

CHAPTER 16

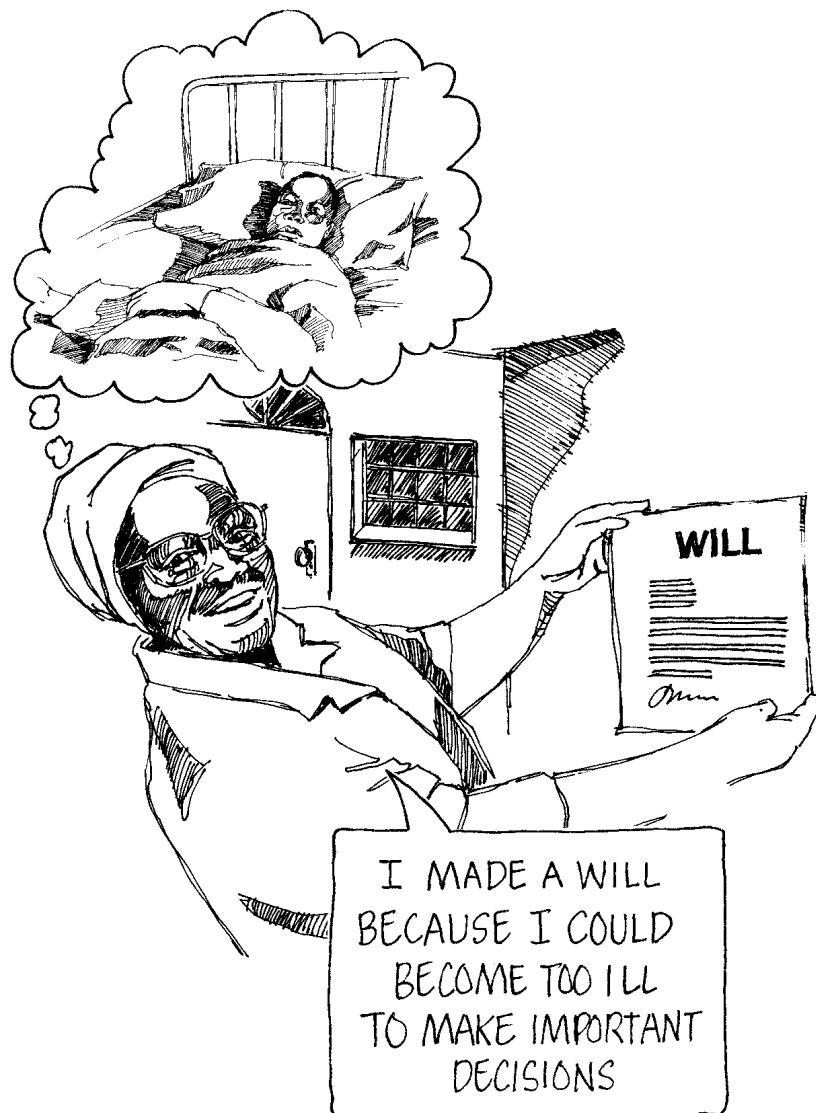
Future planning

16.1	Introduction	368
16.2	Making decisions about property and money	369
16.2.1	Power of attorney	369
	<i>What is a power of attorney?</i>	369
	<i>Can you give a power of attorney for when you are very ill?</i>	370
	<i>How do you make a power of attorney?</i>	371
	<i>Example: Special Power of Attorney</i>	372
	<i>Example: General Power of Attorney</i>	373
16.2.2	Wills	374
	<i>What is a will?</i>	374
	<i>What happens if you do not draw up a will?</i>	374
	<i>Who can make a will?</i>	376
	<i>Who can inherit from a will?</i>	376
	<i>What can be included in a will?</i>	376
	<i>What do you need to draw up a valid will?</i>	378
	<i>Example: A basic will</i>	379
16.3	Planning for the care of your children	380
16.4	Planning for future medical treatment	381
16.4.1	Euthanasia	381
	<i>What kinds of euthanasia does our law allow?</i>	381
	<i>What kinds of euthanasia does our law prohibit?</i>	382
16.4.2	Living wills	383
	<i>What is a living will?</i>	383
	<i>Is a living will allowed in our law?</i>	383
	<i>Why write a living will?</i>	385
	<i>Example: A living will</i>	386
16.4.3	A power of attorney for future medical treatment	387

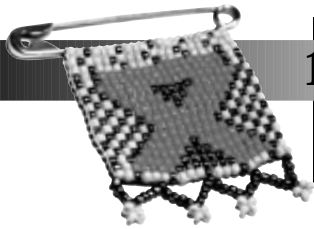
16.5	Donating human tissue	388
16.6	Death	389
16.6.1	Death certificate	389
16.6.2	Winding up estates	389
16.6.3	Guardianship of children	390
	<i>What does the law say about guardianship?</i>	390
	<i>Why is the High Court the 'upper guardian' of all minors?</i>	390
	Talking points	391
	References and resource materials	392

Personal planning for people living with HIV or AIDS is important. People have to consider the possibility that they may face periods of illness, with physical and sometimes mental **incapacity**, and eventually premature (early) death. Making plans for this possibility is one way of relieving stress.

