



## Useful guidelines when drawing up your Will

Sometimes, we are reluctant to contemplate our own mortality, and sometimes we feel that by providing for death we are somehow inviting it closer.

Many very responsible people still leave their estate matters to pure chance, believing that their immediate family will automatically inherit everything. This can lead to unnecessary delays in the administration of the estate and the potential for added trauma and conflict

- at the very time that the family is already suffering the awful stress of dealing with the loss of a loved one.

If a person dies without leaving a Will, or if the Will is not valid for any reason, the beneficiaries will be determined according to legislation - the Law of Intestate Succession. Essentially, the law determines who the closest blood relatives are and distributes the assets in terms of this.

Each situation will be different, according to the nature of the family, but the important point to note is that a family member you may never have chosen to inherit from you, could end up with all your assets. A typical example of this is where a person has three brothers but does not get on with one of them at all. That brother would inherit an equal amount to the other two if the law determined that siblings were to inherit - even if the deceased sibling hadn't seen him for years.

And, if you live with someone but aren't married to the person, the law will not recognise your so-called 'common-law spouse' as the beneficiary of your estate if you haven't left a Will naming them as beneficiary.

There may also be practical difficulties concerning the division of assets. Where you may have chosen to leave everything to your spouse by means of a Will, intestate succession could determine that the assets should be split among your spouse and children. This becomes a practical problem where an asset like a house or farm is concerned.

### Other disadvantages of dying without a Will

- The court could appoint someone you do not approve of to be your executor.
- Your estate will be dealt with according to rigid and inflexible law you can't leave a specific item to

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- someone who would really have benefitted from it, or decide the proportions your beneficiaries will get.
- Your minor children might suffer, since anything they are entitled to receive will have to be transferred in a monetary form to the Guardian's Fund until they turn 18. This means that the family home would have to be sold (to convert it into a monetary form), which is quite possibly something you would never have chosen to happen.
- If you have no immediate, or close family, distant relatives - rather than close friends or a life partner - will claim the inheritance.

To avoid experiencing any of these complications, let Momentum Trust Services help you plan for your family's peace of mind.

If you are unsure of the answers to any of the following questions, you need to consult us to have your Will drafted.

## Family matters

### Types of marriages

If you're married, the way in which you chose to marry will have a significant impact on your estate. When a marriage comes to an end - either through divorce or death - assets and liabilities have to be dealt with and distributed to other people. Your marital regime will determine where responsibility for the assets and liabilities lies.

A common issue which many people do not know concerns marriage in community of property. No matter in whose name property is registered, all assets are jointly owned by both husband and wife. This means that you cannot bequeath an asset in full to someone other than your spouse, since you only own half the asset.

With cash it's much more of a problem because it's an asset that's easily divided up, but the executor will

have great difficulty dealing with something like a house in this instance.

- Do you live with someone to whom you are not married?
- Do you have money overseas?
- Have you considered your children's future if you're not alive during all their childhood years?
- Is your spouse able to take care of his/her finances after you die?
- What will happen to your business after you die?
- Do you have enough ready cash in your estate to cover your liabilities?
- Does your child know how to manage his/her money?
- Who will look after your children if you die when they're still young?
- Who will care for a disabled family member if you're no longer there to do so?

Similarly, both spouses are liable for the debts of each other. The estate of a surviving spouse could be decreased considerably because of the other spouse's debts.

Marriage out of community of property offers far better estate planning opportunities, particularly if your antenuptial contract has been suitably drafted. The contract may be used to secure certain assets for a spouse, and the marital regime may allow for protection of personal assets against debt, in particular where one of the spouses is in business on his/her own.

The choice of marital regime is a vital part of one's future - yet very few people actually give it significant attention. It's a really good idea to discuss this well in advance, in conjunction with planning your Will, with an estate planning expert.

#### **Not married but living together**

South African law is in a state of flux regarding these relationships, but essentially there is little legal protection for a partner in the event of the dissolution of the relationship during one's lifetime or as a result of death. The legal issue relates to both heterosexual and homosexual relationships.

There is a particularly great need for people involved in such relationships to carry out careful and thorough planning of their estates. Ironically, although these relationships are not recognised in most South African legislation, certain benefits available to spouses can be claimed - for instance, in terms of the Estate Duty Act. The advice of an estate planner should be sought in this regard.

#### **Divorce**

The obligations in terms of a Divorce Order have to be met before the terms of a Will. In other words, if you are liable for maintenance in terms of your Divorce Order, you should put in place a special plan to meet this obligation if you die while it's still applicable. Otherwise, your estate will probably face a major claim for a lump sum for this maintenance need - leaving your estate beneficiaries (perhaps a second wife) out of pocket.

