

WILLS

Disposing of property after death

You may not be able to 'take it with you' when you die, but at least you can decide who gets your accumulated assets. This, of course, means that you have to draw up a valid will.

If you die without leaving a will drawn up as required by law, you are said to die 'intestate' and the rules of intestate succession will determine who acquires ownership of the property you leave behind. (See [intestacy](#).)

Most people leave a will setting out what should happen to their assets. With some limitations, you can leave your property to practically anyone in a will. If you wish, and subject to the Maintenance of Surviving Spouses Act, 1990, and [maintenance](#) for minor children, you can leave your entire estate to the Society for the Prevention of Cruelty to Animals or another charity of your choice and leave nothing to your children or spouse.

More important is the fact that by drawing up a will you can arrange for your assets to be distributed among your relatives or friends in the proportions of your choice rather than those laid down by the rules of intestate succession.

The rules in intestacy, for example, give the surviving spouse limited rights, whereas many people prefer to leave their entire estate to their surviving spouse to deal with as he or she may wish. You can, for example, also leave specific property to a specific person in a will - unless you specify who is to inherit what, you cannot be certain of that outcome.

There are other advantages in having a will. If you die leaving a will, your assets must be collected, your debts paid and the balance paid in terms of your will to your heirs and legatees. This is the executor's job and a deceased estate, whether testate or intestate, must have an [executor](#). If the value of a deceased estate does not exceed R50000, the Master of the Supreme Court may dispense with the appointment of an executor and give directions as to the manner in which such an estate is liquidated and distributed.

If the estate is intestate, the Master will appoint an executor - usually the surviving spouse. An executor appointed by the Master is called an executor dative, whereas one appointed in a will is an executor testamentary. A valid will, in most cases, will name an executor. When deciding on an executor testamentary, you can appoint a money-wise family friend or relative to undertake this task.

You can choose whoever you like to look after your affairs, pay your debts and then distribute the remaining assets among the heirs named in your will. If you wish, you can appoint one or more persons to act as your executor(s) testamentary. An executor, whether testamentary or dative, must have proof of appointment and this proof is issued by the Master of the Supreme Court in the form of letters of executorship. (See [estate, deceased](#).)

Warning - Appointing an Executor

Many banks and other financial institutions who offer to assist their clients make a will, tend to persuade the maker of the will to appoint the institution as executor. However, especially for smaller estates, this is often not advisable. The institution will be legally entitled to the executor's fee, which is 3,5 per cent of the gross value of assets and 6 per cent of any income accrued after the date of death.

It is usually better to appoint as executor, one of the beneficiaries of the will who will receive the executor's fee in addition to a bequest. Even if such an executor appoints an attorney to look after the legal formalities, he or she will, by arrangement with the attorney, still receive a share of the executor's fee.

When the estate is valued at under a certain amount, the figure being published in a [government gazette](#), its administration is greatly simplified, as the Master will issue a directive enabling the executor to transfer to his or her own account the assets of the estate for distribution.

Making a will

Because it is the only document you will ever sign that comes into effect after your death, it is vital to ensure that your will lists all your wishes in a clear and unambiguous way. It is equally important to remember that a will must also meet all the legal requirements laid out in the Wills Act, 1953, as amended in 1954 and 1965. When you draw up your will, it is therefore advisable to seek expert advice from an [attorney](#) or from the trustee department of a bank.

Thousands of rands may be squandered if, after your death, your heirs are involved in expensive [litigation](#) in an effort to clarify what you meant by a particular clause. Expert advice is not as costly as is generally believed and it will reduce the possibility of ambiguities that may require interpretation by the courts.

While an attorney will charge for drawing up a simple will, trust companies and [bank](#) do not charge - requiring instead that they be appointed executors of your estate; they will charge a fee when winding up a deceased estate. However, although a trust company or bank may appoint itself executor, in practice it will not accept the appointment if it appears that the estate will be uneconomical to administer. In such cases, an executor dative will have to be appointed.

