

NEWS & OPINION

Draft a will to protect both you and your partner



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FIDUCIARY MATTERS

Dying without a will

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As more than 75% of South Africans die without a will every year, it is important to know what the impact will be in the event of your or your partner's death. The *Intestate Succession Act* now applies to every South African who dies without a will since the Constitutional Court declared section 23 of the *Black Administration Act*, section 1(4) (b) of the *Intestate Succession Act* and related regulations unconstitutional in *Bhe v Magistrate, Khayelitsha*.

In terms of the *Intestate Succession Act*, one's estate devolves according to a specific 'formula'. A single person's estate will pass to his or her children and failing children, to parents and failing parents, to siblings.

If you are in a relationship, the type of relationship will determine who will be allowed to inherit. A spouse married in terms of the *Civil Law* and *Civil Unions Act* will inherit the deceased's entire estate when the deceased has no children. If there are children, the spouse will inherit R250 000 or a child's share, whichever is the greater. A child's share

is calculated by dividing the estate between the total number of children and spouse of the deceased.

To cater for customary law, the *Reform of Customary Law of Succession Act* was introduced and has to be read with the *Intestate Succession Act*. As the definitions of "descendants" and "spouses" both include seedraiser women and women in women-to-women marriages, they benefit twice as they will be entitled to a spouse's share as well as a child's share from the intestate estate if the Act is interpreted literally.

It surely could not have been the intention of the legislator to benefit them twice as much as the actual surviving spouse/s. In practice the Master of the High Court regards these woman as 'spouses' only and therefore does not allow them to benefit both as spouses and descendants. This position could, however, be challenged in future. If the deceased had more than one wife, each wife will be entitled to R250 000 or a child's share,

whichever is the greater.

As Muslim and Hindu marriages do not meet all the legal requirements, they are not recognised as marriages in South Africa. The Constitutional Court did, however, extend the meaning of 'spouse' in the *Intestate Succession Act* in *Daniels v Campbell* to include parties in monogamous Muslim marriages and later in *Hassim v Jacobs* the meaning of 'spouse' was further extended to include spouses in polygynous Muslim marriages. The court followed suit in *Govender v Ragavayah* by including a party to a monogamous Hindu marriage as a spouse for purposes of the *Intestate Succession Act*.

Although the courts have been very accommodating to include couples in relationships that are not recognised as marriages, the court made it clear in *Volks v Robinson* that as there is nothing standing in the way of heterosexual couples to get married, life partners cannot be regarded as "spouses" for the purposes of the *Intestate Succession Act*. The legal view is that there should not be a distinction between same-sex

and heterosexual couples who live together as spouses as everyone may enter into marriage since the *Civil Union Act* came into operation, but the current position is that same-sex couples will inherit intestate because of the Constitutional Court ruling in *Gory v Kolver*. The Master of the High Court will call for an Affidavit as proof that they lived together as spouses and undertook a mutual agreement of support.

As confirmed in *Volks v Robinson*, heterosexual parties living together, will therefore not be entitled to inherit from one another in the event of the death of one of the parties and have to ensure that they either draft a will or enter into an agreement to deal with the distribution of their assets to protect one another.

Draft a will to protect both you and your partner and do not to leave it up to the legislators to determine the heirs of your wealth. Leave a legacy of happy moments and not problems in sorting out your estate.

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The Fiduciary Institute of Southern Africa (FISA) is a non-profit organisation that represents fiduciary practitioners and sets high minimum standards for the industry to protect the public's interests. FISA is the only professional body focusing solely on fiduciary practitioners in Southern Africa.

Membership is drawn from trust companies and banks, as well as the legal, accounting and financial planning professions.

Activities of FISA members include but are not restricted to estate planning, the drafting of wills, administration of trusts and estates, beneficiary funds, tax and financial advice and the management of client assets.

FISA members collectively manage in excess of R280 billion. They draft several thousand wills each year and administer around 50 percent of deceased estates reported to the Master's Office.

FISA helps to make processes smoother for members and the public, particularly through its good working relationship with the Master's Office and SARS.

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IN THE CASE OF MULTIPLE WIVES each wife will be entitled to R250 000 or a child's share, whichever is greater.

A SINGLE PERSON'S ESTATE will pass to his or her children and failing children, to parents and failing parents, to siblings.

A SPOUSE will inherit the deceased's entire estate when the deceased has no children.

