



WILLS AND ESTATE PLANNING

The answers which are given are general in nature, and therefore do not constitute financial or other professional advice. The answers do not take into account your specific circumstances and should not be acted upon without full understanding of your current situation and future goals and objectives. We recommend discussing these with a qualified Financial Adviser.

WILLS

Q. Is a spouse of an heir entitled to the latter's inheritance from his/her family, if they divorce? If so, is there a clause to prevent this?

There is a clause called the "protection clause". This clause excludes inherited assets from the community of property existing between spouses who are married in community of property, and also from the accrual where the heirs are married under the accrual system.

Q. How often should you update your Will?

A Will should preferably be reviewed at least once a year and updated whenever there is a change in your circumstances.

Q. Does your Will override the beneficiary shares stated in your pension fund?

No, it does not. Nominating your beneficiaries for your pension fund is a legal document on its own, so you cannot nominate your pension in your Will. In addition, a pension or retirement fund is excluded from your estate. This applies to life cover as well. However, life cover where a beneficiary is nominated will be deemed property in your estate.

Q. Intestate succession mentions a spouse will inherit a "child's share". Is this the same as sharing the estate with the descendants?

No. Only once the child's share has been allocated to the spouse will the descendants inherit what is left.

Q. In the Muslim religion, Will portions are predetermined and the testator will generally indicate that the Will must be split per Islamic determination. Can you insert that clause into your pension fund beneficiary allocation?

If referring to adding a clause specifying that the pension fund should be allocated as per Shari'ah laws without indicating actual percentages - yes, that can be done. This Will, however, be subject to section 37C of the Pension Funds Act.

Q. What is the definition of a "spouse" and in which Act was it specified?

In 2001, the definition of a "spouse" was introduced into the Income Tax Act No. 58 of 1962. A spouse is defined as a person married in or out of community of property, marriages concluded in terms of Hindu and Muslim rites, and partners in a civil union and a same sex union, which the Commissioner is satisfied is intended to be permanent.

Q. On average, how long would it take to wind up a member's estate?

A deceased estate can take anything from a few months to several years to finalise. The time required depends largely on the size and structure of the deceased's assets and liabilities, as well as other factors like liquidity in the estate etc. Yes, it is possible. It depends on what is happening in the estate and what planning, if any, was made for it. The executor of the estate must explain to the heirs exactly what the delays are and what is required to finalise the estate.

Q. Can a person sign as a witness to a Will if they are mentioned as a beneficiary in that Will?

Beneficiaries of the Will, or their spouses, should not sign as witnesses to the signing of a Will, as then they will not be allowed to benefit under the said Will.

Q. Can your children sign as witnesses to your Will?

It is not advisable, as then they will not be allowed to benefit from the Will.

Q. How do you prove that a signature on a Will is from a genuine witness if that person can't be located?

If this goes to court, it will be up to the parties involved to prove. It is a problem if the witness cannot be located. It is only important to prove that the Will was signed by the witnesses if there is a dispute about the validity of the Will.

Q. Do witnesses also need to add their ID numbers to the Will?

It is not a requirement in terms of the Wills Act. Some institutions ask for the witnesses to provide their ID numbers; some ask for the relationship to the testator/testatrix to be mentioned.

Q. Is a video or digital Will accepted as legally binding?

No, it is not a valid Will in terms of current South African law (the Wills Act).

Q. What is a living Will and do you recommend having one?

A living Will is a written, legal document that spells out medical treatments you would want or refuse to use to keep you alive, as well as your preferences for other medical decisions, such as pain management or organ donation. It really is your own decision whether you would want a living Will or not.

Q. Does your life insurance form part of your estate if the beneficiary stated in your policy passes away at the same time as you?

Your life insurance forms part of your estate for estate duty purposes, even if you have nominated a beneficiary on the policy. However, it is excluded from your estate for purposes of executor's fees if you have nominated a beneficiary. If the beneficiary has passed away, and you have not nominated an alternative beneficiary, then the proceeds of your life cover will be paid into your estate and will devolve according to the instructions in your Will.

Q. If the beneficiaries named on your life policies differ from those named in your Will, which document has the last say in terms of beneficiary payments?

Since nominating beneficiaries on your life policies is done in terms of a contract between you and your insurer (Old Mutual, for example), the beneficiary nomination will be adhered to and not the Will.

Q. If you drew up a police affidavit with instructions about how your property should be dealt with after your death, and there is no other document, will the affidavit be binding?

