



Understanding the importance of a Will



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Over 70% of working South Africans do not have a will. Dying without a will, adds economic pressure and emotional stress as your family deals with your passing. This brochure provides guidelines regarding wills and the administration of deceased estates. This brochure does not supersede any applicable laws and should not be used as a legal reference.



Definitions

Will

A legal document in which you indicate what will happen to your assets when you die. A will contains your instructions as to how your estate should be distributed and who must benefit from it after your death. A will is also known as a testament.

Asset

Something you own. This may include items such as your house and its contents, cars, shares, investments, retirement benefits, cash, etc.

Beneficiaries

Wills, trusts and insurance policies commonly have someone who will benefit upon your death, during the subsistence or at termination of a trust, or when a policy matures. This person, or organisation, who stands to inherit money or other assets is referred to as a beneficiary.

Bequest

A bequest is when you leave items such as a house, jewellery or money to an heir or legatee, e.g. "I bequeath my house in Durban to my spouse".

Capital gains tax

CGT is part of income tax. It is triggered when you make a profit from selling something you own (an asset).

Estate

Everything you own; all your assets (movable property and immovable property) as well as your liabilities (debts).

Estate duty

A tax payable to the estate before it is distributed amongst the beneficiaries. The assessed tax liability is derived from the value of the estate and only applies to estates valued above R3,5 million.

Executor

A person nominated by the testator (you) and appointed by the Master of the High Court to carry out the testator's wishes, after his/her death.

Fiduciary

A person or organisation that manages assets on behalf of another person or persons in good faith and trust. A fiduciary can be a trustee, an executor, or even a legatee in circumstances where a will bequeaths an asset to a legatee on condition that it must go to another person on the legatee's death.

Heir/legatee

Heirs and legatees are people who inherit from deceased persons. The difference between the two is that an heir can inherit from a person who died with or without a will (testate or intestate), while a legatee can only inherit in terms of a valid will. This means that blood relatives, your spouse and adopted children are heirs should you die intestate, but for your domestic worker to inherit a sum of money from you she would have to be specifically mentioned in your will.

Inheritance

A benefit inherited from the estate of a deceased person under a will or under intestate succession. For example, the neighbour's son inherited one third of the residue of his father's estate.

Intestate

When you die without leaving a valid will, you die "intestate".

Legacy

A specific asset which is bequeathed in a will to a specific person.

Liabilities

These are items such as outstanding debts, funeral costs, estate duty, etc.

Residue

What is left of the estate after all debts, costs and taxes have been paid and all legacies have been transferred or paid out to the legatees.

Testate

If a person has a valid will at the time of death, he/she dies "testate".

Testator

The person who makes a will or testament.

Trust

A trust is an arrangement by which control and/or ownership of property are transferred to trustees to hold and apply the property for the benefit of beneficiaries. A testamentary trust can be set up in a will to hold property for minor children until they reach the age of majority (or longer). A trust set up while the testator is alive (a so-called inter vivos or family trust) can also be an heir or legatee in the will to receive and hold the legacy or inheritance for the benefit of the trust beneficiaries.

Trustee

A person or entity, such as an attorney, a bank, trust company or fiduciary professional (FPSA®), who controls the trust and is responsible for managing the trust assets for the benefit of the beneficiaries until they are distributed to the beneficiaries.



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Having a will gives you the comfort of knowing that the rewards of your life's work will be distributed and managed according to your wishes. Not only can a will legally protect your spouse, children, and assets, it can also spell out exactly how you would like things handled after you have passed on.



1. What is a will?

A will is a formal and signed document where you set out how you want your estate distributed after you pass on. Dying without a will means that your estate will not be distributed according to your bequest (instructions), but according to the rules of intestate succession.



2. Why should I have a will?

A will makes life easier for those you leave behind after you die. It is a legal document that contains information about your finances and assets (house, furniture or jewellery, etc.) and how this will be shared amongst your beneficiaries. If you have minor children, you can name the guardian you have chosen to look after them in the event of your death. A will may also contain information on an executor for your estate. If you have not nominated an executor, the Master of the High Court must appoint one after consultation with the heirs.



3. Why don't I have a will yet?

“My house is small and not valuable enough.”