Giving advice on these issues is important, but needs a lot of sensitivity and understanding.



It is better to make plans for your future before you become very ill.



16.2

Making decisions about property and money

In this section, we look at two very important documents to help you make decisions about your property or money:

- A power of attorney
- A will.

16.2.1 POWER OF ATTORNEY

What is a power of attorney?

A power of attorney is a legal document which appoints one person (called the 'attorney') to do things on behalf of another person when that person can't be physically present – for example: things to do with their property and money, or to take legal action on their behalf.

Here an 'attorney' does *not* necessarily mean a lawyer. It is usually a family member, partner or close friend.

Powers of attorney are important for people with HIV or AIDS because of the possibility that there may be times when they are **incapacitated** and not able to carry out everyday tasks like:

- Going to the bank.
- Paying rent or other bills.
- Collecting or signing for grants, such as disability benefits.



THE TWO TYPES OF POWER OF ATTORNEY RECOGNISED IN OUR LAW

Special Power of Attorney

This is where the person (the attorney) is given the power to carry out specific acts, eg to buy a house.

It is safer to grant a person a **Special Power of Attorney**, because then the person only has the power to do that one thing. As soon as this is done, the Special Power of Attorney falls away.

General Power of Attorney

This is where the person (the attorney) is given the power to carry out all acts on behalf of the person giving the power of attorney. Wide powers are given to the attorney and therefore it must be a person who is trustworthy.

A **General Power of Attorney** is also convenient because you don't have to keep getting a new power of attorney for each task that needs to be done.



Can you give a power of attorney for when you are very ill?

There may come a time when you are too ill to make your own decisions. Our law says that a power of attorney falls away when the person giving the power of attorney becomes **mentally incompetent** - in other words, mentally unable to make your own decisions and manage your affairs.

Someone can make an application to the High Court and ask them to appoint a **curator** for the mentally incompetent person. A curator's powers are wide:

- The curator steps into the shoes of a mentally incompetent person and manages all his/her affairs, including making all important decisions.
- A curator is accountable to the Master of the High Court. The curator has to submit accounts and reports to the **Master** so that there is no chance of abusing their powers. If the curator is abusing his/her powers, then the Master can ask the court to remove that person as curator.

For more on a proposed new type of power of attorney to deal with this situation, see 16.4.3 on page 387.

How do you make a power of attorney?

MAKING A POWER OF ATTORNEY

1

If you want your 'attorney' to handle your finances (eg signing cheques, paying bills), you should make a request to your bank:

- The bank will authorise a specific person to act for you if there are times when you are unable to do things yourself.
- To prevent fraud, they will request personal details of this person and ensure that the person is only doing what the power of attorney allows.

2

You can make an affidavit where you give powers of attorney to a friend to carry out:

GUIDELINES



- Specific tasks on your behalf, eg to collect your disability grant (Special Power of Attorney).
- General tasks on your behalf, eg to deal with all your business – your finances, buying and selling your property, and making any contracts on your behalf. (General Power of Attorney).

3

A power of attorney is only **valid** if:

- It is witnessed by two competent witnesses (who are 14 or older) or by a **Commissioner of Oaths**, and
- It is arranged by you at a time when you are considered to be in a sound state of mind. Therefore, it is important to make these arrangements while you are well.

4

A power of attorney gives a lot of power to the person you nominate to be your 'attorney', eg the power to sign cheques or collect money. To avoid fraud, you must choose a person who you trust.

5

Powers of attorney need to be very carefully worded. To make sure that your instructions are clearly written, get some advice and help from a **paralegal** or lawyer.

6

If you have any other specific instructions, you may add them on to the power of attorney as long as they are not illegal or against public morals (see pages 376 and 384).

For more on the importance of powers of attorney for gay and lesbian people, see 10.6 on page 241.

Example: Special power of attorney

SPECIAL POWER OF ATTORNEY

Authority to operate Bank Accounts

Date:

To: The Bank Manager

Bank:

Branch:

I (full names of account holder)

.....

authorise

.....

(insert full names and identity number of authorised person)

to operate the following accounts:

TYPE OF ACCOUNT	ACCOUNT NUMBER	SIGNATURE OF ACCOUNT-HOLDER

The authorised person may deposit and withdraw funds, apply for cheque books, get bank statements, stop payment of cheques, cede any of my rights in the accounts as security, close or transfer the accounts and generally do anything else related to the accounts; subject, however, to the following restrictions:

(list restrictions, if any)

.....

