you should avoid when drafting a will

■ Numerous laws come into play when your will is executed, and your heirs could inherit a legal nightmare if you drew up your will without seeking professional advice. **Margarete King** reports

"I LEAVE MY FARM TO MY CHILDREN." Drafting a will can bring out the best in people, because it gives them the chance to share what they will eventually no longer need – such as prime agricultural land.

It can also bring out the worst in those who want to manipulate the behaviour of their heirs, such as the man whose will read: "To my wife. I bequeath the sum of R50 000 on condition that she shall not use the telephone or her cellphone for a period of 25 days after my death."

Regardless of your motivation, there are plenty of pitfalls when drafting a will – what is said, how it is said and whether the formalities of executing the will are complied with.

For this reason, a do-it-yourself (DIY) will is potentially dangerous and should be avoided.

If you get things wrong, it could have painful unintended consequences. You may simply not be able to achieve what you intended, or your beneficiaries could end up in a long and expensive court case as they battle over the interpretation of your words or actions. When money is involved, some beneficiaries and potential beneficiaries will look for any loophole to exploit.

Unwary drafters of wills may think that as long as the estate is small, the division is straightforward and the language used is simple, there will not be problems. But the unknown unknowns – what you don't know you don't know – are a minefield for the person who does not understand all the laws simultaneously at play.

A DIY will, whether it is self-drawn or the template-type available online or from stationery stores, can, in itself, meet all the requirements of a valid will. (See point 1, below, and "What makes a will valid?" on **page 38**.)

But the Fiduciary Institute of South Africa (Fisa) says you do not need to be familiar only with what constitutes a valid will. The drafter of a will also needs to be well versed in the effect of common law, as well as laws on the statute book, and the implications of the proposed will on your assets, liabilities and cash flow in your estate.

For instance, Alfie Bester, the fiduciary specialist at Citadel Fiduciary and a Fisa council member, says that in the example at the beginning of this article, the farm owner would need to know that agricultural land cannot be sub-divided without the permission of the Minister of Agriculture.

ILLUSTRATIONS: COLIN DANIEL

In the example of the phone-addicted wife, Harry Joffe, the head of legal at Discovery Life, says the will contains an essentially toothless condition. It would be very difficult to enforce and there is no sanction, as the will stands, if the beneficiary disregards the condition. The condition does not invalidate the will, and the wife will most likely still inherit her R50 000 even if she misses his funeral because she is BBM-ing.

But there are ways to add workable conditions to a will, and these are dealt with in point 10.

Bester says template-type wills may work in many circumstances, especially for lower-income people. But with a template will, there is more of a chance of the testator and witnesses failing to comply with the legal formalities in executing the will.

"It happens quite often that legal technicalities are not adhered to," he says.

Another criticism that Bester has of template wills is that inexperienced practitioners who use them may not address your specific circumstances.

"Nine out of 10 times, it works. A template is dangerous in the one out of 10 times when an expert is needed," Bester says. "Rather spend money to use a person who is known to be a specialist. It could wind up being more expensive if you do not."

Here is a cross section of the common mistakes made in the drafting of wills, and how to avoid them.

1 Not sticking to the law

ONE OF THE GREATEST PROBLEMS ARISING FROM a self-drawn will or a template-type will is the failure to comply with the formalities of the Wills Act, Di Nelson, of Nelson Attorneys in Port Elizabeth, says.

If the formalities are not complied with, the will would be regarded as invalid, even though the terms are legally acceptable, she says.

The Act allows you to apply to a court to order the Master of the High Court to accept the document, but this is a costly exercise and delays the finalisation of the estate.

Another problem Nelson points out is that certain beneficiaries who are nominated in the will can end up being disqualified from receiving any benefit. This could be because the beneficiary:

- Signed as a witness; and/or
- Wrote out the will on behalf of the testator.

If a beneficiary does either of these, neither he/she nor the beneficiary's spouse is entitled to inherit.

Nelson says the beneficiary who is disqualified has recourse to court, but at a price.

In one case, a woman's sister-in-law had >>

What makes a will valid?

ANY PERSON AGED 16 OR OVER CAN MAKE A WILL. For the will to be valid, it needs to meet the following conditions, according to the Wills Act of 1953:

- You must be mentally capable of "appreciating the nature and effect" of your action;
- You, the testator, need to sign the end of the will;
- If the document consists of more than one page, each page must be signed;
- Two competent witnesses need to be present when you sign; and
- The witnesses must also sign the document in your presence and each other's presence.

Di Nelson, of Nelson Attorneys in Port Elizabeth, tells of the children of a man whose widow (the man's second wife) applied to court to have her husband's will invalidated on the grounds that the witnesses did not attest the will in the testator's presence, but did so afterwards.

DI NELSON: Will must be attested in the presence of the testator

"The court upheld the application, resulting in the second wife benefiting in terms of a previous will, to the detriment of the children of the deceased, who had been provided for in the later will," Nelson says.

You should choose the witnesses with care, because a witness is disqualified from benefiting from the will. The same applies to the witness's spouse at the time that the will is executed.

The Wills Act does not consider beneficiaries to be only those who inherit assets; executors, trustees and guardians named in the will are also regarded as beneficiaries.

You may want to amend your will because of a change that is significant but does not warrant a redrafting of the will. An example is a will that says you leave your house in Vilakazi Street, Soweto, to your mother. If you later sell the house and buy another property, you may want to change only the address stated in the will.

The Act defines "amendment" as a deletion, addition or alteration. If you amend your will, you must sign next to the change. Two competent witnesses need to be present when you sign the amendment, and the two witnesses must also sign in your presence and each other's presence.

