, minutes, or even seconds of each other; for example, if they were involved in the same airline crash. In such cases, the 30 day clause is especially helpful. The distribution of the estate should not depend on a medical examiner's determination of who died before whom, especially if the determination is practically impossible to make, as in the air disaster scenario. Better to give the property to the alternate beneficiary.

NINTH: If my wife ABIGAIL ADAMS shall not survive me or is adjudged to be incapacitated, I appoint DOLLY MADISON and JAMES MADISON, or the survivor of them, to be the co-guardians of the person and property of any children of mine who have not attained the age of majority. If both DOLLY MADISON and JAMES MADISON shall fail or cease to act as guardian, I appoint JAMES MONROE as guardians. No guardian shall be required to file or furnish any bond, surety or other security in any jurisdiction.

Summary: If my wife dies before I do or is incapacitated at the time of my death, then I want Dolly Madison and James Madison to take care of my minor children. If either of them dies before me, than I want the other as the sole guardian. If both Dolly and James Madison dies before I do, then I want James Monroe to serve as guardian.

Comment:

-The guardian in this typical example does not serve unless the testator's spouse is incapacitated or dies before the testator. Thus, it makes no sense for this testator to name his spouse as guardian.

-The choice of guardian is not binding on the court, although it may be very persuasive, especially if both spouses name the same guardians in their respective wills.

-Your will can not force someone to be a guardian if they don't want to do it.

-In this case, the testator has chosen two people to act as co-guardians, which may make it easier for them to handle the responsibility. This arrangement is most appropriate when the co-guardians have a stable, married relationship and the testator has great confidence in the judgment and abilities of both. The testator in this example has also chosen an alternate guardian to serve in the event that both co-guardians cannot.

TENTH: I have served in the Armed Forces of the United States. I therefore request that my personal representative make appropriate inquiries to ascertain whether there are any benefits to which I, my dependents or my heirs may be entitled by virtue of any military affiliation. I specifically request that my personal representative consult with a retired affairs officer at the nearest military installation, the Department of Veterans Affairs, and the Social Security Administration.

Summary: My personal representative should check with the Veteran's Administration and the Social Security Administration to determine if my estate or my survivors get any benefits as a result of my military service.

Comment: In cases where the testator dies while on active duty, the deceased's military unit will also assign a casualty assistance officer who can help with these matters.

IN WITNESS WHEREOF, I, JOHN ADAMS, sign my name and publish and declare this instrument as my last will and testament this ____ day of _____, 2008.

JOHN ADAMS

The foregoing instrument was signed, published and declared by JOHN ADAMS, the above-named Testator, to be his last will and testament in our presence, all being present at the same time, and we, at his request and in his presence and in the presence of each other, have subscribed our names as witnesses on the date above written.

having an address at

having an address at

MILITARY TESTAMENTARY INSTRUMENT SELF-PROVING AFFIDAVIT

WITH THE UNITED STATES ARMED FORCES
AT CAMP LEJEUNE, NORTH CAROLINA

We, the Testator and the witnesses, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that in the presence of the military legal counsel and the witnesses the Testator, JOHN ADAMS, signed and executed the instrument as his military testamentary instrument, that he had signed willingly, and that he executed it as his free and voluntary act and deed for the purposes therein expressed. It is further declared that each of the witnesses, at the request of the Testator, in the presence and hearing of the Testator, the military legal assistance counsel and each other, signed the military testamentary instrument as witness, and that to the best of his or her knowledge the Testator was at the time at least eighteen years of age or emancipated, of sound mind, and under no constraint, duress, fraud or undue influence.

JOHN ADAMS
Testator

print:
Witness

print:
Witness

Subscribed, sworn to and acknowledged before me by the said JOHN ADAMS, Testator, and subscribed and sworn to before me by the above-named witnesses, this ____ day of _____, 2008.

Notary Public
My commission expires on

Comment: The testator and then two witnesses sign the will. Then, in the self proving section of the will, the testator and the witnesses will sign again. The self proving affidavit is not required for the creation of a valid will; nonetheless, it is a useful document. In executing the self proving affidavit, the testator and witnesses swear, in the presence of a notary public, that the will was signed by the appropriate people in the appropriate manner. The self proving affidavit may assist the estate to defeat a challenge by a disgruntled relative (or anyone else) that the will is not valid due to some defect in its execution.