.....

.....

.....
SIGNATURE OF ACCOUNT-HOLDER

.....
SIGNATURE OF FIRST WITNESS TO
ACCOUNT-HOLDER'S SIGNATURE

.....
SIGNATURE OF AUTHORISED PERSON

.....
SIGNATURE OF SECOND WITNESS TO
ACCOUNT-HOLDER'S SIGNATURE

Example: General Power of Attorney

GENERAL POWER OF ATTORNEY

I, the undersigned,

Name

Identity Number

Nominate and appoint

Name of Person who is to be the attorney

Identity Number

To be my attorney and agent for managing and conducting my business in the Republic of South Africa, with full power and authority for me, and in my name and for my account to carry out these actions:

1. To collect and receive any money on my behalf and to invest this money in the best possible manner, or to use this money in paying any account on my behalf.
2. To open and operate any banking account in my name and to draw, sign and endorse cheques on my behalf.
3. To deal with all legal actions and demands to do with me, my property and my affairs in any court or other body in the Republic of South Africa.
4. To buy or sell movable property (eg a car or furniture) or immovable property (eg a house) on my behalf, and sign all the necessary documents to achieve this.
5. To choose the address where I will receive all important documents, and generally to do, carry out and deal with any act, deed, issue or thing that the attorney may decide is necessary to represent my concerns.

Signed and dated at

on the day of 20...

in the presence of these witnesses.

As witnesses:

1

2

SIGNATURE OF GRANTOR
(person giving power of attorney)

16.2.2 WILLS

What is a will?

A will is a legal document which says what must happen to your possessions when you die. It is a written statement by you (you are called “the **testator**”) on how you want your **estate** (everything you own) to be divided up after your death.

This task should not be left until a time of crisis, such as illness. As the testator, you should spend some time working out what you want to do with your possessions and what this will mean for the people who will inherit the property (called your “heirs”).

What happens if you do not draw up a will?

If you die without leaving a will, the law says you have died **intestate** (without a will). The *Intestate Succession Act* tells us what should happen to a person’s possessions or property when they die intestate. There are also **customary law** rules of succession.

The Intestate Succession Act says:

- If you die and leave only a **spouse** and no children, then the husband or wife who is still alive will inherit all the possessions.
- Where there is a spouse still alive as well as children, then the property is divided up between the spouse and the children – although the law makes sure that the spouse must get at least a minimum amount of money before the children inherit.
- If there is no husband or wife still alive, but there are children, the children will share the property and possessions.
- If you die leaving behind no spouse or children, the property is divided between your parents in equal shares. If one parent is dead, then this share goes to the dead parent’s children, if there are any, or the full amount goes to the other living parent. After that, the property will go to any nearest relatives like aunts and uncles.

All children can inherit, including:

- Children born during marriage
- Children born out of marriage
- Adopted children.



EXAMPLE

CHILDREN'S RIGHT TO INHERIT

Themba dies and leaves an estate of R200 000. His wife is dead, but he has 3 adopted children and one child from his previous marriage. All 4 children will each inherit R50 000.

To summarise: our law says that if a person dies without leaving a will, then the property must be divided between family members. Thus you must write a will:

- If you want to leave more things to some family members.
- If you want to leave things to other people, eg friends, lovers or charities.



EXAMPLES

For more on Customary laws of succession, see 9.4 on page 217.

SAME-SEX COUPLES AND CUSTOMARY UNIONS

- *If partners in a lesbian or gay relationship want to leave property, money or other possessions to each other, they must each draw up wills. If they do not do this, then the surviving partner will have no legal right to claim something from the estate of the partner who dies. This is because the South African law on wills does not yet recognise **same-sex** couples.*
- *If a husband in a customary union (marriage) wants to make sure that his wife inherits the family property, he should draw up a will rather than letting the property be divided according to the customary laws of customary succession.*



KEY POINTS

For more on the rights of lesbians and gay men, see 10.2 on page 229 and 10.6 on page 241.

CHALLENGING UNCONSTITUTIONAL SUCCESSION LAW

The constitutional right to **equality** and **non-discrimination** mean that some of our laws of succession are probably **unconstitutional**:

- *The laws which don't allow gay and lesbian families to inherit intestate may be unconstitutional because they discriminate on the basis of **sexual orientation**.*
- *Customary laws of succession may be unconstitutional because they discriminate on the basis of gender.*

Who can make a will?

Any person who is 16 or older can make a will. But a person is not allowed to make a will if at the time of making the will they are mentally incapable of making decisions – for example: people who have a mental disability or who are drunk are seen by the law as ‘mentally incapable’ of making a will.