Making a mark is considered as valid as signing a signature. But if you are unable to sign or make a mark – this could happen because of a physical impairment such as quadriplegia – another person can sign for you in your presence and by your direction.

If you make a mark or if you need the will to be signed by a person other than you, a commissioner of oaths must be present during the signing and must sign and certify that he or she is satisfied that the will is in line with the wishes of the testator. The requirements for an amendment are the same as above, with the added requirement that it has the signature and certification of a commissioner of oaths.

Even if a will does not meet all the requirements set out above, the Wills Act says that a court can order the Master of the High Court to accept it for the purpose of creating and settling a deceased estate if the court is satisfied that the document "was intended to be his will or an amendment of his will".

However, the cost of claiming your rights may put them beyond your reach.

Nelson is dealing with a matter where the testator was unable to sign in the usual way and made a mark instead.

In this instance, a commissioner was not present during the signing, so there was no commissioner's signature or certificate, Nelson says.

"In the circumstances, the will shall not be accepted by the Master of the High Court, to the detriment of the nominated beneficiaries. Unfortunately, it will be too costly for the family to approach the court for relief."

>> written out her will on her instructions.

Following her death, Nelson applied to court to have the sister-in-law and her husband (the deceased's brother) declared competent to receive a benefit, on the basis that the deceased's sister-in-law and her husband did not defraud or unduly influence the deceased in the execution of her will.

The application was successful, Nelson says, but the beneficiaries' inheritance was reduced by the cost of the High Court application, not to mention the delay in the administration process.

If a beneficiary who signs as a witness or writes out a will on behalf of the testator qualifies as an heir in terms of the laws of intestate succession, he or she is still entitled to inherit, Nelson says, but the value of the inheritance cannot be more than he or she would have received as an intestate heir.

Two simple examples illustrate Nelson's point.

1. The friend of a testator signs as a witness to a will in which he (the friend) is to share the estate with the testator's wife. The will is still valid, but the friend cannot inherit. The wife inherits all the distributable assets.

2. The testator's wife signs as a witness to a will in which she inherits the estate equally with their daughter. Their son is not named as an heir.

The wife will still receive assets, because she would have inherited anyway if there had been no will. The laws of intestate succession do not apply to the distribution of all the assets, since the will is still valid, but they are used in the calculation of the upper limit of her portion.

Let us say the total assets for distribution are R3 million. If she had not witnessed the will, she would have received half (R1.5 million). But now she can receive only R1 million. This is because if her husband had died intestate, she would have received "a child's share" (which is calculated by dividing the assets by the number of children plus one – in this case, R3 million divided by three). Thus, the testator's daughter inherits R2 million, the wife R1 million and the son still gets nothing.

2 Review regularly

IT IS RECOMMENDED THAT YOU REVIEW YOUR will promptly after significant changes in your life, such as marriage, the birth of a child and retirement. Failure to do so could cause problems.

Divorce is a prime example. Fisa says that if you were to die within three months of the date of divorce, any bequest leaving assets to your ex-spouse would be null and void. But if you have not drawn up a new will after three months from the date of the divorce, any such bequests will stand.

Reviewing your will only when there are significant life changes is the bare minimum. More frequent reviews are recommended to take into account the changes to laws that would have implications for your estate.

For example, if your will was drawn up in a way that was appropriate for a R1.5-million estate duty exemption, you may lose out now that there is a R3.5-million estate duty exemption and portability between spouses. (Portability allows you to transfer the estate duty exemption to your spouse to the extent that it hasn't been applied to your own estate.)

Hussan Goga, the chairperson of the Law Society of South Africa's Deceased Estates, Trusts and Planning Committee, says it is sometimes better to redraw your will, rather than have too many amendments. To redo a will in its entirety may take less time than making amendments, and it will certainly be clearer.

"Certainty is very, very important. A will needs to be clear and unambiguous so that there is ease of administration," he says.

"A will shouldn't create any hardship for beneficiaries. Death is a difficult time – you don't want to add to the burden."

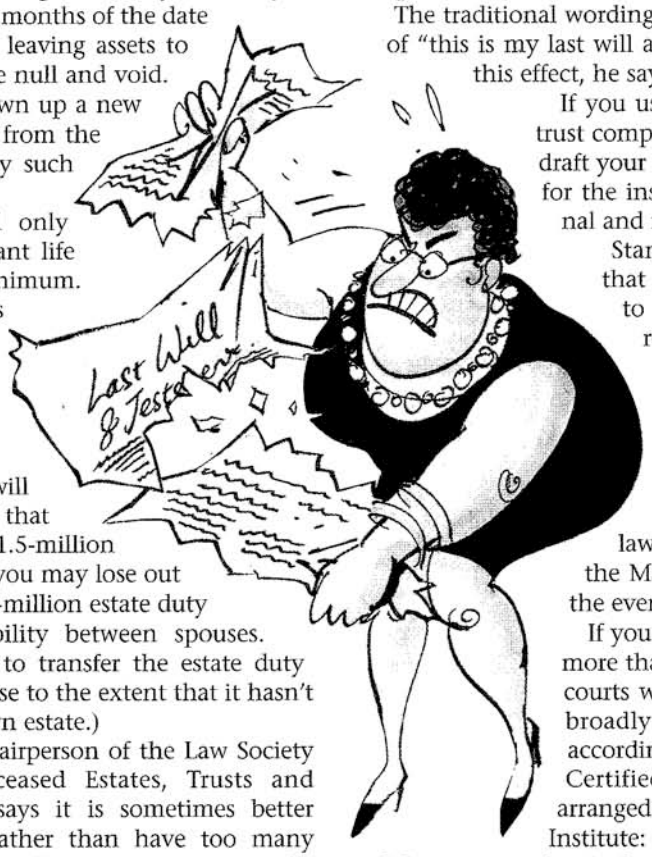
3 Revoke earlier wills

WHILE IT IS IMPORTANT TO KEEP YOUR WILL UP to date, it is dangerous to have several subsequent wills in the custody of different people and organisations.