A will is not only for wealthy people or those with big houses. A will makes life easier for the people you leave behind.

“I am married in community of property and I have never worked!”

Spouses who are married in community of property share equally in the joint estate, i.e. each spouse owns a half share of the joint estate. You need to have a will in order to specifically mention who will benefit from your half share when you die.

“I am still young, there is enough time to draw up a will.”

If you own assets like a car or furniture and are over 16 years old, you cannot be too young to have a will. Even young and single people should have a will to ensure that their wishes are honoured with regard to how they want their assets shared after they die.

“My sister/brother will take care of my children if I pass away.”

In more traditional and cultural homes, there is an unspoken understanding that if you die and your children or dependants are still young, your family will look after them and you do not need to have this information in your will. The better decision would be to discuss the care of your children with your family beforehand and to appoint guardians in your will.

“My family will sort things out between themselves.”

Fact is, they cannot do so. The law (Intestate Succession Act, 1987) determines who will inherit from your estate. Leaving it to your loved ones to sort out your affairs is not only a recipe for family trouble, it is also an unfair burden to place on them. If you decide what is to happen to your property, assets (clothes, jewellery, furniture), cash or debts you will make their lives so much easier while they are in mourning. In your will you can nominate an executor to take charge of your affairs after your death.

“I am embarrassed to draw up a will because I do not know how.”

There are professional people like trust companies, banks, financial services providers (FSPs), fiduciary practitioners (FPSA®) or attorneys who can assist you.

“It costs money to have a will drawn up.”

A will is an important document and should be drawn up by a professional. Some FSPs offer free will-drafting services and will also keep a copy of your will for free. Attorneys may charge a fee but, as a courtesy, may offer to store your will for free. Your bank may charge a minimal fee for the service. Speak to one of the parties mentioned above.

“I will draw up a will next week.”

Do it as soon as possible. Postponing will almost certainly make you forget about it.

“It’s bad luck!”

Many feel that if you write a will, you are inviting bad luck into your home and because of this you will die sooner. Very few people know when they will die. It is better to be prepared.

“I owe more than I own.”

Your remaining debt will eat into the value of your estate. Unless there is enough cash in your estate to pay off the debt or enough assets that can be sold to cover your debts, your creditors can claim outstanding debt from your spouse only if you are married in community of property.

“I have a life insurance policy that will cover all my debt and the rest will go to my family when I die.”

Life insurance is a good source of support for your loved ones when you die. It can cover education expenses and provide the funds to pay off taxes on your deceased estate, or to pay for ordinary household expenses, and sometimes to fund retirement plans. If you expect there to be enough cash in your estate to pay debts, taxes and cost a beneficiary may be nominated to receive the proceeds of a life insurance policy. The proceeds will then be paid directly to the beneficiary. The executor will not deal with the policy and will not be entitled to executor’s fees on the policy pay-out.





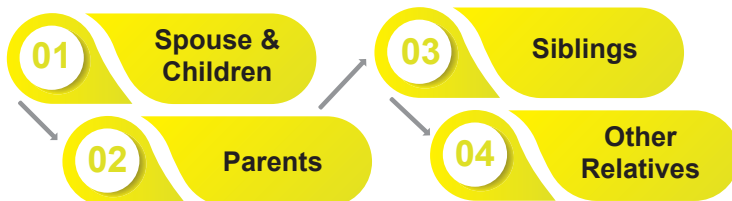
4. What will happen if I die without a will?

If you die without a will you lose the opportunity to decide who benefits from your estate. Instead, the law of intestate succession governs how your estate is divided. The Master of the High Court appoints an executor to administer your estate and may have to appoint a curator or tutor to look after the rights of your minor children and/or mentally challenged or disabled beneficiaries.

The Intestate Succession Act, (Act 81 of 1987) sets out a formula on how your estate is divided. As per the Act, the executor appointed by the Master of the High Court has to divide your estate among your spouse and children (including adopted children), or other blood relatives if you do not have a spouse and children. Any inheritance due to your children will be deposited into the Guardians Fund which is then managed by someone you do not know and who may not have your children's best interests at heart.