Apart from anything else, an expert may be able to foresee contingencies that had not occurred to you and so ensure that you make provision for them. Also, the expert may be able to suggest ways in which the [estate duty](#) payable to the state after your death can be reduced. (In 1996, estate duty was payable only on deceased estates worth more than R1 million.)

Certain stationers sell specially printed forms that enable you to draw up your own will but, again, unless your estate is a very simple one, it is more prudent to seek expert advice.

Who may make a will?

The Wills Act, 1953, which came into force on 1 January 1954, lays down that anyone of at least 16 years of age may make a will if he or she is mentally capable of appreciating the nature and effect of this Act. Essentially, what is required is that the testator must, at the time of drawing up a will, have been of a sound mind and memory.

Although your memory need not be perfect, you must be able to remember the property you are about to bequeath, the manner of its distribution and the persons to whom you wish to give it. Also, you must be able to understand that you are making a will.

Should anyone allege that a testator was mentally incapable of making a will, the burden of proof rests on the person who alleges that the testator was incapable.

Warning - The illiterate or very ill testator

The law requires a testator who is illiterate and cannot sign, or is too ill to do so (he or she may be unable to write, but able to speak, for example), to either sign the will by making a mark (if the testator is illiterate, for instance) or direct another person to sign the will on his or her behalf.

That person must, in the presence of the testator and the witnesses and at the direction of the testator, sign the will. Furthermore, a certificate has to be attached at the end of the will in which a [commissioner of oaths](#) verifies the identity of the testator and that the will so signed is the will of the testator. If the will consists of more than one page, it must be signed by the commissioner of oaths on each page.

It would be wise to ensure that this certificate is attached at the same time as the will is signed (either by mark or by a person signing on the testator's behalf) by the testator and the witnesses, so that the execution of the will is completed in a single transaction.

Who may benefit under a will?

Generally you can distribute your estate as you please, but there are some people who may not benefit from the will. They are:

UNWORTHY There are people who are unworthy to benefit, the most obvious being a person who murders the testator. He or she is precluded from deriving any benefit from the testator's will, for it would be wrong for a person to benefit from an unlawful act. It is unclear whether a prospective beneficiary who kills a testator negligently rather than intentionally is disqualified from benefiting. No case on this point has arisen, but our older legal authorities suggest that a negligent killer is also disqualified.

However, there have been many cases in which a husband's negligent driving has caused his wife's death, yet in none of these cases has the husband been prevented from benefiting from his wife's estate. On the other hand, in the case of *Taylor v Pim* (1903) it was held that a beneficiary who had caused the deceased to live an immoral and degraded life by entering into an adulterous relationship with her, had encouraged her to drink intoxicating liquor that in the end led to her death and had neglected to provide her with

medical attention, was unworthy and disqualified from receiving benefits under her will. In another case, concerning a son who, while mentally disturbed, shot his father, the court held that he was entitled to inherit.

Also, people who use fraud or duress to prevent a testator from changing a will, or making a will if one has not previously not being drawn up, are disqualified from deriving benefit either under the old will or under the rules relating to intestacy.

This rule is designed to prevent, say, an intestate heir from stopping a person making a will when it is clear that the prospective testator wishes to exclude him or her from among prospective beneficiaries.

GUARDIAN It was held in *Mostert v The Master* (1878) that anyone who marries a minor without the consent of the minor's parent or guardian cannot benefit under a will even if the minor was a major when making that will, or even if the consent to the marriage was given after the marriage.

PARTICIPANTS A number of prohibitions relate to people who write out the will for the testator or who witness it or participate in a number of other ways in the formalities of its execution.

The person who writes a will for the testator may not, in the absence of a court order remedying the situation, derive any benefit from it unless the testator confirms the bequest.

However, this rule is subject to qualification. A prospective beneficiary who would have benefited on the intestacy of the testator, can take as much as would have been taken on intestacy. But a person who would have taken nothing at all on the intestacy of the testator, can take no benefit at all under the will unless the bequest is confirmed.