"A later will does not necessarily revoke an earlier will," Angelique Visser, the head of fiduciary products at FNB Wealth and a Fisa council member, says. "If one does not explicitly revoke the earlier will, both wills could be read together in the event of death."

Lloyd Buthelezi, the general manager of Nedbank Financial Planning, says only a later will that is "properly signed in accordance with the provisions of the Wills Act and which clearly states that it revokes all previous wills and codicils" has the effect of revoking all previous wills.

The traditional wording of a will – along the lines of "this is my last will and testament" – will have this effect, he says.



If you use an institution such as a trust company or a firm of lawyers to draft your will, it is common practice for the institution to keep the original and for you to keep a copy.

Standard Bank recommends that you ask for the custodian to return the original of a revoked will, and then you should destroy it.

Visser says you should avoid keeping a revoked will in custody at an institution. "These institutions will be required by law to lodge these wills with the Master of the High Court in the event of death."

If you were to die now and leave more than one unrevoked will, the courts would approach the matter broadly in the following way, according to a 2011 workshop for Certified Financial Planners arranged by the Financial Planning Institute: "The golden rule in terms of the common law is that when a testator dies leaving more than one testamentary disposition, the wills must be read together and reconciled, >>

DEFINITIONS

- **Codicil:** An addition to an existing will.
- **Intestate:** To die "intestate" means to die without leaving a valid will.
- **Laws of intestate succession:** In South Africa, the rules that govern how assets will be distributed and who qualifies as a beneficiary when a person dies without leaving a valid will are laid down in the Intestate Succession Act.
- **Master of the High Court:** There is a Master of the High Court appointed in every provincial division of the High Court of South Africa. There are 14 provincial divisions, so there are 14 Masters across the country. There is also a Chief Master, Lester Basson, located in Pretoria.
- **Residue:** The portion of the estate remaining that has not been specifically bequeathed. Unless the entire estate is specially bequeathed, a residuary heir must be nominated.
- **Testamentary trust:** A trust that is created in a person's will. It is distinct from an inter vivos trust, which is created during a person's lifetime.
- **Testator:** A man for whom a will is drawn up. A woman for whom a will is drawn up is correctly known as a "testatrix", but in this article the word "testator" is used for both sexes for the sake of simplicity.

– Additional information supplied by Sanlam Trust's Fiduciary Glossary

>> and the provisions of the earlier testimonies are deemed to be revoked in so far as they are inconsistent with the later ones.

"Where there is conflict between the two wills, the conflicting provisions of the earlier testament are deemed to have been revoked by implication."

4 Nominate an executor

THE EXECUTOR TAKES CONTROL OF YOUR affairs once you die. His or her role is to protect your assets, settle your debts, identify your heirs and distribute your assets in line with your will. This process is overseen by the Master of the High Court.

You nominate your executor by naming him or her in your will. It is also advisable to stipulate how much the executor will earn in fees.

An executor can be any adult person you trust, such as your spouse, an adult child or a friend. (The executor is able to inherit from your estate.) You could also choose a professional person who knows your financial affairs (such as your lawyer or accountant) or an entity such as a law firm or trust company.

After your death, the nominated executor must apply to the Master to be appointed. At this stage, the Master will evaluate whether the nominee has enough experience and knowledge of the Administration of Estates Act to perform an executor's duties. If you have chosen a family member who is not an expert in fiduciary matters, the Master will normally want the nominee's application to be accompanied by the name of the professional who will act as an agent in winding up your affairs.

If you do not nominate an executor, this does not make your will invalid, but the winding-up process may be delayed. This is because your beneficiaries will have to agree on a nomination and submit it in writing to the Master, who has the final say on whether to accept the nomination and whether to add an agent.

If your beneficiaries cannot decide on a nomination, the Master has the discretion to appoint an objective third party who can carry out the duties.

You are not restricted to nominating only one executor. It is considered good practice to name back-up executors in case your first choice is unwilling or unable to act when the time comes.

The nominee should, however, not indicate his or her willingness to accept the role by signing your will.

Buthelezi says: "It is not necessary and should preferably not be done. Any nominated executor in any will has the option to take up that appointment or decline to do so after the death of the testator.

"Any professional executor will usually take up the appointment, unless there are special circumstances."

If you do not state the fees in your will, the maximum as set out in regulations under the Administration of Estates Act will apply. The maximum fee is 3.5 percent of the gross value of your estate and six percent of income accrued and collected after death. (Both figures exclude VAT.)

Not all your assets form part of your estate. The biggest single portion of your estate is usually fixed property, such as your home. The executor's fees on a house valued at R1 million would be almost R40 000 if the maximum was charged and once VAT has been added (for a total fee of 3.99 percent).

Add to that the value of the other assets that will go into an estate – vehicles, cash, life assurance policies without nominated beneficiaries (if there is a named beneficiary, this will not be the case), gold coins and bars, and investments in shares, unit trusts and exchange traded funds – and it is clear that the executor's fee can mount up quite dramatically in some cases.