It's also crucial to have a new Will drafted as soon as you get divorced. If your current Will names your spouse as beneficiary and you subsequently get divorced, she could still inherit if you die later without having amended the Will.

#### **Children**

South African law no longer distinguishes between children born within marriage, those born outside of marriage, and those adopted. If you wish to treat such children differently in terms of inheritances, your Will should be drafted accordingly.

Where children could inherit while under the age of 18, your Will should make provision for a Trust to be set up to house the inheritance. If the inheritance consists of a reasonably substantial amount, the opportunities for growth in the capital value of the inheritance, as well as for flexible use of the funds, are far greater if a Trust holds the inheritance than if it is paid over to the Guardian's Fund.

## Useful hints when drafting your Will

- Try to keep the wording as uncomplicated and plain as possible.
- When referring to a person, use his/her full name as well as a short description to avoid ambiguity for example: 'my nephew, John Brown'.
- Avoid using vague terms - for example, 'cash' - as this can lead to confusion and, ultimately, litigation.
- Ensure that you understand each clause in the drafted document and that the Will accurately reflects your wishes.
- When you plan the distribution of your estate, plan on the basis of your dying today. Assuming that the plan you put in place today will only come into effect

40 years later could create havoc if you die at a younger age than you'd have expected. Rather review and amend your Will regularly, so that it reflects your current situation at all times.

- If the Will is complicated, rather have a person with expertise revise it.

### How important is it to appoint alternate heirs?

It is always wise to include an alternate heir in your will. This is especially important when spouses with young children frequently travel together and the chances of the whole family not surviving an accident are far greater. If you do not nominate alternate heirs, your intestate heirs will inherit your estate.

### When should you review your Will?

Your will should be reviewed periodically, especially when there has been any change in your status or circumstances, or those of your beneficiaries, such as marriage, divorce, remarriage, the birth or adoption of a child, a death in the family, or following a substantial change in your assets or general financial position. Another good time to review your Will would be after any changes in legislation that could affect your estate.

### What do you need to tell others?

Your Will is a legal document. In order to ensure that your wishes expressed in it are put into effect at the time of your death, your family and friends should know the following:

- Whom you have nominated as your executor
- That your executor should be notified immediately in the event of your death
- The whereabouts of your Will

## Estate planning - a brief guide

There are so many different elements to our lives, both personal and financial, that it's all too common for people's affairs to be unnecessarily complicated and messy when they pass away. That's why it's crucial to carry out estate planning exercises at various stages of your life.

#### What does estate planning aim to achieve?

- As regards one's personal affairs, estate planning is particularly important where one has been involved in more than one marriage or relationship. This may set up responsibilities to more than one spouse or partner, necessitating particularly careful planning.
- Multiple relationships may also result in obligations towards various children. One needs to cater for this appropriately.

*Momentum Trust Services can hold the original document for you for a small annual fee. Numerous benefits apply, the most obvious of which is that the document will remain safe and secure, and will be easily accessible on your death.*

- Your wishes regarding funeral arrangements
- Whom to contact if you wish to donate organs or tissues, since time is of the essence in such cases

#### Should you draft your own Will?

You should always seek expert and professional advice when you want to draft or review your Will. Attempting to draft the Will yourself, without being a specialist, could result in the Will being invalid, or could cause consequences after your death because of the wording used - consequences you would not have intended.

- Death can be a very costly exercise - not only emotionally, but financially as well. Various tax ramifications arise, and suitable planning throughout one's life could help limit the impact of taxation on your estate. Estate Duty, in particular, affects estates significantly, especially where there is some wealth, but there are ways of reducing the impact substantially over time.
- Many estates lack sufficient available cash to settle debts. This may result in hardship for family members who will either have to provide cash themselves or agree to the sale of other assets to generate the cash needed. Ongoing planning for the liquidity needs of an estate is a vital element of estate planning. The introduction of Capital Gains Tax, which can affect your cash position on death, necessitates you to reconsider the cash position of your estate on death.
- If one has a business interest, this may impact one's personal affairs to a great extent. Estate planning considers issues such as how a business is structured, whether business creditors could attach personal assets, tax ramifications for one's personal affairs, and so on.
- Where a person holds assets offshore, estate planning should consider a person's global position.
- Income tax can now be levied on foreign investments - a change in the South African tax regime – and this is an added factor that should be dealt with.
- Ultimately, the goal of estate planning is to devise a holistic plan for the individual's life and affairs.

