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Q&A

FREQUENTLY ASKED QUESTIONS REGARDING WILLS, DECEASED ESTATES AND TRUSTS

Q: WHAT WILL HAPPEN IF I DIE WITHOUT HAVING MADE A WILL?

There are laws which 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 can arise in the absence of one.

Q: 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.

Q: WHAT IS THE DIFFERENCE BETWEEN A SINGLE WILL AND A JOINT WILL AND WHEN IS IT ADVISABLE TO HAVE ONE OR THE OTHER?

A single will is the will of one person. Anyone can make a single will irrespective of their marital status. A joint will is a will of two persons - it could be more but this seldom happens in practice. Most joint wills are made by married couples or partners in common law relationships but this is a not a legal requirement. There is almost always a desire by the parties to a joint will to benefit the survivor of them upon the death of the first dying party. A joint will must provide for a bequest of the estate of the first dying of the parties, a bequest of the estates of both parties if they die within a short period of one another and a bequest of the survivor's estate should he or she survive the first dying and thereafter die without making a further will. Provided these requirements are met a joint will is perfectly acceptable.

Q: 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.

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Q: CAN I BEQUEATH MY ESTATE TO WHOEVER I MAY 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 whoever 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 dependant 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.

Q: CAN THE PROCEEDS OF A PENSION FUND, GROUP LIFE SCHEME, PROVIDENT FUND, RETIREMENT ANNUITY 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.

Q: 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.

Q: IF I GIVE MY SPOUSE A POWER OF ATTORNEY TO OPERATE ON MY BANKING ACCOUNTS WILL HE OR SHE STILL BE ABLE TO CONTINUE TO OPERATE THESE ACCOUNTS AFTER I DIE?

In terms of South African law a power of attorney granted by a person during his or her lifetime becomes null and void when the person who granted it dies. In addition once a person has passed away no one is legally permitted to deal with any assets in that person's estate except an executor in whose favour the Master of the High Court has issued Letters of Executorship.

Q: WE ARE MARRIED IN COMMUNITY OF PROPERTY - IF ONE OF US DIES WILL THE BANKING ACCOUNTS IN THE NAME OF THE SURVIVOR OF US BE FROZEN AS WELL?

From a strictly legal point of view the answer is yes, the surviving spouse's banking accounts should be

frozen as well. However in practice it may be possible for your executor to make alternative arrangements with the banking institution to allow your spouse to transact on his or her own accounts provided he is satisfied that there is no possibility of the community estate being insolvent.

Q: IF ALL BANK ACCOUNTS ARE FROZEN AFTER I DIE HOW WILL MY FUNERAL EXPENSES BE PAID?

If you do not have a funeral policy to cover this expense then providing your spouse's banking accounts are not frozen he or she could use the funds in these accounts for this purpose. It may also be possible to enter into a credit agreement with the funeral undertaker to the effect that your executor will pay the account once he is able to access the funds in your accounts. Another option is that a family member or friend pays the account and claims reimbursement from your executor.

Q: CAN WE NOMINATE A GUARDIAN IN OUR WILLS TO LOOK AFTER OUR MINOR CHILDREN AFTER THE DEATH OF THE SURVIVOR OF US?

Yes it is possible to do this.

Q: I WISH TO BEQUEATH SPECIFIC ITEMS OF JEWELLERY TO EACH OF MY CHILDREN. MUST THESE BEQUESTS BE REFLECTED IN MY WILL OR CAN I DO A LETTER OF WISHES.

A letter of wishes is not a legally binding document. If your heirs in terms of your will are prepared to abide by the terms of a letter of wishes insofar as the distribution of the jewellery is concerned then that is in order but if they disagree then the assets must be dealt with strictly according to the will. It is therefore preferable to reflect the bequests in the will.

Q: I WANT TO BEQUEATH MY IMMOVABLE PROPERTY TO MY CHILDREN BUT I ALSO WISH MY SPOUSE TO BE ABLE TO LIVE IN THIS PROPERTY UNTIL HIS DEATH. IS IT POSSIBLE TO PROVIDE FOR THIS IN MY WILL?

Yes this is possible. The bequest to your spouse would be of what is legally known as a limited interest. There are various limited interests and your professional advisor would be able to assist you in deciding which is best suited to your purpose. The title deed in respect of the immovable property would contain a reference to the limited interest so that your children would not be able to dispose of the property without your spouse's consent.

Q: WHAT IS A TESTAMENTARY TRUST AND FOR WHAT PURPOSE IS IT USED?

If for example you wish to bequeath a share of your estate to a child but you intend that child only to receive his inheritance when he attains a certain age, then you should provide in your will that the inheritance concerned will be managed in the interim on that child's behalf by a suitably qualified and responsible person or persons who are known as trustees. The entity to which the inheritance will be awarded by your executor is called a testamentary trust. Your will will define the terms and conditions on which the trust will operate and the powers which the trustees will enjoy. Such a trust only comes into existence on your death and then only if the purpose for which the trust was created exists, ie if you have stipulated that the trust must terminate when your child attains the age of 25 years and if at the date of your death your child is over that age, then there is no need for a trust.

