

FREQUENTLY ASKED QUESTIONS REGARDING WILLS AND DECEASED ESTATES

Uncertainties can arise when structuring a will. You may wonder, for example: What happens to assets bequeathed to children who live overseas? What if I die without having drafted a will? How are my maintenance obligations to a divorced spouse dealt with? In the next few paragraphs we answer some frequently encountered questions to assist you in your planning.

What will happen if I die without having made a will?

There are laws that determine who will inherit if a person dies intestate, that is without a will. However it is always preferable to have a will which specifies your chosen beneficiaries and executor and avoids the many complex problems which may arise in the absence of one.

Can I draw up my own will without seeking professional advice and if I do so will my will be valid?

The law does not prevent a lay person from drawing up his own will but there are many legal formalities which must be complied with for the will to be valid. Often these are overlooked by the inexperienced will draftsman with the result that the will is rendered invalid, a situation which may only be capable of rectification by a costly application to the High Court. In addition, there are many issues which may need to be dealt with in a person's will which might not be considered unless professional advice is sought.

I have assets in a foreign country. Should I have a separate will in respect of those assets or can I have one will to cover my world wide estate?

It is possible to have one will which deals with your worldwide estate. However succession law and the procedures which have to be followed with regard to estate administration differ from country to country and it is therefore recommended that a person has a separate will drawn by an expert in the relevant law of each country where he or she has assets.

Can I bequeath my estate to whomever I choose or am I obliged in law to benefit certain persons, for example my spouse and children?

If South African law applies to your estate, you have complete freedom to leave your assets to whomever you may choose. However, the Maintenance of Surviving Spouses Act entitles a spouse who has not been adequately provided for in the will of his or her predeceased spouse to claim, in certain circumstances, maintenance from the

predeceased spouse's estate. In addition, a parent has to provide for the maintenance of his or her dependent children and if no provision is made for this in the will, the children concerned can claim from the estate. It is also important to remember that the surviving spouse of the deceased may have a claim against the deceased's estate by virtue of the law governing the marriage or an antenuptial contract. Spouses who are married in community of property have a right in law to one half of the net value of the joint estate.

Can the proceeds of pension funds, group life schemes, provident funds, retirement annuities and insurance policies be bequeathed in terms of a will?

The proceeds of an investment can only be bequeathed in terms of your will if such proceeds are payable to your estate on your death. If you have nominated a beneficiary to receive the proceeds of an insurance policy on your life then the company who issued the policy will pay the proceeds to such beneficiary and you cannot revoke the nomination by bequeathing the proceeds in terms of your will. The nomination can only be changed by liaising directly with the company concerned. However if the proceeds are payable to your estate because you have not nominated a beneficiary, then you can bequeath same in your will. All the other benefits referred to in the question posed above will be payable by the company, scheme or the trustees of the fund concerned directly to your dependants which may include your adult children even though they are not actually financially dependant on you. Only if there are no dependants whatsoever may these moneys be paid to your estate.

I have maintenance obligations towards my former spouse in terms of the divorce order which terminated our marriage. How will this be dealt with by my executor?

With professional advice you can make provision in your will for a practical way to cover this liability which will not cease on your death. If no such provision is made then your former spouse will be entitled to lodge a claim against your estate as a creditor and same will have to be settled from your assets thereby reducing the balance which can be awarded to your nominated heirs. If there is insufficient liquidity in your estate to meet the claim, immovable and/ or movable property may have to be sold.

I am nominated as executor in terms of a will and the person who made the will has died. What must I do?

Although the will nominates you as executor you will not be able to act on behalf of the estate until the death of the deceased has been reported to the Master of the High Court and Letters of Executorship have been granted by the Master in your favour. Letters of Executorship is a formal document which states that the executor named therein has been formally appointed by the Master and from the date on which it is issued the executor is legally empowered to act. It is possible to go to the Master's Office yourself to report the estate but with certain fairly limited exceptions the Master will require, before issuing

Letters of Executorship, that you nominate a professional estate administrator to attend to the administration of the estate on your behalf. It is good advice therefore to choose an estate administrator such as your firm of attorneys who will report the estate to the Master and sort out all the legal requirements. Once all the necessary documentation and information has been approved to the Master's satisfaction he will issue the Letters of Executorship confirming your appointment as the executor of the estate.

I have bequeathed my estate to my children who live overseas. Will it be possible to transfer their inheritances to them in their country of domicile?

Under present exchange control regulations an inheritance bequeathed to a beneficiary who has never been resident in South Africa can be transferred into a bank account in the name of the beneficiary in his country of choice. If a beneficiary has ever been resident in South Africa on a permanent basis then the inheritance can likewise be freely transferred provided the beneficiary has formalised his or her emigration with the SA Reserve Bank. Failure to finalise emigration at the time of leaving the country can be rectified subject to compliance with certain formalities.

What steps can I take to make sure that my family is financially secure when I die?

It is important that you take steps to ensure that there is sufficient liquidity in your estate to provide for your debt and for the ongoing maintenance of your family. Failure to do so may result in your family home and/ or other assets having to be sold. Insurance products are a good way of bringing extra cash into your estate for this purpose. However it is also important to have a financial plan both to give you the reassurance that you will be able to provide for the obligations of your estate and to minimise, if possible, any estate duty liability which may arise on your death. Both certified financial planners and professional persons specialising in the preparation of wills and estate planning can assist you in this regard.

Contact us at info@stbb.co.za or visit our website at www.stbb.co.za to make an appointment with an attorney in our Estates and Trusts Department.

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