An affidavit is not a Will, so no, the affidavit will not replace a Will and will not be binding. You will then be seen to have died intestate (without a Will). It is advisable that you rather get a valid Will in place.

Q. Is a Will drawn up at a bank legally binding, or is it just a template?

If the requirements in terms of the Wills Act are adhered to and the Will is signed correctly, then the Will should be valid in terms of the Wills Act. You may ask a financial adviser or get the input of a legal adviser to look at the relevant Will and advise whether it is valid.

Q. If two people have been living together for 10 years, would they be considered to be spouses in terms of a Will?

The time that people have been living together is only one of the factors that the court will take into consideration if there is a dispute with regard to whether they can be seen as spouses or not. The intention of the parties should have been for the relationship to be permanent, and that has to be proven to the Commissioner of Inland Revenue.

Q. If you have a joint Will and are married under an antenuptial contract (ANC), can you change your Will as an individual?

Yes, each party has their own estate, since they are married out of community of property. Even if married in community of property each can have their own Will.

Q. If your Will states that your spouse inherits, but you subsequently divorce and then die without changing the Will, would your ex-spouse still inherit?

It depends on whether you pass away within three months after your divorce or not. The Wills Act makes provision for the following:

If the testator dies within three months of divorce but has not removed the former spouse as heir, then it is assumed that the testator did not intend the former spouse to inherit.

If the testator dies after three months of divorce and has not removed the former spouse as heir, then it is assumed that the testator did intend the former spouse to inherit.

Q. Can a Will be used to specify who should become the legal guardian of a child if both parents die?

Yes, there is a clause that can be included to appoint guardians should the legal guardians of a child pass away.

Q. Do you have to get a Will drawn up when you reach legal age (18 years)?

There is no requirement as to when you have to get a Will drafted. According to the Wills Act, you can have a Will from the age of 16. If a child aged 16 or older has assets, then it is advisable to get a Will in place.

Q. What happens if you die without a Will?

If you pass away intestate, and the Intestate Succession Act 81 of 1987 will be applicable to the heirs that will inherit from your estate.

Q. If you die intestate, is it true that your spouse is entitled to 50% by virtue of a marriage in community of property, and the balance is split equally between your spouse and your children?

If you pass away intestate and only leave a spouse, then the spouse inherits the entire estate. If you pass away leaving a spouse and children, the spouse will inherit the greater of:

a child's share (which is calculated by dividing the monetary value of the estate by the number of surviving children of the deceased and deceased children who have left descendants), plus one OR

such portion of the intestate estate as does not exceed in value the amount as fixed by the Minister in the Government Gazette. The current fixed amount is R250 000.

Q. Where a spouse passes away intestate and leaves adult children from a previous marriage, are these children eligible to inherit from the estate?

In terms of the Intestate Succession Act, where a person dies without having a Will and is survived by a spouse and descendants (children), then:

If the estate is worth less than R250 000 the entire estate shall be awarded to the spouse.

If the estate is worth more than R250 000, then the spouse is entitled to a child's share or R250 000, whichever is the greater and the balance of the estate is divided amongst the children equally. A child share is established by dividing the value of the estate by the number of children plus the number of spouses.

Q. Does a Will need to be certified?

A Will requires the certification of a Commissioner of Oaths when the testator/testatrix is unable to place a signature on the Will document and is signing it by means of a mark/thumbprint. The certification by the Commissioner serves to identify the person signing the Will by means of a mark.

Q. How is your estate dealt with if you are insolvent at the time of death?

A person is considered insolvent when their liabilities exceed their assets. The Administration of Estates Act sets out a specific procedure for the administration of such estates, including the distribution of payments to creditors.

TRUSTS

Q. How do you make provision for a child(ren) with disabilities?

Generally, our legal advisers will recommend that you establish a special trust. A “special trust” is defined as a trust created solely for the benefit of a person who suffers from any mental illness or any serious physical disability. A “special trust” is also a trust established in terms of the Will of a deceased person, solely for the benefit of beneficiaries who are relatives of the deceased and who are alive on the date of the deceased’s death, where the youngest of those beneficiaries is under the age of 21 years on the last day of the year of assessment of that trust.

Q. What does it cost to register a trust to transfer assets to?

As published in the Government Gazette, the fee payable to the Master in terms of section 4 of the Act at the lodgement of a trust instrument is R250 in respect of each trust instrument. There are no costs involved in amending an existing trust.

Q. What is a testamentary trust? How do you set it up and what are the requirements if you have nominated a minor child as a beneficiary?