One advantage of naming your spouse or a friend or adult child as executor is that usually the person will waive their right to executor's fees. If he or she uses the services of an agent, the estate can pay the agent at professional rates per hour. This could well

work out cheaper than the system that links remuneration to the value of the estate.

If you prefer to name an entity or institution as your executor, you should discuss the fee for which it would be willing to act and write this into your will. Your bargaining power will, to a large extent, depend on the value of your estate, and not all testators may be able to negotiate a discount to the maximum. But failure to stipulate a figure in your last testament will allow the executor to claim the 3.5-percent maximum. For more on executors, see "10 things you should know about choosing an executor" in the fourth quarter 2010 issue of PERSONAL FINANCE magazine. To order back issues, see page 97.

5 Consider security

ONCE YOUR EXECUTOR IS APPOINTED AFTER your death, he or she will have to post a bond of security, which is a type of insurance policy against his or her stealing all the money in your estate.

Security is required in all instances, except when:

- Your will nominates an executor and directs the Master of the High Court to dispense with the need for security;
- The executor is your parent, spouse or child (unless the Master specifically directs the executor to provide security); and
- A court rules otherwise.

"It is almost impossible for a layperson to get a bond of security," Bester says. "To get it, you need a track record. Plus, it costs between one percent and 1.5 percent of the gross value of the estate per year.

"Rather nominate a company you trust as executor and, in your will, dispense with security."

Any waiver of security can be challenged by the Master of the High Court. "The Master carries ultimate discretion. Even if the will says there is a waiver of security, the Master can insist on it," Bester says. "In that way there is always protection."

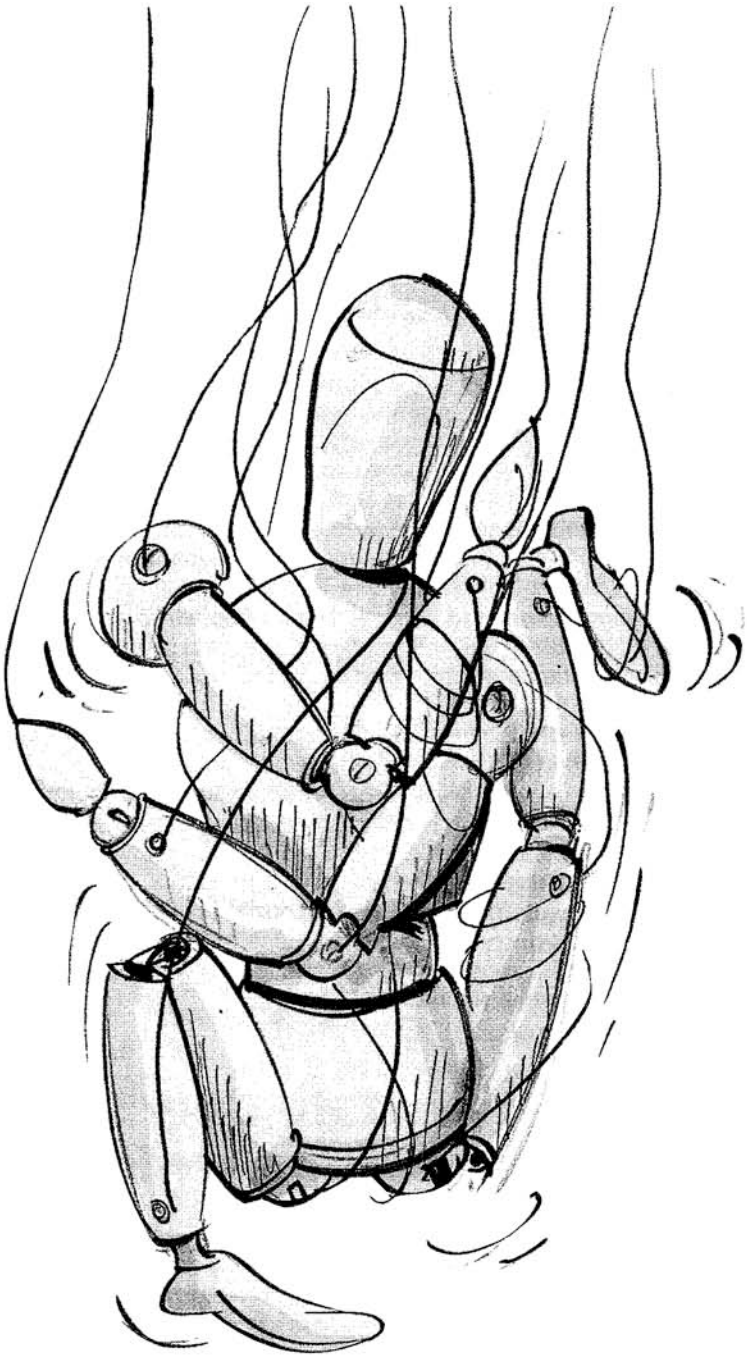
If your will is silent on the question of the waiver, the estate will bear the cost of security, he says. If your will does not waive the security and stipulates that the cost must be borne by the executor, the executor may say it is not worthwhile to take up the duties.

But Bester strongly recommends that you make sure the person or entity you are exempting carries enough professional indemnity cover.

"Big trust companies invariably have professional indemnity cover," he says.

Goga says you also have protection if you use the services of a lawyer.

Losses caused by professional negligence and claims arising from bonds of security are covered by the Attorneys Fidelity Fund Professional Indemnity Insurance Scheme, which is underwritten by the Attorneys Insurance Indemnity Fund, Goga says.