The Act makes provision for the division of your estate in a specific order. For example:

- If you are survived by a spouse alone, they inherit your entire estate. A spouse is anyone who is married under the Marriage Act, the Civil Union Act, the recognition of Customary Marriages Act, or a religious ceremony.
- If there are a spouse and children, they share the estate. The spouse receives either a share equal to a child's or R250 000, whichever is greater. Children then share the rest of the estate equally.
- If there is no spouse, any surviving child or children inherit the estate.
- If you do not have a spouse or children, your parents share your estate equally. If your parent(s) died before you, your siblings inherit the portion that the deceased parent would have inherited.
- Without immediate relatives, your estate is divided among the remaining closest relatives.
- Unmarried couples who live together, even if they are in a committed long-term relationship, do not enjoy the same protection. If you die without a will, your partner is not able to inherit from your estate under intestate law.





5. Can my brother or trusted friend be the executor of my estate?

Before deciding on who to choose as your executor be sure that they have the necessary skills and time to handle the responsibility. Executors need to gather your possessions and distribute them according to your will or the rules of intestate succession mentioned above.

South African law sets very few restrictions on who can be an executor, but ideally the nominated person should have an understanding of the law, knowledge of the tax system and the ability to work with beneficiaries, creditors and pension funds, etc.

So, you can indeed choose a trusted friend or a brother to be the executor of your estate. However, the Master of the High Court may require that a nominated executor who does not have the necessary qualifications must be assisted by a professional agent such as an attorney, auditor, advocate, FPSA®, or a trust company during the administration process. When this happens, the executor you nominated in your will may have to employ such an agent to administer the estate.

The nominated executor is still responsible for the finalisation of the estate but the day-to-day administration will be seen to by the agent the executor appointed.

If you nominate a person without special qualifications but who is a trusted person with integrity, you yourself can in your will also appoint a professional as a co-executor to help administer the estate. In this way you have the peace of mind that one of the executors is someone you know and trust, and the other is a professional with suitable deceased estate management experience.



6. What are the executor's responsibilities?

Obtain a certified copy of the death certificate, the original will and any policy documents – funeral, insurance etc.

Compile an inventory of all the deceased's property.

If the estate is the beneficiary of any life insurance, ensure the insurance company is notified and the policy is paid to the estate.

Inform your creditors by an advertisement in the Government Gazette and a newspaper that you have passed on and pay outstanding debts and other valid claims against the estate. File tax returns and pay income and estate taxes.

Draft an account for the estate, called a liquidation and distribution account (L&D), and setting out all the assets in the estate and who will receive what from the estate as per instructions contained in the will.

Submit this L&D account to the Master of the High Court and, once checked by the Master and advertised in the Government Gazette and a newspaper, distribute the assets to the heirs and legatees.

If necessary, convert the assets of the estate, such as property, art or life insurance for example, into cash.

Receive payments that are due to the estate such as interest, dividends, investments and other income (e.g. unpaid salary, leave pay-out and other cash benefits). The executor must open a bank account in the name of the estate as soon as funds of more than R1 000 are received and must pay all funds received into this account.

Retirement funds are specifically excluded from an estate and Section 37C of the Pension Funds Act governs how executors disburse those benefits. This section of the legislation is intended to protect dependents even over the wishes of the deceased. You cannot name a beneficiary in your will for your retirement benefits. Only if no dependant or beneficiary can be traced within twelve months of death will these benefits be paid into the estate and be distributed by the executor to the heir(s) of the residue.



7. I am ready to draw up a will, who can help me?

It is important that you use someone with the necessary know-how and expertise to draw up your will. You can use an attorney or approach your bank or a trust company for help. The person drawing up your will does not have to be appointed as executor. When drawing up your will you can appoint one or more people to act as executor and set a fee for their services. If the fee is below the prescribed maximum fee of 3.5% of the value of the estate, you will need their agreement.

Once the will is completed, it must be signed in full on every page in the presence of two witnesses for it to be valid. Witnesses must at least be 14 years of age or older and be competent to give evidence in a court of law. Both witnesses must also sign the will in the presence of the testator and each other.