A testamentary trust is created in your Will, and you set it up in your Will, although it is technically only created after your death, and after your estate has been wound up.

It is advisable to contact a financial adviser to assist you in getting your Will drafted correctly, especially when minor children are involved and nominated as beneficiaries. Minor children should not be nominated as beneficiaries on any policies. A financial adviser will be able to assist you in creating a testamentary trust in your Will and making sure that your beneficiary nominations are not in conflict with the contents of your Will.

Q. How do you manage/approach a testamentary trust that you are a beneficiary of?

A testamentary trust is managed by the trustees as nominated in the last Will and Testament of the deceased. If a beneficiary is under the age of 18, the guardian will approach the trustees for requests of assistance on the beneficiary’s behalf. After the beneficiary has turned 18, the beneficiary may personally approach the trustees for assistance required from the testamentary trust.

EXECUTOR

Q. Who is classified as a professional executor?

An attorney, an accountant or a trust company will fall into this category. They are compelled, by the professional bodies they belong to, to maintain a certain standard of care and diligence in conducting their duties as an executor.

Q. Is it necessary to have an executor appointed to your Will?

It is recommended that you nominate an executor in your Will, failing which the Master of the High Court will appoint an executor. The Master of the High Court may also appoint an executor where the nominated executor declines the appointment as executor or where the nominated executor has predeceased the testator. An executor appointed by the Master is known as an Executor Dative and will usually be requested to provide security to undertake the task at hand.

Q. Can you nominate more than one executor?

You may appoint more than one executor. They will then be co-executors and jointly responsible for decisions, unless otherwise stipulated in the Will.

Q. What is the difference between having an institution vs an individual as your executor, and will the bank still require an individual from the family to assist them?

A trust company will fall into the category of an institution, as the professional bodies they belong to expect them to maintain a certain standard of care and diligence in conducting their duties as an executor. It is reassuring to know that those dealing with your loved one's estate have the necessary skills to do so. An individual may not have the same level of skill and the Master usually requires an individual to obtain the assistance of a professional when attempting to administer an estate.

Q. How is an executor selected or appointed?

You will have to nominate an executor in your Will, and usually the nominated executor is also the person or institution the Master then appoints as the executor. Selecting an executor is really up to the client, but it is advisable to nominate someone with the know-how to wind up an estate as executor – like an attorney, auditor or accountant or a trust company like Old Mutual Trust. Clients think that if they nominate family they will save on executor's fees, but the truth is that the family member then has to appoint a specialist anyway to wind up the estate and the executor's fees are still payable.

Q. Is a beneficiary in a Will also allowed to be the executor of the estate?

Yes, it is possible.

Q. Under which circumstances will the executor be forced to sell movable and immovable property/assets when winding up an estate?

When there is not sufficient liquidity in the estate, and the beneficiaries are not able to provide for or make up the shortfall in the estate.

Q. What recourse do beneficiaries have against an executor if the latter does not perform their duties correctly/effectively?

The executor may be reported to the Master of the High Court, who is empowered to remove and replace an executor with another. If the executor belongs to a professional body, the executor may also be reported to that professional body.

Q. What are the benefits of nominating Old Mutual as the executor?

You will have experts dealing with your estate where these specialists go out of their way to restore a certain sense of normality in the lives of those left behind. There will always be someone who can fulfil the role of executor of your estate. Old Mutual Trust makes use of advanced software to speed up a fully integrated administration process.

FEES & CHARGES

Q. What are the average fees and charges to be paid from an estate?

There are no average fees and charges, as each Will's costs and charges are calculated per the testator's assets and liabilities.

Master's fees:

Where the gross value of the estate is R250 000 or more but less than R400 000: R600

Where the gross value of the estate is R400 000 or more: for each R100 000 that exceeds R400 000 a further R200, but subject to a maximum of R7 000. The remuneration of an executor may either be determined by the Will of the deceased or assessed according to a prescribed tariff, which is currently 3.5% in respect of the gross value of assets in the estate and 6% in respect of income accrued and collected after the death of the deceased. Where the executor is a VAT vendor, VAT of 15% will be charged. Estate duty is levied at 20% on the first R30 million dutiable estate and 25% on the dutiable estate above R30 million.

Q. How much does it cost to have Old Mutual draw up your Will?

There are no costs for drafting a Will where Old Mutual Trust is nominated as the executor. Where Old Mutual Trust is not the nominated executor, the fee is R2 500. All clients are entitled to free reviews of their existing Old Mutual Trust Wills, provided that Old Mutual Trust is the nominated executor. The safe custody fee is R90 per annum.