A professional estate planner will be able to advise you of other purposes for which a testamentary trust can be used.

Q: WHAT IS THE DIFFERENCE BETWEEN A TESTAMENTARY TRUST AND AN INTER VIVOS TRUST?

A testamentary trust is created in your will and only comes into existence on your death. An inter vivos trust comes into existence while you are alive, you having created same by arranging for a suitably qualified person to prepare a trust deed on your behalf. The terms and conditions on which the trust will operate, the beneficiaries and the first trustees of the trust as well as the powers which the trustees will enjoy will be contained in the trust deed and this deed will have to

be registered with the Master of the High Court. This kind of trust is utilised mainly as a device to reduce the amount of estate duty which you may have to pay on your death. The professional who you consult will be able to assist you in deciding whether the creation of an inter vivos trust is a viable option for you.

Q: WHO IS THE MASTER OF THE HIGH COURT?

The Master of the High Court is a government department, forming part of the Ministry of Justice, which is empowered in terms of the law to oversee the administration of deceased estates, trusts, curatorships and related matters.

Q: 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.

Q: THE MASTER HAS ISSUED LETTERS OF EXECUTORSHIP IN MY FAVOUR. WHAT HAPPENS NOW AND HOW LONG DOES IT TAKE UNTIL THE ADMINISTRATION OF THE ESTATE IS FINALISED?

South African law, in the form of the Administration of Estates Act, prescribes a formal process which must be followed in so far as the administration of a deceased estate is concerned, the main purpose of which is to protect the rights of heirs and of creditors, including the South African Revenue Service. Among other things an executor has to place statutory advertisements in the newspaper and to lodge an account with the Master in a certain format containing specific information. Your professional estate administrator will attend to this on your behalf and in an average uncomplicated estate the process should be completed in 10 - 12 months. For various reasons some estates are more complex and take longer.

Q: THE PROCEDURE FOR ADMINISTERING AN ESTATE SEEMS COMPLEX. IS THERE A SIMPLER PROCEDURE FOR SMALL ESTATES?

Yes. If an estate is lower than a certain value, currently R250 000, there is a simpler procedure also prescribed in the Administration of Estates Act, but the death of the deceased still has to be reported to the Master together with the same documentation as required for larger estates. In these smaller estates the Master issues Letters of Authority in favour of the nominated executor (as opposed to Letters of Executorship) who can then administer the estate without having to comply with any of the formal requirements applicable to larger estates such as placing advertisements in the newspaper and submitting accounts to the Master. It is not necessary or required that an executor of such an estate utilise the services of a professional estate administrator although he is always free to do so.

Q: ON WHAT BASIS DOES AN EXECUTOR CHARGE FOR HIS SERVICES?

The Administration of Estates Act prescribes a tariff equal to 3.5% of the value of the gross assets of the estate being administered as Executors remuneration as well as a commission of 6% on all income collected by the executor from date of death to date of finalisation of the administration process. This fee may be negotiable in certain circumstances.

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Q: 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.

Q: 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.

Q: WHEN WILL MY ESTATE BE LIABLE TO PAY ESTATE DUTY?

Currently your estate has to have a net worth of over R3,5m before you are liable to pay estate duty which is charged at the rate of 20% of the amount by which such net worth exceeds R3,5m. For example if your net estate is valued at R4,5m and is liable for estate duty you will pay R200000, being 20% of R1m (R4,5 - R3,5m = R1m). Whether or not your estate will be dutiable depends mainly on who inherits although certain classes of assets are also exempt from estate duty in terms of the Estate Duty Act. If a married person bequeaths all of his assets to his or her spouse no estate duty will be payable in the estate of the first dying spouse. In addition there is a roll over of the exempt amount of R3,5m from the first dying's estate to the survivor's estate with the result that an amount of R7m is exempt from estate duty in the survivor's estate. There are other ways of minimising estate duty which can be fully explained to you by the person assisting you with estate planning and the preparation of your will.

Q: WILL MY ESTATE BE LIABLE FOR CAPITAL GAINS TAX?

The death of an individual is regarded as a disposal of his or her assets for the purpose of capital gains tax. If you are married and you bequeath all of your assets to your spouse there will be no capital gains tax payable on your death if your spouse survives you. In all other cases your estate is potentially liable for capital gains tax and your executor will have to disclose any capital gains to the South African Revenue Services as part of your income for the financial year in which your death occurs.

Q: WHAT IS A LIVING WILL?

A living will is a document which you sign to the effect that you do not wish to be kept alive by artificial means or by the use of life prolonging drugs in the event that your state of health is such that there is no reasonable hope of your recovery and the condition from which you are suffering is causing you severe pain and distress or making you too incapable of rational life. There is a standard format which is used for this purpose and it is recommended that you use this format although there are no prescribed legal formalities which must be complied with for same to be valid.

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