Maximum free cover amounts to just over R1.5 million per individual practitioner per year – so the total cover that a firm has depends on the number of practising attorneys that make up the firm.

However, Goga says that many attorneys take out top-up professional indemnity cover.

If you suffer monetary loss as a result of theft by an attorney acting as an executor or administrator of a deceased estate, you can claim from the Attorneys Fidelity Fund. Cover is not limited to losses arising from the actions of attorneys only, but also from the actions of their employees and candidate attorneys.

"The Fidelity Fund is a unique institution not replicated anywhere else in the world and offers unlimited protection to members of the public," Goga says.

You can find out more about the Fidelity Fund at www.fidfund.co.za >>

6 Debts on assets

>> BEING ABLE TO BEQUEATH PROPERTY IS one of the pleasures of drawing up a will. Yet even this is not uncomplicated.

In this example – "I bequeath my family home at Fancourt, mortgaged to Mutual Bank, to my wife" – the will does not state whether the home is to be inherited with or without the mortgage.

Joffe says the common law assumption is that an asset on which there is still a debt (also called an encumbered asset) is bequeathed without the debt, unless the will explicitly says otherwise. The outstanding debt is paid out of the estate, which reduces the residue.

In the example, the testator's intention may have been different to what would have transpired. He may have wanted his wife to assume the mortgage, because she is a wealthy businesswoman, leaving a healthy residue to the family's long-time domestic worker. As it would have turned out, the residue would have been depleted by the outstanding bond on the property, and the man's employee would have been much worse off than if he had been properly advised when drafting his will.

How the estate duty is taken out of the residue

CALCULATING THE NET ESTATE	
Gross value of the estate	R5 000 000
minus Claims against the estate (such as income tax owing, executor's fees)	– R500 000
Net estate	**= R4 500 000**
CALCULATING THE ESTATE DUTY TO BE PAID	
Net estate	R4 500 000
minus Estate duty abatement	– R3 500 000
Dutiable amount	= R1 000 000
Estate duty to be paid (20 percent of dutiable amount)	**= R200 000**
BEQUESTS	
To employee	R1 000 000
To niece	+ R250 000
Total bequests	**= R1 250 000**
CALCULATING THE RESIDUE	
Net estate	R4 500 000
minus Bequests	– R1 250 000
	= R3 250 000
minus Estate duty	– R200 000
Brother's portion	**= R3 050 000**

Bester says you should be specific in your will about who takes over debt of any asset that is burdened, whether it is property, a vehicle or a boat.

"A legacy takes precedence over the residue," he says. "The law is that legacy is paid 'clean'."

7 Estate duty and the residue

AND SINCE BEQUESTS, OR LEGACIES, ARE PAID out first and in their entirety (if there is enough money in the estate to do so), it means that estate duty is paid from what is left – the residue. This is the case even though the estate duty will have been calculated on a larger amount (the dutiable portion of the estate, including the bequests).

The simple example in the table on the left illustrates this. The estate is that of a young woman without dependants who leaves an estate with a total value of R5 million. She is single, and has never been married, so the estate duty abatement is limited to R3.5 million. She bequeaths R1 million to her employee and R250 000 to her niece. The residue is left to her brother. In brief, the estate duty is paid out before the residue can be determined, while, to use Bester's words, the legacies are paid "clean".

The example illustrates why it is important to consider estate planning when drafting a will. The result may, or may not, have been in line with the young woman's wishes.

Not only do you have to know the tax consequences of your death and have enough liquidity in your estate to cover the tax bill and executor's fees, but you also have to understand the repercussions of the way you have chosen to distribute your assets.

8 Children

A DIY WILL DOES NOT ALWAYS INCLUDE ALL THE necessary provisions, such as taking into account the fact that minor children cannot inherit cash or moveable property, Nelson says.

Assets can be administered for them by means of a trust, but in the absence of a trust, the money will be held by the Guardian's Fund of the High Court.

Fisa says: "If an inheritance is payable to a minor child, this payment will be paid to the Master of the High Court's Guardian's Fund. It may be prudent, depending on the amount involved, to deal with this in the will either via a will trust (testamentary trust) or some other mechanism on which the drafter can guide you."

Nelson describes one case she has experienced concerning a divorced man with two minor children.

After writing out his will, bequeathing his estate to his children, he committed suicide.

The document made no provision for a trust to be established for the children. "The monies had to be paid over to the Guardian's Fund and administered by officials with no connection to the family. I won't even begin to mention the frustration of the guardian in obtaining release of funds for the maintenance and benefit of the children," Nelson says.

"How much easier life would have been had a trust been established for their benefit!"

Goga says in one instance he has encountered, a testamentary trust was set up by a DIY will. But in terms of the will, no power was given to the trustees to sell assets. "The only way to resolve the difficulty was to approach the courts for relief."

Fixed property can be registered in the name of a minor child or children, Goga says. But if the property later has to be sold, their guardian or attorney will have to obtain permission for this from the High Court if the sale price of the property is more than R100 000. (The Master of the High Court must give permission for the sale of properties valued at less.)

The following little-known cautionary applies to anyone who has descendants, regardless of whether they are minors or adults.

"It is a common law right that siblings have a right to equal inheritance," Bester says.

In *Meyerowitz on Administration of Estates*, David Meyerowitz writes that the parent is presumed to have intended that there is equality among his descendants after his lifetime. The technical term for this is "collation".