You should put a date on a will. This helps to decide whether, at the time of making the will, the testator was mentally competent (able) to make the will.

Who can inherit from a will?

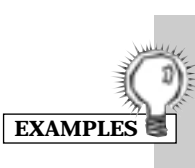
Generally any person, group or organisation can inherit from a will. But the law stops some people from inheriting:

- A person who kills the person who wrote the will.
- Any person who signed as a witness on the will or who signed on behalf of the testator (because the testator was unable to do it him/herself).

What can be included in a will?

Any wishes can be included in a will as long as they are not:

- Illegal – something that is against the law.
- Against public morals – something is invalid (not recognised by the law) if it offends public morals.
- Too uncertain to be carried out – something that is too vague (general and unclear), eg it is not clear who is to inherit the property.



WHAT IS NOT ALLOWED IN A WILL

- “X will inherit my house if she poisons her husband Y.”
- “X shall be my heir if he becomes a drug dealer.”



BASIC DETAILS TO INCLUDE IN A WILL

Personal and family details

1. Your full names, age, identity number and permanent address.
2. Your marital status and whether you are married in or out of **community of property** (sharing of property in a marriage).
3. If married, your spouse's name and ID number.
4. The names, sex and ages of your children, and whether they are single or married.
5. Details of your relatives and other persons or groups who will inherit.
6. The name and details of the **executor** – the person who manages the will and who is responsible for winding up (closing) the estate and making sure that the estate is distributed properly.

Business and financial details

1. Your personal financial position – for example: what you own, what money you owe, any policies you have, eg life assurance.
2. Your and your spouse's income tax numbers.
3. Your employment details – provident or pension fund beneficiaries and employer's address.
4. Your business details and duties (eg the names and addresses of business partners, and instructions on whether a business you own should be sold or carried on).

What do you need to draw up a valid will?

For a will to be valid and able to be carried out practically after your death, it must be properly executed – in other words, all the formalities (formal rules) must be followed in writing the will.

GUIDELINES



FORMALITIES YOU MUST FOLLOW UNDER THE WILLS ACT

- 1** The will must be in writing – this includes a typed, printed or hand-written document.
- 2** As the testator, you must sign every page. If you can't sign (eg you are illiterate or physically unable to sign), then someone can sign on your behalf, in front of you and the witnesses.
- 3** You can sign in full, or use initials or make a mark, eg 'X'. But if you sign by making a mark, then a Commissioner of Oaths must write that he/she is satisfied that it is your mark and that the will reflects your wishes.
- 4** You (or a person signing on your behalf) must sign the will in the presence of (in front of) two or more witnesses who must be present at the same time. The witnesses must be 14 or older.
- 5** The witnesses must sign the will in front of you as the testator and each other. The witnesses must sign in full – they should not use initials or a mark.
- 6** If the will has more than one page, all the pages must be signed by you (or the person signing on your behalf). The last page must be signed as close as possible to the end of the will. This stops anyone trying to add something in a space that is left at the end of the will.

KEY POINTS



THE ROLE OF WITNESSES AND ADVICE

Witnesses do not have to read your will:

- They are just there to confirm your signature and that the document is your will.
- They do not need to be consulted about the contents of the will.

It is better to get advice and help in drawing up your will, especially if you have a big estate. You can go to:

- A lawyer
- A community advice office or paralegal

Example: A basic will

WILL

This is the Will of (full name)

Identity Number

of (address)

.....

.....

1. I revoke any past wills made by me.

2. I nominate (full name and address of person appointed as Executor)

.....

.....

to be Executor of my Estate.

3. I direct that my nominated Executor does not have to give security to the Master of the High Court for the proper administration of my Estate.

4. I leave my Estate to the people and in the amounts indicated here:

.....

.....

.....

5. I appoint

Identity Number

of

to be the sole guardian of my minor children.

Signed at

on the day of 20...

in the presence of the undersigned witnesses, who signed in my presence and in the presence of each other, all being present at the same time.