The confirmation of the bequest by a testator to the person who wrote out the will can take place in a variety of ways. The usual way is for the testator to write at the end of the will, in his or her own hand, words that confirm the bequest - for example, 'I confirm the bequest to xyz, who wrote this will, contained in clause A above' - but the bequest can be confirmed orally, too. All that is required is that the court be satisfied that it was confirmed.

The prohibition extends only to the actual writer, so anyone who dictates the will or writes out a draft that is subsequently typed by someone else, may none the less benefit under the will.

The Wills Act provides that the witnesses to the will (the persons who sign the will in the presence and at the request of the testator), can neither take any benefit under the will, nor be nominated as an executor of the estate. The same applies to the testator's spouse. This may, however, be changed by the order of a court competent to hear the matter.

Formalities for making a valid will

The making of a will is an important act, which may have far-reaching consequences. Obviously you will not be able to explain what you meant in your will when the time comes to read it; nor will you be able to expose it as a fraud. It is, therefore, necessary that a will be witnessed, so that in the event of a dispute it may be possible to call on a witness to give evidence that you did, in fact, sign the will.

At the same time, it is obviously important that wills should be relatively easy to make. People frequently postpone making a will until they are near death, and it then becomes necessary to make a will quickly and speedily. If the law stipulated that a will had to be made only before an attorney or a notary public, there would be many more intestate estates.

South African law has steered a middle course between extremes of informality - allowing a mere written or oral statement by the testator to stand as a will - and formality, for example, by requiring a will to be executed before a notary public.

In the case of a will executed after 1 January 1954, the essential requirement is that the will be signed by the testator 'at the end thereof' and that the signature be witnessed by two or more people present at the same time, who must then sign the will in the presence of the testator and of each other. If the will consists of more than one page, each page must be signed by the testator and by the same witnesses, who may sign anywhere on a page, so long as the signature of the testator on the final page appears at the end of the will.

Oddly enough, the Wills Act does not say where on the last page the witnesses should sign; it would be advisable for them to do so at the end of the will also.

Warning - When expert advice is essential

Do not draw up a will that creates a [usufruct](#), a [fideicommissum](#) or a trust without taking expert advice. In fact, get an expert to draw it up for you.

The law in this area is particularly complicated and technical, and estate duty considerations are involved.

Fideicommissa, usufructs and trusts need to be created with the greatest care or you may well find that you have left nothing to your descendants except a legal wrangle.

To put the matter simply - you and two independent witnesses must sign every page in one another's presence, and sign the last page as near to the end of the typing, print or handwriting as you possibly can. This is simple enough, but some points may be emphasised:

1. 'At the end' of the will means as close as possible below the last line of writing or typing as the case may be. Be careful to ensure that your will is signed in this way.

2. The witnesses must either be present at the time you sign the will or be present when you acknowledge that your signature is, in fact, yours. Both witnesses must be present at the same time and must then sign the will in your presence and in the presence of each other.
3. The witnesses must be persons 14 years old or older, who at the time were competent to give evidence in a court of law. Generally speaking, the law will consider them to be competent if, at the time, they were not insane, drunk or otherwise without sufficient understanding to be aware of their acts.
4. Any deletion, addition, alteration or interlineation made in the will after it was executed is invalid unless the deletion itself is accompanied by all the formalities necessary for the execution of a valid will. Any codicil to the will - an addition that the testator wishes to add after the execution of the will - must also be completed with all the formalities required for completing an original will.
5. If a will does not comply with all the formalities a competent court may, if it is satisfied that the document was intended to be the deceased's will, order the Master of the Supreme Court to accept the will.

How to draw up a simple will

In a simple will, the name and address of the testator (the person making the will) must be clearly set out. There is no legal obligation to date the will, but it is extremely advisable to do so - a date would be helpful in the event of a dispute after the testator's death. A statement revoking previous wills will also simplify interpretation.

