

YOU AND YOUR WILL

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Why Make a Will?

If you die without making a Will you are said to die intestate. As you will not have nominated an executor to wind up your estate, it will be necessary to ask the Master of the High Court to appoint an executor. After considering the views of the surviving spouse, the heirs and other interested persons, the Master will appoint a person to be the executor of the estate. The Master may convene a formal meeting for the purpose of receiving recommendations before making his appointment.

The delay can be, and often is, prejudicial. Until an executor is appointed there will be no one who can operate on your bank accounts.

In the absence of a Will your estate will be disposed of in accordance with the law governing intestate succession. If a person dies intestate leaving a surviving spouse and children, the surviving spouse takes whichever is the greater of a child's share or an amount fixed from time to time by the Minister of Justice, currently R125 000,00. The surviving spouse counts as a child for the purpose of determining a "child's share". Thus if the estate is valued at R500 000,00 and there are four children, the surviving spouse will receive R125 000,00 as a child's share amounts to only R100 000,00. The balance of R375 000,00 will be divided equally between the children.

Wishes you may have expressed during your lifetime concerning the disposition of your assets are of no force or effect unless they are recorded in a Will.

Drafting a Will

Subject to various limitations which are touched upon below, you may dispose of your property in a Will in any manner you please. The validity of Wills is not infrequently challenged by disappointed relatives. In order to be valid the Will must comply with the formalities laid down in the Wills Act, 1953. Many Wills have been set aside as being invalid because they were not properly signed or witnessed.

A Will must be signed in the presence of two witnesses present at the same time. The witnesses and their spouses are disqualified from taking any benefit from the Will. If the person nominated in the Will to be the executor signs as a witness or if his or her spouse signs as a witness, the nomination is rendered invalid.

The Courts will refuse to give effect to the terms of a Will which are too vague or uncertain in their meaning to be enforced. A Judge described one such Will as being another unsatisfactory instance "in which the Court was called upon to say what the testator meant when it was perfectly clear that he did not know what he meant himself".

If you leave your estate to your children in equal shares they will be required to

collate unless you indicate a contrary intention. In other words, your children will be obliged to bring into account for the purpose of achieving an equal division, gifts which they have received from you during your lifetime. A wedding present which you gave to your daughter may have the effect of reducing her share of your estate unless you specify that your children are not required to collate.

If you leave your house to your wife subject to the direction that it is to go to your son on her death, your wife acquires only a life interest in the ownership of the property. This will make it difficult, if not impossible, to raise a loan on the security of a mortgage bond registered over the property. If, on the other hand, you left the property to your son with a life usufruct in favour of your wife, the property could be mortgaged by your son.

In drafting your Will it is important that you should make your intentions clear. You will not be there to explain what you meant when the Will comes to be interpreted. In *Katz v Gordon 1958 (4) SA 213 (W)* the testator bequeathed "all of the assets" of his business to a legatee. The business had substantial assets and substantial liabilities. The testator may have intended to bequeath the business with its assets and liabilities. If this is so he failed to record his real intention. The Court decided that the effect of the language which the testator had used was to give to the legatee the gross assets and to burden the heirs with the liabilities of the business. It not infrequently happens that people bequeath a house, which is subject to a mortgage, to a legatee without realising that in the absence of any indication in the Will to the contrary the legatee can insist upon being given transfer of the property free of the mortgage debt.

If the meaning of the language used in your Will is clear the Courts are obliged to give effect to what you have written. A Judge may not speculate as to the nature of your real intentions.

Your Will should be drafted by an attorney. If it has not been drafted by an attorney you should have it checked by an attorney with a view to ensuring that the legal formalities have been complied with and that the Will is drafted in terms which correctly record your intentions.

The Appointment of an Executor

You may appoint one executor or you may appoint a number of executors. The executor is responsible for winding up your estate in accordance with the directions contained in your Will. The executor is subject to supervision by the Master of the High Court with whom he is obliged to file an account.

The fact that a person has attended to the preparation of your annual income tax return is not in itself a good reason for appointing that person as the executor of your estate. The preparation of an income tax return constitutes only a small part of the executor's responsibilities.