As witnesses:

1

2

TESTATOR



16.3

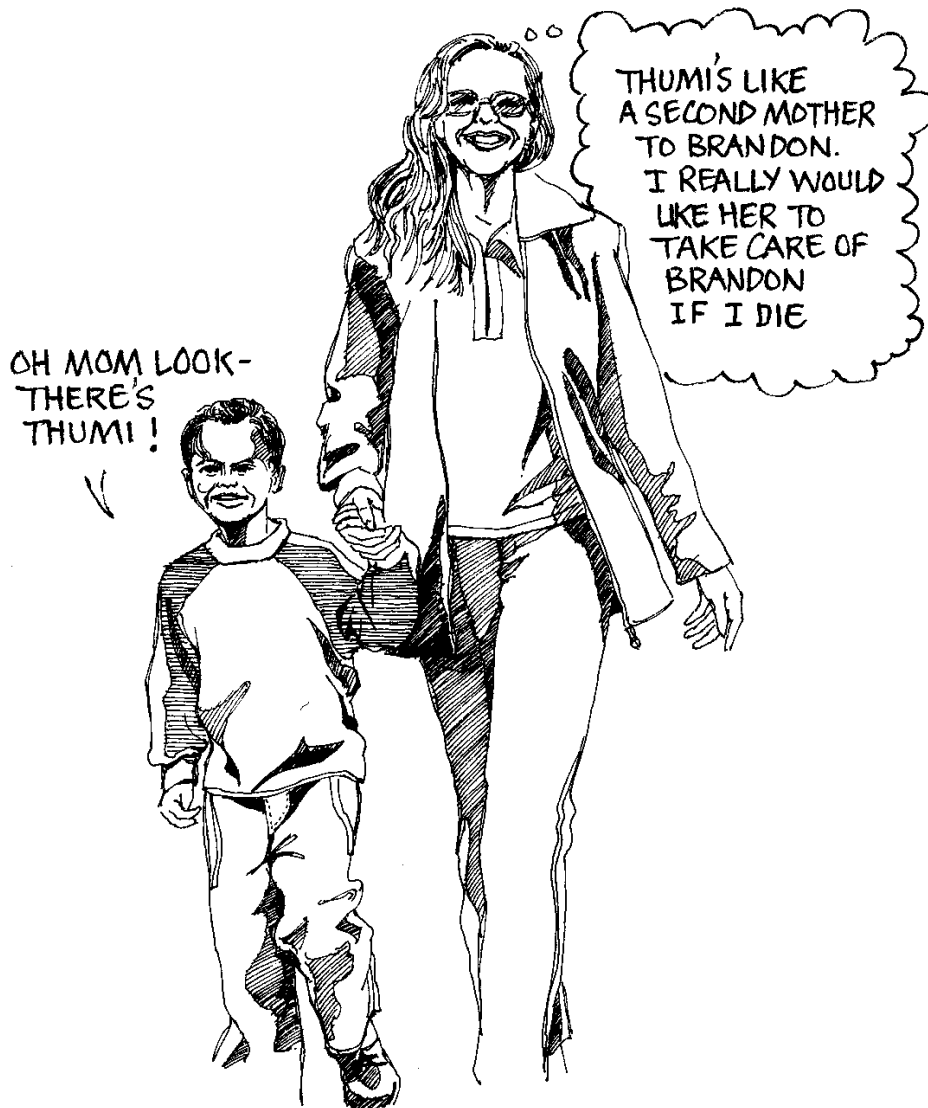
Planning for the care of your children

For an example of how to write this in a will, see page 379.

For more on guardianship, see 16.6.3 on page 390.

In most situations, the law sets out who will become the guardian of your children after your death. But in some cases (eg if your husband or wife is dead), you may want to make your own decisions about who will care for your children after your death.

You can appoint a guardian for your children in your will. If any person who has an interest in the child's welfare challenges this, the High Court will decide who will be the best guardian.





It is important that people with HIV or AIDS think about and plan for decisions about their future medical treatment.

As a person living with HIV or AIDS, you may want to :

- Think about what decisions you would like to make about your medical treatment in the future, if you get to a stage when you are very ill.
- Tell family members what your feelings are about your future medical treatment, in case family members are asked to make decisions for you when you are very ill.
- Write down what you would like to happen, or who should make medical decisions for you.

This section looks at what is allowed in our law when making decisions about ending life.

16.4.1 EUTHANASIA

Euthanasia is also known as ‘mercy killing’ and generally involves the ending of the life of someone who is **terminally ill** and in pain, so that the person can die as quickly or as painlessly as possible. Euthanasia can happen in different ways – some of these are allowed by our law and some are not.

At the moment, our laws on euthanasia are not clear. The **South African Law Commission (SALC)** did an investigation into euthanasia, and has recommended that some of our common laws on euthanasia should be changed and made into a statute called the *End-of-Life Decisions Act*.

For information on the proposed new Act, see the SALC Report in References and resource materials on page 392.

What kinds of euthanasia does our law allow?

- A doctor is allowed to stop giving life-saving treatment to a person who is medically dead.
- A doctor is sometimes allowed to stop giving life-saving treatment to a person who is in a vegetative state (eg when someone is in a coma for a long time).
- A person of 18 or older can refuse medical treatment, even if this means that he/she may die more quickly. A doctor can carry out the person’s wish to not be treated.
- A person of 18 or older can ask for more painkillers, even though the result will be that he/she may die more quickly. The doctor can, by law, increase the painkillers as long as the doctor does this for the purpose of reducing pain, and not with the intention of killing the patient.