At Momentum Trust Services we focus on all points of the plan in unison, rather than on a Will in isolation.

### Who should undergo an estate planning exercise?

Thorough estate planning could benefit anyone. However, if you have growing wealth - likely to give rise to an estate worth more than R3,5 million in assets, and life insurance and employee benefits - or have a complex family set-up, or own a business, you should definitely consider speaking to an expert in the field.

Momentum Trust Services can assist with this. We have a number of estate planning experts on our staff, suitably qualified in law, taxation and financial planning.

## A guide to the content of your will

A Will is a detailed legal document, written in legal language, which often appears very complicated. In fact, it's not such a complex thing - an explanation of the basic content should help you understand what it's about.

### A Will should contain the following:

- The identity of the person whose Will it is - the Testator (male) or Testatrix (female). Full names will be included, and there may be information such as marital status, identity numbers, dates of birth, etc.
- There may be a reference to this document being the last Will, which means that, should someone die leaving more than one Will, the document with the most recent date will be the one the deceased intended to apply to his/her estate.
- The beneficiaries of the estate will be named, as will the inheritance each is to receive. Either one or more people will inherit the residue of the estate. This refers to whatever assets remain after liabilities have been paid and after any particular assets or sums of money have been paid out in terms of the instructions in the Will. Usually, the residue is the bulk of the estate after specific bequests have been made.

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- The Will may contain a clause providing for the setting up of a Trust should certain circumstances apply when the person dies. Most commonly, this is where some of the beneficiaries are under the age of 18. Details regarding the powers of the Trustees are included - for instance, how they may invest Trust funds, their powers in respect of banking, their authority to pay out Trust funds to the beneficiaries, and so on.
- There could be a clause in which you nominate someone to act as guardian to a minor child. This will come into being only if both natural guardians that is, usually, the biological parents of the child are dead or have had their guardianship rights removed by a court.
- A Will can be used to protect an inheritance from the legal ramifications of a particular type of marriage. A clause must be included stating that the inheritance is not subject to the terms of any kind of marriage.

This means that, if a beneficiary is married in community of property, for instance, and gets divorced subsequent to inheriting, the value of the inheritance will be kept out of the joint estate, and he thus won't

lose half the inheritance to his spouse on divorce.

- The Will will name someone or an institution as the nominated executor. It may also nominate someone as trustee. These are the people who will be responsible for the administration of your estate and trust, respectively.
- The will may also state that the executor is exempt from providing security. Sometimes, the Master of the High Court demands security - in the form of a type of insurance policy - for the value of the assets in the estate. The premium on the policy can be quite

## Our products and services

Momentum Trust Services specialises in peace of mind and offers a range of products and services to suit your financial planning needs, now and in the future. These include:

### Estate planning - last will and testament

- Planning the financial security of your loved ones after your death
- Making certain that your specific wishes are correctly set out in your will
- Ensuring prompt and effective administration of the estate once you have passed away
- Safekeeping critical documents, such as your last will and testament during your lifetime

### Estate administration services

We administer estates where we are nominated as executor in terms of a will, as well as where a family expensive, so an executor will often try to avoid this cost - which is what this clause does.

### Signing the will

On each page of the will, both the Testator and two witnesses should sign. They should also sign next to any alteration.

The place and date of signing must be written in at the end of the document.

Witnesses should be people who have no interest in the will, and their signatures merely acknowledge that they saw the Testator sign. They do not have to know the content of the document.

When you sign your will, it's preferable not to ask family members or anyone else who could be an heir or the spouse of an heir to sign as a witness.

member approaches us to assist with the administration of the estate, both in cases where the deceased did

not leave a will or where the will nominates a family member as executor. Such administration is attended to by a professional team of experienced and qualified specialists.

#### Trust creation and administration

Various family and financial situations could give rise to the need for you to establish a Trust during your lifetime or to make provision for one to be set up after your death. Momentum Trust Services has many years of experience in setting up such Trusts. This includes the drafting and registering of Trust documents, and ongoing administration of Trust assets.

#### Asset management

If you need assistance with your day-to-day financial affairs and investments, the Managed Investment Account will prove to be a reliable product for you. This service provides you with a 'one-stop shop', which literally manages your assets and liabilities, income and expenditure requirements.

For more information about our services, call 0860 102 763 or

e-mail us on [fnbtrustho@fnb.co.za](mailto:fnbtrustho@fnb.co.za).

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