If a later will does not expressly, or by necessary implication, revoke the earlier will, the wills must be construed together and the earlier one will be regarded as revoked only in so far as its provisions conflict with the later will.

Identify the executor by name and address. An executor testamentary who is not the parent, child or surviving spouse will have to provide the Master of the Supreme Court with security for the proper performance of his or her duties; this stipulation may, however, be waived by a clause in the will. Normally, legacies take precedence over the distribution of the balance of the estate.

If the estate is insufficient to pay out all the legacies, they will be paid pro rata and there will be no balance for distribution. The language of a will should be clear: for example, the word 'money' should not be used without the amount being specified.

Warning - The widow's or widower's rights

Testators have freedom of testation, which means they can dispose of their property as they like. Children have certain rights to claim maintenance against the estate of their deceased parent and the Maintenance of Surviving Spouses Act, 1990, provides surviving spouses with a claim in certain circumstances against the estate of a deceased spouse.

What to put in a will

It is very difficult to state anything definite, for individual circumstances are always different. Moreover, if you have the slightest doubts, or if your affairs are even slightly complicated, it would be wise to seek expert advice. In general, however, the following should be included:

EXECUTOR The property of a deceased person does not go directly to heirs or legatees, but to an executor, who pays the debts and distributes what is left to the beneficiaries named in the will. It is usual - and indeed wise - to appoint an executor in a will. However, it is not essential, for if you fail to appoint an executor, or the person appointed declines to act as executor or is dead, the Master of the Supreme Court can appoint someone else to act. (See [estate, deceased](#).)

Obviously, discretion must be exercised. It would be foolish to appoint an executor who is not honest. An executor should be trustworthy and diligent. The executor will generally be required to provide the Master of the Supreme Court with some security - a cash deposit, perhaps - as a guarantee that he or she will perform the required duties properly. This can be inconvenient, and it is, therefore, usual practice to exempt an executor from giving security to the Master. (See [executor](#).)

LEGACIES After you have nominated the executor of your will, you can list specific legacies to certain people. A legacy is the term for a specific article, piece of property or a specified sum of money. In this way you may leave specific sums of money or specific articles to relatives and friends or to a charity.

HEIRS After providing for legacies, you can leave the residue of your estate (the portion left after the legacies and duties have been paid) to any heirs. Should you decide not to leave the residue to a particular person or persons, this will be distributed according to the rules relating to intestacy. It is almost always wise, therefore, to appoint an heir or heirs to the residue of your estate.

In making legacies or appointing heirs, you should consider all possibilities and contingencies. For example, if you appoint your wife as the heir to the residue of your estate, you should give some thought as to what the position would be if she should die before you.

CHILDREN In drawing up the will, it is important to be as clear as possible regarding the use of words such as 'children'. However, in terms of the Wills Act, the fact that a person was born out of wedlock must not be taken into account when determining his or her relationship to the testator. Stepchildren are not generally included within the term 'children'.

Remember, too, that if one of your children - who stands to benefit under your will - dies before you, the lawful descendants of the child will be entitled to succeed to the benefit, unless you indicate the contrary in your will.

Fideicommissa, usufructs and trusts

In most cases wills are used for leaving a particular piece of property or amount of money to a particular relative, friend or organisation - in which case that person or organisation then becomes the owner and is able to dispose of the inheritance in whatever way deemed appropriate.

There are, however, a number of ways in which a testator can provide for substitution of beneficiaries. One way is to leave the property to one person who will not be free to dispose of it because the property must, on the occurrence of a certain event, pass on to someone else. For example, a father may appoint his eldest son to succeed him on his farm when he dies provided that on that son's death his eldest son (the testator's grandson) inherits it.

IN THE FAMILY

The central idea here is that the farm or other asset should be kept within the same family. Such an arrangement is known as a [fideicommissum](#). For many years it was possible to keep the same property in the same family for generations in this way; in 1965, however, the legislature provided that only two such substitutions could take place.