EXAMPLES

WHAT DOCTORS ARE ALLOWED TO DO

- *Magadi is brain-dead and is being kept alive by a heart-lung machine. The doctor can turn off the heart-lung machine so that she is not being kept alive any longer.*
- *Keith has cancer, and is in a lot of pain. He asks his doctor for more morphine to ease the pain. The doctor knows that if she gives Keith more morphine, Keith may die. But she gives Keith the morphine anyway, to ease his pain.*

What kinds of euthanasia does our law prohibit?

Our law prohibits what we call ‘active euthanasia’ – where you do something which directly assists the death of the person. This means:

- You are not allowed to give a terminally ill person something which will help them to kill themselves, even if they ask for your help.
- You are not allowed to do something to kill a terminally ill person (like giving them an injection) even if they ask for your help.
- You are not allowed to do something to kill a terminally ill person where they don’t or can’t ask for your help, but because you feel sorry for them.


CASES

EUTHANASIA

- In *State v De Bellocq* (1975), a young married woman gave birth to a baby that had a disease called toxoplasmosis and would never be able to have a normal life. She drowned the baby in the bath. She was found guilty of murder, but was never actually sentenced. She was discharged (released) under a section of the old Criminal Procedure Act, which said the court could call her back for sentencing later.
- In *State v Hibbert* (1979), Hibbert’s wife was very depressed and wanted to commit suicide. She asked Hibbert to help her and so he gave her a gun. When she shot herself, he was found guilty of murder and sentenced to 4 years in prison.
- In *State v Marengo* (1990), the accused shot and killed her 81-year old father because he was suffering from cancer. She was found guilty of murder and given a suspended sentence.

16.4.2 LIVING WILLS

You may want to write down your feelings about euthanasia when you are well, so that once you become too ill to make decisions, your doctor and family members know what you want. You can do this in a document called a 'living will'.

What is a living will?

A living will is a document you write when you are well. In the living will, you say what you want to happen if you become very ill and are not able to communicate your wishes any more.



EXAMPLE

WHEN A LIVING WILL IS NEEDED

You are being kept alive only because you are being fed through a tube. You want the tube to be taken away so that you can die naturally.



KEY POINTS

THE PURPOSE OF A LIVING WILL

A living will is not like other wills. It is called a living will because it is a document which deals with how you want to be treated while you are still alive, not when you are dead.

It is an instruction of how you wish to be treated if you become seriously ill. It allows medical staff, partners and other family members to know your wishes if you become unable to communicate with them directly.


Our courts have used the living will as one way of finding out what the patient's wishes are. So a living will can be used in our law to show what decisions the patient wanted for his/her medical treatment.


Is a living will allowed in our law?

Our law isn't clear about living wills. The South African Law Commission (SALC) has recommended that the living will should be recognised in our law, so that a person of 18 or older is allowed to write a living will when they are in a healthy state of mind.

At the moment, living wills are not recognised by our **statute law**. There haven't been any cases which have answered the question of whether living wills are valid. But our courts have said that we should respect the wishes of the patient made when they were in good health.

Section 12 of the **Constitution** supports the right of any person to make decisions about their medical treatment:

 Everyone has the right to bodily and psychological integrity, which includes the right:

- (a) to make decisions concerning reproduction,
- (b) to security in and control over their body; and
- (c) not to be subjected to medical or scientific experiments without their informed consent. 

A living will can only deal with acts of euthanasia which our law allows. The law will not pay attention to a living will where a patient makes unlawful wishes.

LAWFUL AND UNLAWFUL WISHES

- Laverne writes a living will when she is in good health. She says that she does not want to be kept alive by life-saving treatment if she is brain-dead. She also says that if she is in a lot of pain, she would like to be given only palliative care (care that relieves pain, eg sedatives) even though this may speed up her death. Her wishes are lawful, and the living will is good evidence of her wishes. The doctors and the courts should respect her wishes.
- Letsoholo writes a living will when he is in good health. He says that if he becomes terminally ill and is in great pain, he would like the doctor to end his life by giving him a lethal injection. His wishes are not lawful, and a court cannot recognise this living will.



EXAMPLES

Even though our law does not yet recognise a living will, the South African Living Will Society has a membership of more than 20 000.

COPIES OF A LIVING WILL



GUIDELINES

The Living Will Society recommends that you should make 3 copies of your living will:

- One to be kept at home in a safe place
- One given to your family doctor
- One in your in-patient file.

Why write a living will?

The living will allows you to decide beforehand what should happen if you become terminally ill.