Bester says that you do not have to leave equal shares to all your children, "but if you are not going to give equally to your children, exclude collation in your will. Unless you do, your children could end up in a bunfight after your death.

"It's something that is very often overlooked."

He stresses that collation operates only among siblings, including illegitimate and adopted children.

9 Succession clauses

REGULAR REVIEWS OF YOUR WILL CAN REDUCE the chances that a person nominated to receive an inheritance dies before you. But it is not foolproof. You may die very soon after your heir or you may fall into a coma for many years before dying. For this reason, it is important to name substitute heirs.

Graham McPherson, the managing member of Zenzele Executor and Trust Solutions and a Fisa member, says if you simply state in your will that "I bequeath the residue to X person", without additional steps, various issues may crop up.

"For example, if it is a descendant to whom you wish to leave the residue, such as your daughter, and should she die before you, that portion will be claimed by her descendants, and if there are no descendants, the portion will devolve in terms of intestate succession.

"If she has children, [and] if they are under 18 and the inheritance is in the form of cash, it will need to be paid to the Guardian's Fund.

"It would be more appropriate to state what you want to happen if your daughter pre-deceases you, thereby providing for succession to the inheritance."

He says an example may be to state that should your daughter have pre-deceased you, the amount she would have inherited should be payable to her children, in equal shares, subject to the condition that if they are under the age of 18, such inheritance falls into a trust to be administered by your trustees, for the children's benefit, until they >>

>> attain a specific age, when the funds can be paid to them.

10 Conditions and public policy

PLANNING FOR DEATH CAN BRING OUT THE quirkiness in some of us.

One man's will provided for a testamentary trust to be established. The reason? To provide a kilogram of best-quality biltong at regular intervals to the man's Rottweiler (named "Hitler") for the rest of the dog's life, David Knott, BoE's head of fiduciary products and the deputy chairman of Fisa, recounts.

Knott also recalls the bequest by one man to his ex-wife of a case of the finest Russian vodka and the bequest of another to a family friend of "my tortoises".

This is paying back, in the positive sense of expressing appreciation to another person (or dog or tortoise). But other testators want to use their will for payback – for revenge or to try to control from the grave.

One of the major motivations for inserting a condition in a will is that the testator wants to change the behaviour of heirs – to stop a relative smoking, to try to get a child off drugs, or perhaps to reduce the time a wife spends on the phone.

Joffe says an effective condition has two attributes. It has to be enforceable, which means that someone has to be able to determine whether or not the behaviour change has taken place. And it has to have a sanction if the behaviour change does not happen, Joffe says.

A sanction would be that the money or assets left to the heir are specifically withheld or directed elsewhere.

He cites the example of a parent who leaves money, via a trust, to a drug-addicted daughter on condition that she stops taking all drugs for a year. The condition could be made enforceable: the teenager has to undergo drug-testing at regular intervals, with the results sent to the trustees. The sanction would be that if she did not stay drug-free for a year, the money would go instead to an animal centre.

If the condition you want to impose contains an element of time – such as "my husband must look after my Maltese poodle until it dies before he can inherit my millions" – you will probably need to set up a testamentary trust in your will, because an executor cannot delay the wrapping up of the estate until the prescribed period of time has lapsed.

Joffe says conditions normally crop up in relation to smoking, most often with the testator trying to make not smoking a condition in order to inherit.

But testators can try to turn the tables. Joffe quotes an extreme case in Britain where a man – a cigarette smoker – left money to his wife, an avowed anti-smoker, on condition that she took up the habit after his death. But the man's wish could well have been frustrated on public policy grounds.

ALFIE BESTER: It's better to get specialist advice

GRAHAM McPHERSON: Provide for succession in the inheritance

HARRY JOFFE: Clauses that go against "public policy" will be ignored

Joffe says that when drafting a will, you need to be very careful about inserting clauses that are against public policy, because a court will ignore such clauses.

What exactly constitutes "public policy"? Joffe says courts in this country would be guided by, among other things, the Constitution and South Africa's international treaties.

"Courts are very reluctant to uphold clauses that are racist or sexist or discriminate on religious grounds."

There have been a string of such cases recently. In December last year, the Cape Argus reported on Western Cape High Court rulings that "the terms of three trusts, which provide bursaries to students, be changed so that they no longer discriminate along the lines of race or gender.

"Two of the trusts specify that bursaries be granted to boys only, while a third specifies that those assisted should be white."

The three trusts involve wills that were executed in 1943, 1987 and 1989.

Joffe says that because the courts are guided by the Constitution, they will allow fair discrimination. So you would be able to set up a bursary for a previously disadvantaged person.

Pound wise, penny foolish

THE 10 POINTS IN THIS ARTICLE COVER just some of the frequently encountered slip-ups. Nelson says she could go on and on about the problems she has encountered with DIY wills. "Anyone who dares to draw his or her own document should speak to a professional first. He or she may just reconsider."

Goga says a will needs to be a "thoroughbred" document because it is one of the most important documents you will sign in your lifetime, while Bester says it needs to be "bullet-proof".

Fisa's opinion is this: "Taking into account the knowledge required to draft a will properly, paying for the good advice when drafting your will is a small price to pay." ❑

WHAT YOU CAN EXPECT TO PAY FOR A WILL

■ The days of "free" wills have more or less passed, but that doesn't mean a will has to cost you an arm and a leg. **Margarete King** looks at your options.

THERE WAS A TIME WHEN BANKS WOULD draft a will for you free of charge. But times – and practices – have changed. Now, if you approach a bank to draw up a will, you can expect to pay roughly R350 to R450, although prices range between R250 and R1 000. "Free wills" are available only in some circumstances.