If the person whom you select for appointment as executor has no knowledge of the law relating to the administration of deceased estates, it will be necessary for that person to entrust the detailed work involved in winding up your estate to a qualified person.

Banks and trust companies will accept appointment as executor but some of them, although nominated in a Will, will decline appointment if the fee to which they will become entitled upon the winding up of your estate falls below what they consider to be an economic minimum.

In the event that the value of the estate does not exceed an amount which is determined from time to time by the Minister of Justice in the Government Gazette, the Master of the High Court can dispense with the appointment of an executor and give directions to heirs as to the manner in which any estate will be liquidated and distributed. This is an informal means of winding-up an estate. The current value as stipulated must not exceed R125 000,00.

Testamentary Trusts

You may use your Will to establish a trust which will come into operation on your death by appointing a trustee to take charge of and administer your estate, or a part of it, for the benefit of others. Trusts are often established in the following circumstances:

- (a) The testator wishes to have investments competently managed for the benefit of minor children or of a child who is mentally incapacitated.
- (b) The testator's wife is inexperienced in business matters making it undesirable that the management and investment of the estate should be placed in her hands.
- (c) The creation of a trust is likely to bring about estate duty or income tax savings.
- (d) The need to provide continuing financial support for an aged relative or former employee.
- (e) The need to maintain intact the voting powers conferred by a controlling shareholding in a company.

In some circumstances it may be preferable to create a usufruct instead of a trust. A usufruct arises when the ownership of property is given to one person subject to the right of another person to use that property for a defined period. For example, a testator might leave her farm to her son subject to a life usufruct in favour of her husband.

Estate Duty

Estate duty is levied in terms of the Estate Duty Act, 1955 at the rate of 20% on the amount by which the net value of your estate exceeds the sum of R3 500 000,00. The net value of your estate will be determined after subtracting from the gross value your liabilities and various deductions. The most important of these deductions is the deduction granted in respect of bequests to your husband or wife.

If, for example, the value of your estate, after discharging all liabilities, is R4 400 000,00, there will be no liability for estate duty if you bequeathed not less than R900 000,00 to your spouse:

Value of estate		4 400 000,00
Less abatement	3 500 000,00	
Less bequest to spouse	900 000,00	4 400 000,00
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Dutiable value		Nil
		<hr/>

If you bequeathed the whole of your estate to your children the duty would amount to R180 000,00.

Value of estate	4 400 000,00
Less abatement	3 500 000,00
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	R900 000,00
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Estate duty on R900 000,00 calculated at the rate of 20%, ie R180 000,00.

Insurance Policies

You may nominate someone to be the beneficiary of your insurance policies by giving the appropriate notice to your insurance company. If you do this the proceeds of the policy will be paid directly to your nominee. The amount paid will, however, be brought to account in your estate for the purposes of assessing estate duty. If you have nominated your spouse to be the beneficiary the amount paid to her by the insurance company will be included as deemed property in your estate but the full amount will then qualify for the deduction applicable to a bequest made to a surviving spouse, with the result that no estate duty will be payable on the proceeds of the policy.

If you have nominated someone to be the beneficiary of one of your policies you should not bequeath that policy in your Will without cancelling the nomination.

Capital Gains Tax

On your death capital gains tax will be assessed as if you had disposed of the assets in your estate at their market value on the date of your death, subject to a number of exclusions. The most notable of these exclusions are:

- The first R1 500 000,00 of gain or loss in respect of a primary residence. This is defined as a residence where a deceased ordinarily resides as his or her main residence and is used for private or residential purposes.
- The first R50 000,00 of any other capital gains;
- Bequests to a surviving spouse;
- Bequests to approved public benefit organisations;
- Qualifying long-term insurance policies.

25% of the capital gain will be added to the taxable income earned by you up to the date of your death for the purpose of assessing the income tax which will be charged against your estate.

Updating a Will

Your Will should be reviewed at regular intervals with a view to updating it. If changes are needed you have the alternative of either making a new Will or executing a Codicil to your existing Will.

It is not only changes in family or financial circumstances which make it necessary to amend a Will. Changes in the law, especially tax laws, may make it desirable to amend a Will. A tax efficient scheme for the disposal of an estate devised some years ago may no longer be effective as a result of subsequent amendments to the Income Tax Act or Estate Duty Act.

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