Living wills have these advantages:

- You stay in control over decisions about medical treatment even after you have lost the mental capacity to make decisions.
- You can appoint a trustworthy person to make sure that your wishes are carried out, eg a partner can ensure that the life-support machine is turned off at the time requested.
- You may request a close partner to be at the bedside even when the person is not legally recognised as family, eg the law does not yet recognise a lesbian or gay partner as family.

GUIDELINES



A CONTACT FOR MORE INFORMATION ON LIVING WILLS

Saves – The Living Will Society

P.O. Box 1460

WANDSBECK 3631

Tel: (031) 266 8511

Fax: (031) 267 2218

Example: A living will

LIVING WILL

1. I, (name)
of (address)
make this Living Will after careful consideration and while in sound mind, to state my wishes in case I become unable to communicate, and cannot take part in decisions about my medical care.
 2. I do not wish to be kept alive by medical treatment if I have a physical illness with no likelihood of recovery, and/or if my mental functions become permanently impaired, and/or if I become permanently unconscious with no chance of regaining consciousness.
 3. I request that medical treatment be kept to the minimum needed to keep me comfortable and free from pain, even if this should hasten the moment of death. I expressly do not consent to be kept alive artificially and/or to be provided any form of tube feeding.
 4. I have informed this doctor / clinic of this Living Will:
(name)
(address)
(contact telephone for doctor/clinic)
 5. I give consent to any person to apply for a court order to ensure that this Living Will is followed if any medical, health authority or institution, and/or family member or partner refuse to follow my wishes.
 6. I wish to be kept alive for so long as it is reasonable to enable the following person(s) to be with me before I die, even if this means temporarily going against the wishes stated earlier in this Living Will.
(name)
(address)
(telephone numbers)
 7. I appoint this person (name)
(address)
(telephone numbers)
to take part in decisions about my medical care on my behalf, and to represent my views about them, if I am unable to do so. I wish (name)
to be consulted about or involved in those decisions. Further, I wish those caring for me to respect the views (name) expresses on my behalf unless they go against or are in conflict with my wishes in this Living Will.
 8. This document remains effective until I make clear, while in sound mind, that my wishes have changed.
 9. This declaration is signed and dated by me and confirmed by the two witnesses below.
(signed) (date)
- Witnesses:
- | | |
|-----------------|-----------------|
| Signature | Signature |
| Name | Name |
| Address | Address |
| | |

16.4.3 A POWER OF ATTORNEY FOR FUTURE MEDICAL TREATMENT

Our law says that a power of attorney falls away when a person becomes mentally incompetent. So, this means that our law does not allow you to appoint a power of attorney when you are in good health, to make medical decisions for you in the future when you are not able to make decisions yourself.

When you become mentally incompetent, someone can apply to the court to appoint a curator to take care of your personal affairs and to make medical decisions for you. The South African Law Commission (SALC) has recommended that the law should be changed so that people can make an **enduring power of attorney** – in other words, a power of attorney that carries on even when a person becomes mentally unable to make decisions anymore.

For more on powers of attorney, see 16.2.1 on page 369.



EXAMPLE

AN ENDURING POWER OF ATTORNEY

Eddie has a long-term relationship with Phumi, but they are not married. Eddie wants to write a power of attorney giving Phumi the right to make decisions about his medical treatment if he becomes too ill to do so. He is worried that his family may try to make those decisions without Phumi.



KEY POINTS

WHAT THE SALC'S PROPOSED END-OF-LIFE DECISIONS ACT SAYS

- Every person has the right to ask that life-saving medical treatment be stopped.
- Where the person is brain-dead, the doctor may stop giving life-saving medical treatment.
- Where the person is mentally incapable of giving his/her wishes, in some cases a doctor is allowed to stop giving life-saving medical treatment, if family members agree to this.
- Every person has the right to refuse any medical treatment.
- Every person has the right to ask for, and a doctor is allowed to give, increased painkillers even though this may speed up death.
- The living will is recognised in our law.
- An enduring power of attorney is recognised in our law.

To find the proposed new Act, see the SALC Report in References and resource materials on page 392.



Sometimes a person wants to donate their human tissue after their death. Under the *Human Tissue Act*, 'human tissue' is parts of the body – for example: flesh, bones, organs, glands or body fluids. Any person who can, by law, write a will, can also donate their human tissue to be used after their death, for example: a person living with AIDS wants to have parts of their body used in medical research to find a cure for HIV/AIDS.

For this to happen, you must give consent before you die. You can give consent in one of these ways:

- In a will
- In a written document signed in front of two witnesses who are 14 or older
- Verbally in front of two witnesses who are 14 or older.

For more on wills, see
16.2.2 on page 374.