Therefore, if a testator leaves a piece of property to A but directs that it should go to B on A's death and similarly to C on B's death and D on C's death and so forth, the law provides that C will inherit the property without any restriction and that D will have no legal rights at all in respect of that property.

Alternatively, a husband may wish that his wife live in his house until her death, but wants the property to go ultimately to his children. This can be done if he leaves the property to the children, with the rights of use and enjoyment to the wife. The wife, the usufructuary, would have a usufruct over the property.

A fideicommissum therefore consists of one or more substitutions of different owners in the same property. In a usufruct, on the other hand, the same person remains the owner throughout, but someone else has the rights of use and enjoyment of the property.

TRUST A further way by which a testator can tie up an estate is to create a trust. For instance, a father with a large estate may take the precaution of creating a trust in case he dies while his child is still relatively young and inexperienced. He will do this if it is his intention that his child should inherit, but only at a certain age or the happening of a certain event. He will leave the property to a named trustee in his will with directions that the trustee care for the estate, invest the money prudently and profitably, and, for example, use the proceeds, at his discretion, for the maintenance and education of the child named in the will.

Then, when the child reaches the age stipulated or the event happens - for example, the child gets married or turns 21 - the money is paid to him or her. In this case the trustee becomes, in strict law, the owner of the property, but is bound to look after it and use it in the manner that is provided for in the will.

Revocation of a will

Warning - The grounds on which a will can be challenged

Overturing a will is a difficult and often fruitless exercise because the burden of proof rests with the person challenging it.

A will that appears to be valid - that is, it contains the necessary signatures and so on - will be accepted as valid by the Master of the Supreme Court and the courts until the contrary can be proved.

The onus rests on the person challenging the will to show that it is flawed - and this can be difficult. If the will was drawn up a long time before the testator's death - during which the will could have been changed - the courts would be very reluctant to find that the will was not an expression of the testator's wishes.

Consult an attorney if you believe that the will can be challenged under one of the following.

- **Formalities** If the document that appears to be a will has not been executed with the formalities laid down by law.
- **Forgery** If the will can be shown to be a forgery or if the testator was mistaken about the signed document. For example, if a man thought he was signing a contract to sell his farm, but in fact the document was a will bequeathing his farm to someone else, such a will can be challenged.
- **Duress, fraud or influence** A will must be an expression of the testator's own wishes, not the wishes of some other person.

Where a testator signs the will under duress - for example, because of threats or blackmail - the will is an expression of the wishes of the threatening person, not the wishes of the testator.

The same applies to fraud; for example, where a testator is misled into believing that certain relatives are dead or cannot be traced or are unworthy to inherit - and so leaves them out of the will.

Similarly, where the testator is under the influence of another person - for example, a timorous invalid in the care of a domineering mother - the will expresses the mind of the person having undue influence over the testator.

Insane If the will was made by a person under an insane delusion.

You can revoke a will that you have made at any time. This can be done in a variety of ways. The usual way is by stating in a later will that you revoke all previous wills - a standard clause in the average will. However, it is also possible to revoke a will by destroying it - simply tearing up a will with the intention of revoking it is sufficient.

If the will is destroyed, however, it does not necessarily follow that it has been revoked. If the will was destroyed in error - for example, if you thought it was an old insurance policy rather than your will, then the will remains valid. Of course, it may be difficult to prove that a will existed if it has been destroyed, but this is not impossible. For example, a signed duplicate may exist. Moreover, if it is shown that the will was destroyed because you thought it had already been revoked by a later will, but it subsequently transpired that the later will was invalid and therefore did not revoke the first, the act of destruction is not regarded as an act made with the intention of revoking the will and revocation is therefore not effective.

Disclaimer

We have gone to great lengths to ensure the accuracy of the information contained in this book. However, it is important to remember that laws, government departments, interest and taxation rates are constantly changing. If you have a particularly difficult problem you are advised to consult a qualified legal authority. The publishers cannot accept responsibility for any act or omission arising from consulting this book.

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