

# Leaving your children out of your will

## PETER WRITES:

**I** have decided not to include my two older sons in my will as I don't think they need me any more.

One son is 26 and the second is 21. One is on drugs, despite my interventions. I have another two children, who were born after my divorce, aged six and five, and are from different mothers.

What I want to know is whether the law can change my will after my death and give them a share of my estate, even if I have specifically excluded them.

## CHRIS MURPHY, A MEMBER OF THE FIDUCIARY INSTITUTE OF SA, REPLIES:

Our South African common law upholds "freedom of testation", granting us the right to leave our assets in our will (our estate) to any person. However, this right is not absolute and can be limited in certain circumstances. For example, if it is contra bonos mores (against public policy) or if it is unlawfully prejudicial, offensive or illegal.

There is no obligation in South African law on parents to leave assets in their estate to their children.

There is, however, an obligation for parents to maintain minor

children or dependants.

A claim can be lodged by such a child against the estate of a deceased parent for maintenance, but true dependency would have to be proved.

In this example, the minor children of five and six, if not adequately provided for in the will, would, in all likelihood, be able to lodge a claim against the estate for maintenance.

The older children, as they have already reached majority (18 years or older) would not, in all likelihood, be able to lodge a claim for maintenance, except possibly the son who is addicted to drugs, if he could prove that he is still dependent on the

testator (the person making the will).

It is thus important that you have a valid, enforceable will to ensure that those you want to inherit will inherit, and those you do not want to inherit, do not.

If there is no will and the estate is administered in terms of intestacy (subject to the Intestate Succession Act) the rules are automatic, and all children will inherit, even if this is against wishes you may have expressed while alive.

"Murphy is a director of Legacy Fiduciary Services and a member of the Fiduciary Institute of SA (Fisa). You can find a Fisa member to contact on its website: [www.fidsa.org.za](http://www.fidsa.org.za)