IF IT WAS NOT FOR
MY HEART TRANSPLANT.
I WOULD NEVER HAVE SEEN
MY DAUGHTER'S WEDDING.
I'M VERY GRATEFUL TO
THE MAN WHO
DONATED HIS ORGANS.





16.6 Death

16.6.1 DEATH CERTIFICATE

After death, a relative, friend or partner must get a medical certificate on death from the doctor who attended to the person when they were dying.

This certificate confirms:

- That the person has died
- The date of death
- The cause of death:
 - Natural causes, eg illness
 - Unnatural causes, eg murder.

For more on death certificates and confidentiality, see page 129 in 6.2.4.



WHAT IS WRITTEN ON A DEATH CERTIFICATE

It is not necessary for a doctor to note AIDS as the cause of death on a death certificate.

16.6.2 WINDING UP OF AN ESTATE

The estate must be wound up (closed down) by the Master's Office of the High Court:

- The death must be reported to the Master's Office within 14 days after the person dies.
- A copy of the death certificate must be handed in.
- The Master's office will give the family different forms to fill in, to help wind up (close) the estate of the deceased.
- If the estate is worth less than R50 000, a family member or some other representative can wind up the estate on their own.
- If the estate is worth more than R50 000, then the Master's Office usually says that an Executor must wind up the estate.
- If an Executor has not been appointed, the Master will appoint one.

16.6.3 GUARDIANSHIP OF MINOR CHILDREN

What does the law say about guardianship?

The law tells us who will take care of minor children and make decisions about their lives. This is called **guardianship**. Guardianship carries on until the child is 21.

The *Guardianship Act* says that, if the parents are married, the mother and the father have equal guardianship over the child. This means that both parents have the right to make decisions about the child's welfare, eg about school education.

But sometimes (eg after divorce), the court may award guardianship to only one of the parents. On the death of that parent, the guardianship would normally go back to the other parent.

When a child is born outside of marriage, the mother is automatically the guardian of the child. If the mother dies, her parents become the guardian of the child. But the new *Natural Fathers of Children Born out of Wedlock Act* says that now the natural father can apply to the High Court to also become the guardian of the child. The court may ask the Family Advocate's Office to carry out an enquiry, and if the court thinks it is in the child's best interests, it may grant the father guardianship.

Why is the High Court the 'upper guardian' of minors?

You can nominate a guardian for your minor child in your will. But if somebody challenges your wishes, the High Court can overrule your intention. The High Court takes the final decision on who should be the guardian. This is because our law makes the High Court the 'upper guardian' (the highest guardian) of minors.

If one or both parents die, the High Court has the power to make whatever decision is necessary 'in the best interests of the child'.



For more on the 'best interests of the child', see 11.1.2 on page 251.

THE HIGH COURT'S POWERS

- When the High Court decides who will be a child's guardian, they look at the best interests of the child.
- Even while the parents are alive, the High Court can order another person to be the guardian of the child if the parents are unable to act in the best interests of the child, eg if a child is being sexually abused or neglected.



Talking points

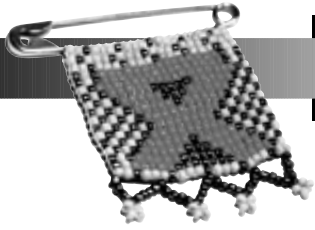


1 Our law prohibits active euthanasia (see 16.4.1 on page 381). But in many of the cases, the courts do not give harsh sentences to people who are accused of this. The South African Law Commission (SALC) investigated active euthanasia and got so many different opinions on the issue that it was difficult to know what to recommend.

- *What do you think?*

2 The SALC have recommended that children of 14 or older should be allowed to refuse medical treatment. Our law allows children of 14 or older to consent to medical treatment.

- *Do you think it should also allow children to refuse medical treatment?*



References & resource materials

LAWS

Criminal Procedure Act, No 56 of 1955.

Guardianship Act, No 37 of 1953.

Human Tissue Act, No 65 of 1983.

Intestate Succession Act, No 81 of 1987.

Natural Fathers of Children Born out of Wedlock Act, No 87 of 1997.

CASES

State v De Bellocq, 1975 (3) TPD.

State v Hibbert, 1979 (4) SA 717 (D).

State v Marengo, 1990 WLD (unreported).

REPORTS, MANUALS AND OTHER USEFUL MATERIALS

South African Law Commission: Report on Euthanasia and the Artificial Preservation of Life, Project 86, November 1998 (including proposed End-of-Life Decisions Act).

AIDS Law Project and Lawyers for Human Rights: HIV/AIDS and the Law: A Trainer's Manual (First Edition), July 1997.

WEBSITES

AIDS Law Project: www.alp.org.za

AIDS Legal Network: www.redribbon.co.za/legal