Note: If, in your will, you choose a person who is a beneficiary to sign as witness, or if he or she was involved in the drafting of your will, they may be disqualified from benefitting from your will.

Remember: A will “speaks” for the person who has died. A professional is best suited to understand your intent and set it out in clear and concise terms.





8. What documents do I need when drawing up a will?

DOCUMENTS NEEDED TO DRAW UP A WILL	
The name and identification details of the executor of your estate.	
The name and ID number of your spouse and the copy of the marriage certificate that details the type of marriage agreement. If you are divorced, you must provide a copy of the decree of divorce and settlement agreement.	
The full names and ID numbers of all your children, including adopted and stepchildren if you want them to benefit from your will.	
The names and ID numbers of any grandchildren you would like to include.	
If you have minor children, the name and contact details of a guardian.	
If applicable, details of institutions such as a hospice, orphanage or religious institution you wish to bequeath assets to.	
Details of any other party or institution you wish to benefit.	
Copies of title deeds in respect of immovable properties in South Africa and details of mortgage bonds over such property.	
Copies of pension or provident fund documents and insurance policies, such as endowment policies, life policies, credit life policies etc.	
Digital currency, like Bitcoin, is considered an asset of intangible value by South African Revenue Service (SARS). Normal tax rules apply, and they can be included in your will to benefit your heirs. Their uniqueness presents challenges to executors who would require a unique password or key to access your digital wallet after your death. As wills are public records it is advisable not to include this information in your will. It is best to find a more secure manner for your executor to access your digital wallet.	
It is important to include a complete list of your liabilities as well.	



9. Frequently asked questions

Can I use an online will template to do my own will or write it on a piece of paper?

It is not a good idea to do your own will. A will must meet certain legal requirements for it to be valid. A will must be clear, concise and represent the true intentions of the testator (you). Wills drafted by those with little or no experience usually lead to problems.

What is an example of a special request that I can set out in my will?

One example of a special request that you can include in your will can be that your children be given control of their assets at different stages of their lives; the first one third of their inheritance becomes available at the age of 21 with the remainder at the age of 25, or even later if there is a good reason. If you want to consider a special request like the example above, your best option could be to set up a trust. There are three kinds of trusts:

- a testamentary trust, which you set up in your will;
- an *inter vivos* trust, which is the typical “family trust”;
- a trust created by a court order to receive specific payments such as, for instance, a Road Accident Fund pay-out.

What is the purpose of a trust?

A trust can own property, receive donations and inherit money from your estate when you die. What makes a trust so secure is that decisions are taken by the trustees you appoint when you create it. The beneficiaries can only claim their benefit at the age or time set in the will or trust deed. Depending on the type of trust you set up, assets are owned by the trust and can be safe from creditors claiming repayment of your debts.

If you want to transfer money or assets from your estate into a trust, this should be done by an attorney, bank, trust company, or fiduciary professional (FPSA®) who have specialist knowledge to effectively assist you to do the transfer or to set up such a trust.

If you want to leave a house in a trust for your spouse or a child, they will need to pay transfer costs to get the house registered in their name. You can also leave them some money to pay for these transfer costs. Transferring a property to an heir can take several months and municipal rates and taxes still need to be paid. Heirs are not charged transfer duty, but administrative costs like conveyancing and deeds office fees will be charged. Note that there is a cost in having a trust. A trust works well for people with larger and more valuable estates to manage and can be a cost effective way to cut taxes. For families that want to pass down family-owned land creating a trust that owns that land is a way to keep it in the family and prevent pieces being sold off by single heirs.

Where should I keep my will?

Banks, accountants, trust companies, attorneys and authorised financial advisors keep wills on behalf of their clients for free or for a small fee.

Make a copy of your will and clearly mark it with the word "Copy" and let a trusted person know where to find it in the event of your death. Inform the executor you nominated in your will where the original will is kept, as well as the copy.

How often should I update my will?

Wills need to be revised from time to time, especially if important events have taken place in the life of the testator (you). Significant life-changing events can include the birth of a child, marriage, divorce, death of a beneficiary or executor, gaining of property and other assets that you acquired after the signing of your existing will. It is important to review your will within three months after divorce, as not doing so may cause unwanted consequences.

