



Last Will and Testament

Financial Planning Academy

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Insurance

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Introduction



“Everyone has a Will. You either draft one yourself or the state will draft one for you using the rules of intestate succession” ...Shapiro

Necessity of a will



- ⑤ A will can be defined as a legal document that records the free and independent wishes of the testator in respect of the distribution of the assets in his estate.
- ⑤ It follows that a stipulation made by the testator under duress or improper influence will be invalid.
- ⑤ **A will may be typed or hand written.**

Claims against deceased Estate



- South African law accepts the principle that a testator can bequeath his/her assets to whomever he or she pleases.
- Exceptions to this rule include:
 - ❑ Minor children have a right to maintenance and education.
 - ❑ The surviving spouse has a claim for reasonable maintenance until death or re-marriage.
 - ❑ If married out of community of property with accrual, there may be an accrual claim.
 - ❑ Trustees of a pension fund have the authority to decide which of the testator's dependants are to receive benefits. This super cedes any beneficiary nomination.

Invalid Will



- If a person dies without a will, whether invalid or outdated, the following problems may arise:
- An executor has to be appointed - a costly and time-consuming process.
- Intestate succession can be impractical and takes place according to a fixed pattern.
- Wishes expressed during lifetime cannot be executed.
- Inconvenience and unpleasant situations regarding heirs could arise.
- Assets cannot be distributed until all the rules regarding intestate succession have been adhered to.
- The wrong people may inherit.

When does a will come into force?



- ⊙ A Will only comes into force on the death of the testator and;
- ⊙ **When the Master of the High Court thereof has accepted the validity.**



Legal Capacity of Testator



- To be able to make a valid will, the testator must
 - Be 16 years or older
 - Be of sound mind at the time of signing the will
 - Not act under duress or improper influence
 - See to it that the will is duly signed

Legal Capacity of the Witnesses



- ❑ Two witnesses must sign the last page of the will.
- ❑ A person must be 14 years of age or older and competent to give evidence in a court before he may sign a will as a witness.
- ❑ A witness does not acknowledge the accuracy of the contents of the Will. He only attests that the testator signed the Will of his own free accord.

Heirs

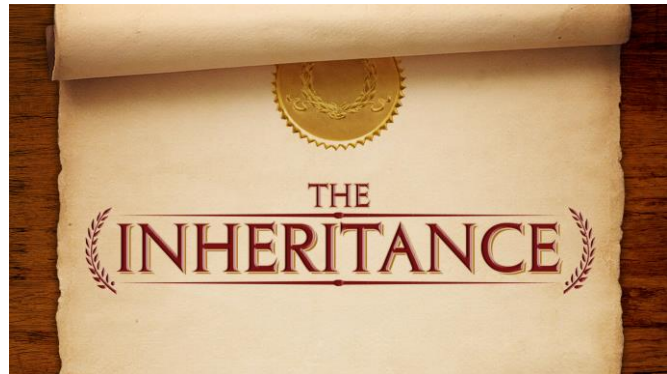


- ⑤ No formal requirements are set with regard to who qualifies as heir.
- ⑤ References to "a child" includes adopted children
- ⑤ Children born from more than one marriage - it is important to indicate when referring to "our children" whether children from a previous marriage of the testator or testatrix are included.
- ⑤ The fact that a person had been born out of wedlock is not taken into consideration in the determination of his relationship to the testator or to that of another person for the purposes of the will.

Inheritance



- ⊗ An inheritance is that part of a testator's estate, which his heirs receive after all estate costs; debts, all pre-legacies and legacies have been paid.
- ⊗ Inheritance may be protected from marriages and spouses creditors in the Will of the testator.



Draft wording: Inheritance



Draft wording that can be used to protect an heir's inheritance:

- I direct that the inheritance devolving upon any beneficiary under this will or a later codicil,
- as well as the proceeds,
- the reinvestment of such proceeds and
- the income thereon
- shall be free from the legal effects, including any accrual system,
- of any present or future marriage of such beneficiary and
- shall also be protected against the creditors of their spouses.”

Consequences of Inheritance



- An heir that receives the inheritance prior to marriage, upon marriage:
 - ❑ If in community of property – the inheritance is protected from the community of property and from the spouse’s creditors.
 - ❑ If out of community of property without accrual - the inheritance is protected from the marriage and the spouse’s creditors.
 - ❑ If out of community of property with accrual – the ante nuptial contract must specify that the inherited asset is excluded from the marriage. If this is not done, the asset will form part of the accrual.
 - ❑ An heir that receives the inheritance whilst married: the inherited asset falls outside the marriage.

Necessity of a Testamentary Trust



- If minors without a guardian are the beneficiaries in a will,
- and a testamentary trust is not created for them,
- any money that they inherit will be paid into the guardian fund
- until they reach the age of majority.



Guardians



- Any person over the age of 18 may be nominated as a guardian of minor children in a will. Such a nomination must, however, be ratified by the Master.
- The Master also has the power to invalidate such appointment if the guardian does not care for the children properly.
- The testator must sign each page of the will.



Signature



- ⊗ **Ordinary cases**
- ⊗ Witnesses have to sign only the last page. Witnesses may also sign by initialling (but not by making a mark)
- ⊗ The testator and the witnesses must validate every codicil or amendment of the will by signing in one another's presence.
- ⊗ If amendments are made later, the witnesses do not have to be the same as the original witnesses.
- ⊗ The place and date of signing must be indicated on the last page, as well as at every codicil.
- ⊗ A person who attests and signs someone's will as a witness is disqualified from receiving any benefit in terms of that will.
- ⊗ Being appointed as an executor, a trustee or a guardian is also deemed to be a benefit.
- ⊗ A person who signs a will as a witness and who is appointed as executor, trustee or guardian in terms of that will shall then forfeit those benefits.