"Free or not, the most important factor is that you ensure you actually get a will executed, and that it covers your particular circumstances and gives effect to your wishes," the Fiduciary Institute of South Africa (Fisa) says. Fisa represents some of the fiduciary practitioners in South Africa.

When you go along to a bank branch for a will, it is not the bank but the trust company that is part of the same group as the retail bank that does the drafting and will be the custodian of the will.

For example, if you are a client of Standard Bank and you approached your local branch for a will, the actual drafting would be done by Standard Executors and Trustees (SET).

The major banks confirm that the costs are the same, whether you make the approach through a branch or go to the trust company directly.

However, there is no cost for drafting if you apply online for a will from FNB Trust Services, Angelique Visser, the head of products for the trust company, says.

Sanlam Trust also has a free option.

"We provide a computer program to intermediaries with which they have the option to draft wills for the client at point of sale, free of charge. This program can address the needs and requirements of 70 percent of their clients," Ann Nel, Sanlam Trust's national manager: wills, says.

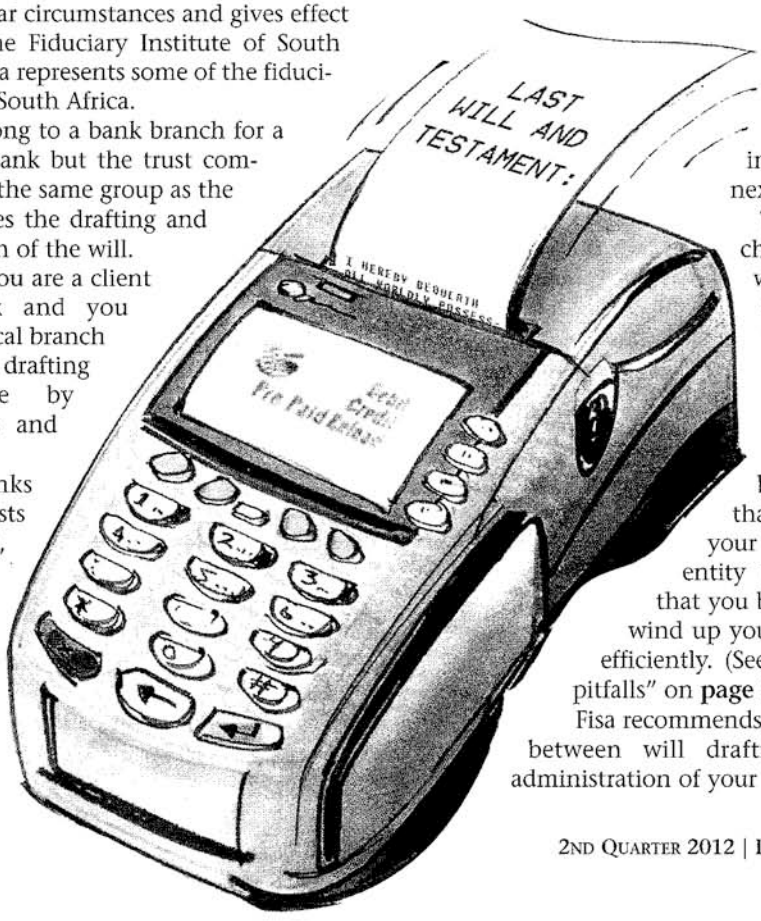


ILLUSTRATION: COLIN DANIEL

The prices charged by the main trust companies can be found in the table on the next page.

Trust companies charge extra to draft a will in which they are not nominated as the executor.

The important thing is not to seek the cheapest option – if at all possible – but to be confident that you have named as your executor a person or entity that you trust and that you believe is best able to wind up your estate quickly and efficiently. (See point three in "10 pitfalls" on page 39.)

Fisa recommends that you distinguish between will drafting and the administration of your estate. >>

What the main trust companies charge for wills

	If trust company is named as the executor	If trust company is not named as the executor	Free drafting?	Joint wills	Will review	Annual custody fee
ABSA TRUST	Standard will: R342	R2 300	If client 60 or over	–	Free if named as the executor	R84 (Free for people over 60)
BoE TRUST/ NEDBANK *Costs for assets of R500 000 or more*	R300 Set of two single wills: R350	R450 Set of two single wills: R900	If client over 60 and BoE is named as executor	R350 (if BoE is executor) R900 (if BoE not executor)	Free once a year	Free if BoE is named as the executor
FNB TRUST SERVICES	R340	R1 000	If done online	R340	Free if will held in custody	Single: R60 Joint will: R120
SANLAM TRUST *Fees negotiable*	R456	R798	Will from intermediary	R456	Free if named as executor	Currently free
STANDARD EXECUTORS & TRUSTEES	Pre-printed: R250 Complex: R475	R1 000	If client 55 and over	Pre-printed: R250 Complex: R475	R250 or free at interviewer's discretion	R90

All prices include VAT. Prices correct as of February 2012 and are subject to change.

>> "Each is as important as the other and each should be attended to by a professional," Fisa says. "In practice, the will drafter may often be appointed executor, but this is not, and need not, always be the case."

Fisa says it is not unreasonable to have to pay for the will-drafting service and, later, for the administration of your estate through the executor's fee.

Before drafting the will, the institute suggests, discuss "the appointed executor's ability to attend to your estate", the cost of drafting the will and the executor's fees.

If you do not set the level of the executor's fees in your will, your executor will be able to claim the maximum 3.5 percent (3.99 percent including VAT) once he or she has wound up your estate.