Is it true that there are some taxes that need to be paid after I die?

There are two taxes payable on estates: estate duty and capital gains tax (CGT).

Estate duty is a form of tax that has to be paid after your death if your net estate (after all debts, costs, taxes and bequests to a surviving spouse or charity have been deducted) is worth more than R3,5 million.

To be exact, your estate (which may include property, insurance and money) has to pay 20% estate duty to the SARS if it is worth a net amount of between R3,5 million and R30 million. A rate of 25% is payable on any net amount above R30 million. If your estate is worth less than a net amount of R3,5 million, no estate duty is payable.

CGT is payable on any amount that exceeds a profit of R2 million on the sale of a primary residence (the house where you and your family lived on a permanent basis). Similarly, when a capital loss exceeds R2 million, only the portion of the loss exceeding R2 million will be allowed as a capital loss.

CGT is paid on all capital profits over R300 000 in the tax year in which you passed on. It is assumed that you transferred all your property to your deceased estate on the date of your passing and the profit is the difference between what you paid for the asset when you bought it and the value of that asset on the date of your death. The R300 000 exclusion is deducted from the sum of all these profits. Then 40% of the result is included in your income for that tax year in which you passed on and will be taxed with your other income on the normal income tax rates.

In 2020, the year this booklet was published, the effective rate of CGT was between 7.2% and 18% of the profits exceeding the amount of R300 000.

- Any personal-use assets such as motor vehicles and personal belongings are excluded from CGT.
- All assets going to the surviving spouse are also excluded from CGT.

Refer to the SARS website for yearly updates with respect to the tax brackets as mentioned above (www.sars.co.za).

Useful contacts

Financial Sector Conduct Authority (FSCA)

To check if an FSP or financial advisor is authorised to sell you financial products and services, contact the FSCA.

Call Centre: 0800 20 3722 (FSCA)

FSCA Switchboard: 012 428 8000

Fax number: 012 346 6941

E-mail: Info@fsca.co.za

Physical address:

4th Floor, Riverwalk Office Park, Block B,
41 Matroosberg Road, Ashlea Gardens,
Pretoria 0181

Postal address:

PO Box 35655, Menlo Park, Pretoria, 0102

Website: www.fsca.co.za

FSCA's Consumer Education Department (CED)

For more consumer financial education information and resources contact the FSCA's CED.

E-mail: CED.Consumer@fsca.co.za

Website: www.FSCAMymoney.co.za

The Fiduciary Institute of Southern Africa (FISA)

For assistance with wills, estates, trusts, estate planning and beneficiary funds contact FISA.

Telephone: 082 449 2569

E-mail: secretariat@fisa.net.za

Postal address:

P.O. Box 67027, Bryanston, 2021

Website: www.fisa.net.za

Financial Planning Institute of South Africa (FPI)

For assistance with estate or other financial planning services contact the FPI.

Telephone: 011 470 6000

E-mail: info@fpi.co.za

Postal address:

P.O. Box 6493, Weltevredenpark, 1715

Physical address:

84 Sophia Street, Fairlands, Johannesburg

Website: www.fpi.co.za

South African Registry of Wills and Testaments (SARWT)

If you want to make sure that your loved ones will be able to find your will after you die, you can register it with the SARWT.

Telephone: 061 436 2240

E-mail: admin@sarwt.org

Physical address:

1 Bellingham Crescent, Alberton Gauteng

Website: www.sarwt.org

Legal Practice Council

If you have a query or need to lodge a complaint against a legal practitioner, contact the Legal Practice Council:

Website: www.lpc.org.za

Gauteng, Limpopo, Mpumalanga, North West

Telephone: 012 338 5800

Physical Address:

ProcForum Building,
123 Paul Kruger Street, Pretoria

Eastern Cape, Northern Cape, Western Cape

Telephone: 021 443 6700

Physical Address:

29th Floor, ABSA Centre,
2 Riebeeck Street, Cape Town.

Kwa-zulu Natal

Telephone: 033 345 1304

Physical Address:

200 Hoosen Haffejee Str,
Pietermaritzburg

Free State

Telephone: 051 447 3237

Physical Address:

139 Zastron Street, Bloemfontein

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