Signature

⊗ **Exceptional Cases**

- ⊗ To accommodate persons who cannot write, the Act prescribes that the testator may sign the will by way of a mark or may request someone to sign on his behalf and in his presence.
- ⊗ The signing must take place in the presence of a Commissioner of Oaths who must certify that he has been satisfied as to the identity of the testator and that the signed will is in fact the will of the testator.
- ⊗ The certificate may be attached to any page, but the Commissioner of Oaths must sign each page.

Divorce



At divorce it is important that the parties review their Wills.

The law indicates that if a person dies within three months of date of divorce, the deceased's Will shall be interpreted as though the former spouse died at date of divorce.

Exception: The above rule falls away if the deceased made it clear in his Will that his ex-spouse must inherit

If the testator dies after three months of date of divorce and had not amended his Will, the ex-spouse will inherit according to the specifications of the Will.

Joint will



" Can my wife and I draft a joint Will?
Is it legal ? "

- Two or more persons can make a joint will and they do not need to be married.
- For the purposes of interpretation, the wills are treated as individual wills.

The executor and/or trustee



- The testator may nominate a person or institution (e.g. a trust company, bank, lawyer, etc.) as an executor and/or trustee in his will.
- The Master of the High Court must approve of such a person and must approve his appointment.
- The executor may charge a maximum fee of 3.99% including VAT [3.5% plus 14% VAT].
- If the surviving spouse is nominated as executor and does not have sufficient knowledge to administer the estate personally, he/she may appoint a trust company, bank, lawyer or accountant, as proxy to administer the estate on his/her behalf.



You as intermediary will often be expected to advise the client with regard to the question:

“Whom should I nominate as executor?”

Nominating an Executor



- ⊗ The executor administers the estate in accordance with the stipulations of the will
- ⊗ In executing his duty, he must look after the best interests of the heirs.
- ⊗ The choice of a person to fulfil this role should not be taken lightly.
- ⊗ The first choice is often to nominate the spouse as executor in the will. Is this the best choice?
- ⊗ The Master of the High Court will appoint the spouse as executor, but the spouse may not have the ability to administer the estate and an agent will have to be appointed to do so on behalf of the spouse.

Nominating an Executor



- ⊗ Potential Problems:
- ⊗ The death of a loved one is an emotional event and not everyone is able to make important financial decisions (e.g. who should act as agent) when he/she is grieving.
- ⊗ Without the necessary knowledge the spouse may not know where to obtain the best service or advice. The spouse may be exposed to someone who is acting in his own interest, in which case the “cheque book” of the estate could fall into the wrong hands, without the heirs having any security.
- ⊗ The duties of the executor sometimes entails the administration of a trust over a much longer term.
- ⊗ The spouse might die at the same time or shortly after the first deceased and this would result in a delay in the administration process and the winding up of the estate. This argument applies to any natural person nominated as executor, e.g. a lawyer, auditor or other relative
- ⊗ Given the above, the intermediary has an important role to play in advising his client with regard to making this choice.

Sanlam Trust as Executor



- Sanlam Trust has the benefit of a reliable trust company's knowledge of wills, estates, trusts and related matters. As a result of this specialisation the service is highly professional, the conduct objective and confidential; and the task is completed quickly and efficiently –
- Specialist knowledge in other fields can be obtained easily.
- Sanlam Trust's sophisticated computer system ensures the intermediary and his client of the very best service and the benefit of the latest technology.
- Sanlam Trust offers continuity. Unlike in the case of a spouse, brother, lawyer or auditor that has been nominated as executor, the leave/death of an official will not result in a delay in the winding up of the estate.
- Sanlam Trust has a head office for any possible complaints.

Sanlam Trust as Executor



- Do not underestimate this advantage.
- Along with this, the internal monitoring and control offer the client extra security. Good service to the client is thus guaranteed.
- Research is conducted on an on-going basis in order to keep the staff of Sanlam Trust abreast of the latest developments in their field that could, for example, necessitate amending a will or calculating estate duty.
- The interests of the intermediary are protected and he is able to -
 - ❑ enhance his professional image;
 - ❑ expand his practice;
- Retain his client base, and, best of all
- Earn some commission in the field

Other Legalities



Courts amending of Wills

- ⊗ Courts may change or vary a will if a situation arises. This is done to give effect to a testator's wishes that would otherwise not be able to be fulfilled.

Videos

- ⊗ A video cannot be accepted as a valid Will as it does not comply with the Act by implication. The required signatures are omitted.

Electronic Wills

- ⊗ The Will cannot be accepted as valid without a court application.

Living will

- ⊗ A person may wish not to be kept alive by artificial means if the situation arises. He would state this intention in a living will.

Revocation of Wills



- It is important that the testator, when making a new Will, should revoke all previous Wills, codicils, or any other document of a testamentary nature that he may previously have made individually or jointly with someone else, if it is his intention that they should be revoked.
- If he fails to do this, the provisions of such previous documents remain in force, and they will be read together with the new Will.
- If there are contradictory provisions in an old and a new Will, the provisions of the latter will apply.
- If a new Will omits reference to assets bequeathed in an older Will, the stipulation in the old Will, as it concerns those assets, can still be valid.
- The testator can also of course destroy a previous Will, which will then not exist at his death.

Revocation of Wills



Draft wording

"I hereby revoke all previous Wills, codicils and testamentary writings and declare this to be my last Will and testament."

Note: At Sanlam Trust, the revocation clause is incorporated in the preamble.



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