Nel says the factors that play a role in negotiating the executor's fees are your age, the value of your assets and the complexity of your estate.

She stresses that not only executor's fees are negotiable; Sanlam Trust will negotiate all prices in connection with wills on merit.

In most cases, the cost of drafting a will does not depend on how complicated your estate and your wishes are.

However, SET makes a distinction between a pre-printed will (R250) and a complex will (R475) if it is named as the executor.

Roy McMurchie, the managing director of SET, says a pre-printed will from SET is a straightforward will that is flexible enough for a few different situations, including if you want to bequeath your entire estate to your surviving spouse.

Spouses can sign a joint will in terms of which they bequeath the entire estate of the first-dying person to the survivor, McMurchie says.

"A pre-printed will can also cater for a situation where all the assets must go to children, and, if they are minors, that a trust be established to hold the inheritance until they have attained majority."

A pre-printed will would not be suitable if you wanted to make cash legacies to different people or to put in place particular conditions with regard to the creation of a trust.

"A further example would be where the person is involved in various business ventures like close corporations and companies, and the shares or interest in those entities must be held in trust for the benefit of certain beneficiaries," McMurchie says.

Absa says it charges R342 for a "standard will" but does not specify the cost of a complex will.

Derek Mabin, the national manager: advice and fulfilment at Absa Trust, says: "A standard will may be defined as being a request by a client to have his or her will drafted in accordance with specific wishes. Guidance is given to the client in alignment with his wishes and current assets and liabilities. Possible estate duty and liquidity implications may also be addressed."

A complex will is in many cases associated with estate planning, Mabin says.

"The complexity and high value of assets often

Get help from a professional

THE FIDUCIARY INSTITUTE OF SOUTH AFRICA (FISA) recommends that you use a Fisa-registered professional to draw up your will.

Fisa undertakes to ensure that its members adhere to a code of ethics, and Fisa says on its website, at www.fidsa.org.za, that it will "facilitate a complaint resolution process" if you have a complaint against a member. There is a search function on Fisa's website to help you check whether or not the person with whom you are dealing is a member.

Fisa has set up a dedicated email address for people who may have queries relating to wills or who need a practitioner in their area. The address is willsquery@fidsa.org.za

Not many attorneys are listed as members of Fisa – probably because the institute has its origins in the Association of Trust Companies – but that does not mean a properly qualified lawyer should not draft your will.

"An attorney has the necessary knowledge and expertise to ensure that the will is drawn in accordance with the client's instructions, and that such will has been properly executed and is valid and binding in terms of the Wills Act," says Hussan Goga, the chairperson of the Law Society of South Africa's Deceased Estates, Trusts and Planning Committee.

HUSSAN GOGA: An attorney can identify potential problems

"The attorney can advise on any potential problem which may arise with regard to the will and also deal with any legal issues the executor might encounter," he says.

Not only must a draftsman have a thorough knowledge of testamentary and fiduciary law, Goga says, but he or she must also have skill in the use of words.

By way of example, Goga asks: "When the testator says 'I bequeath my shares to my children', does the testator mean his listed shares, or shares in his unlisted Pty company, and, if the latter, does he also mean to include the loan account in the Pty company?"

Provincial law societies will investigate complaints about unprofessional and irresponsible conduct on the part of their members. You can find out how to complain at the Law Society of South Africa website at www.lssa.org.za

Your financial planner should take an interest in ensuring your will is shipshape, but the actual drafting will in most cases be left to a specialist in the field.

"I would always consult with a professional in their field, as the downside of a DIY will or poor advice from somebody not qualified or experienced to give input is too ghastly to comprehend," says Alec Riddle, a Port Elizabeth-based financial planner at Consolidated Financial Planning and the Financial Planner of the Year in 2009.

"I always ask new clients to provide us with a copy of their will and more often than not insist that they have an updated will. Remember that the most brilliant of financial plans or estates can be destroyed by an ineffective will, or one that is not up to date," Riddle says.

place unnecessary tax implications (such as estate duty and capital gains) on the client. In such circumstances, we recommend that the client goes through the process of an estate plan to avoid or limit such obligations. In this process, fees are charged in accordance with the amount of work and time involved in drafting the plan and the will," he says.

If your circumstances call for the more advanced estate planning associated with a complex will, you will be referred to deal directly with Absa Trust rather than the bank, he says.

Of the trust companies surveyed, only BoE Trust/Nedbank make a distinction based on the value of your assets.

The prices given in the table for BoE/Nedbank are if you have assets of R500 000 or more. If your assets are worth less, you can have a will drafted by BoE and you would still pay the same price as if BoE had been nominated as the executor (for example, R300 for a single will). But you would have to select an executor other than BoE and you would keep the original will (in other words, BoE would not be the custodian).

Hussan Goga, the chairperson of the Deceased Estates, Trusts and Planning Committee of the Law Society of South Africa (LSSA), says the fee charged by an attorney to draw a will is usually calculated on a time-cost basis. The cost of a simple will would be somewhere between R450 and R750.

"The fee for drawing a complex will would be significantly higher. It all depends on the complexity of the will, and the expertise and seniority of the attorney," Goga says.

All fees are generally negotiable with an attorney, and these include the costs of drawing a will, as well as executor's fees, Goga says. "Many firms store wills as a free service and a courtesy to their clients."

Every year, attorneys hold National Wills Week, where participating members draw up basic wills for members of the public free of charge.

This year, National Wills Week takes place in September. You can find out more details on the LSSA's website at www.lssa.org.za ❑