Q. Who becomes responsible for shortfalls/outstanding debts upon winding down an estate?

The estate is responsible for any shortfalls/outstanding debts and it is the executor who will be liable to ensure that these are recovered/settled prior to any transfers/payments to heirs. Also note that where an amount due under a policy is recoverable by any person other than the executor, the person liable for the duty shall be the person entitled to recover the amount due under the policy.

Q. Can an executor forego fees as stated in the Will?

Yes, as the testator you may negotiate with your executor to discount or forego fees and state that in your Will. Old Mutual Trust may provide a discount on a case-by-case basis, subject to the value of the gross estate and an estate plan being drafted by an Old Mutual legal adviser.

Q. What exemptions are there when calculating estate duty?

The most popular exemption is section 4(q) of the Estate Duty Act, where everything left to the surviving spouse is exempted in the sense that it does not attract estate duty in your estate.

Q. Are savings, retirement annuities and living annuity policies included when calculating your overall estate duty?

Savings will be included.

Retirement annuities/retirement funds are excluded, unless you have contributed more than what was allowed as a deduction in terms of section 11F, in which case it will be included in the estate of the deceased as property for estate duty purposes.

Living and Life annuities are excluded.

Q. Can you take out a separate policy to cover the estate taxes and other costs associated with the estate?

Yes.

Q. Is the estate duty calculated at only 50% of joint assets if you are married in community of property?

Yes, therefore only on your portion of the joint estate.

Q. Why is a monthly fee payable to Old Mutual to hold a client's Will if Old Mutual is the executor and will benefit from fees when the client dies?

One reason why a safe custody fee is payable (and note that in Old Mutual's case it is an annual fee, not a monthly fee), is that trust companies have to pay for huge walk-in safes where these Wills are kept. Many clients leave their Wills there and don't bother to tell an executor if they have appointed another company as executors, and then the company first appointed has no way of knowing for sure that the client they keep a Will for is in fact still their client. They might even not be the executor of the very last Will and Testament that the client drafted. This may be a way to make sure that the clients whose Wills you keep in safe custody are in fact still your clients.

Q. What are the current Estate Duty fees?

Currently estate duty is as follows: For a person who is single and does not have a partner that fits the definition of a spouse, abatement of R3 500 000 is applied and thereafter 20% estate duty on assets in excess of R 3 500 000 up to R30 000 000. For an estate above R30 000 000 the estate duty is R6 000 000 plus 25% of the value of the assets above R30 000 000.

If one is married and one intends leaving one's assets to one's spouse then one may enjoy a spousal rollover on the death of the first dying spouse. On the death of the surviving spouse an abatement of R 7 000 000 is applied (R3 500 000 for each spouse) before estate duty as indicated above is applied.

Q. What are the fees/charges paid to an executor and when are they payable?

3.5% plus VAT (if the executor is VAT registered), which translates into 4.03% on the GROSS value of your estate. On income post death, your executor is entitled to 6% plus VAT, i.e. 6.9%. Such fees are due, owing and payable on the finalisation of the estate.

Q. Can you elaborate on income accrued and collected after death?

Let's say, for example, the deceased owned a rental property. The executor will collect the income from the property. The income will be property in the deceased estate and will devolve as per the deceased's last Will and Testament. In most cases it will form part of the residue in the estate and will therefore devolve as per the residue clause in the Will.

Q. In order of priority, which items get paid first from your estate by the executors?

Preferential claims for example maintenance claims from spouses and children, and debt which is secured, for example a bond that is registered against your property.

Q. When drawing up a Will, which assets can be included and allocated to beneficiaries?

All your assets – excluding your pension fund/provident fund, preservation funds and retirement annuities, which will be dealt with under the Pension Funds Act – will be included in your estate. Policies with beneficiary nominations will be paid to the beneficiaries who were nominated. If no beneficiaries were nominated, then the proceeds of such policies will be paid into the estate.

Q. What are the pros and cons of excluding assets from an estate when drawing up a Will?

When entering into an antenuptial contract you have the option of excluding assets from the marital regime, i.e. getting married under the accrual system. The only way to exclude assets from the estate would be to nominate beneficiaries on your policies, for instance, and the advantage will be that you do not pay executor's fees on policy proceeds that is payable directly to beneficiaries.

Note that the fees and charges reflected in this document were accurate at the time of producing the document.