

Where there's a will, there's a way forward for those you love

If you don't take the trouble to make out a will, the control of your dependants' finances could end up in the hands of a complete stranger, writes **Sue Torr**.

A will is not the privilege of the wealthy; it is the right of all South Africans who want to plan their legacy while they are still alive. Anyone who has assets and who wants to reduce the emotional and administrative burden on their loved ones when they die, should have a will.

The reasons many people do not draft a will include the misconception that their estate is not large enough to warrant it and the usually ill-fated assumption that there is a "good understanding" among their children over how the estate should be divided. Many young couples believe it is "too early" to plan for their death and delay preparing a will – sometimes with devastating consequences.

If you die intestate (that is, without a will), your estate will be distributed according to the law of intestate succession. This may result in people you wanted to exclude from your estate inheriting some or all of your assets.

Under the law of intestate succession, the Master of the High Court will appoint a curator to administer your estate. Any assets that need to go to your minor children will be placed in the Guardians' Fund until they are old enough to inherit them. The State will appoint a guardian to take care of your children, and he or she may not be the person you would have chosen.

WHO CAN DRAFT A WILL?

Although anyone can draft a will, a will must meet certain legal requirements to be valid. Simple errors can have serious consequences. For example, if a beneficiary acts as a witness to the will, he or she could be disqualified from inheriting. It is strongly recommended that an estate planning expert drafts your will, regardless of the size of your estate.

WHAT IS AN EXECUTOR?

The executor (or executrix in the case of a woman) performs a vital role of winding up your estate and distributing your assets to your

nominated heirs. It is therefore important to appoint someone with sound financial and administrative skills, who you feel confident has your best interests at heart. Preparing a will gives you autonomy over who winds up your estate, instead of leaving this vital responsibility to the State.

WHAT IS A GUARDIAN?

If you have minor children, it is imperative to name and appoint in your will a legal guardian to your children. The guardian will take custody of your children and will be legally entitled to care for them until they reach adulthood. Leaving the guardianship of your minor children to the judgment of government authorities is less than ideal and can be avoided by making this provision in your will.

WHAT IS A TESTAMENTARY TRUST?

A testamentary trust is a trust that is set up in terms of your will and comes into existence only on your death. It is designed to protect the interests of your minor children. All assets bequeathed to your children will be managed by the trust and its appointed trustees until the children are old enough to manage their financial affairs on their own. As the testator (the person whose will it is), you can choose who you want to appoint as trustees and can also stipulate at what age the assets will transfer to your children.

HOW OFTEN SHOULD I UPDATE MY WILL?

You should revise your will when certain significant events occur, such as marriage, the birth of a child, divorce, the death of a beneficiary or executor, or if you acquire an asset that has not been included in your existing will. The failure to keep your will up to date may result in heart-ache or bitterness if, for example, a child does not inherit, or an estranged former spouse inherits contrary to your intentions. It is best to review



NATIONAL WILLS WEEK

Monday, September 12 marks the beginning of National Wills Week, promoted by the Law Society of South Africa. It runs until Friday, September 16.

During Wills Week, you can get a basic will drafted by a participating attorney free of charge. To find a participating attorney in your area, and for more information, go to <http://www.lssa.org.za/our-initiatives/advocacy/national-wills-week>

your will once a year to ensure that it reflects your desired legacy.

WHERE SHOULD I KEEP MY WILL?

You should keep your will in a fire-proof safe, and its whereabouts should be known to your loved ones. It is also advisable to keep a copy of your will in another location, or with your lawyer or financial planner.

WHAT IF I CAN'T FIND MY WILL?

If you have misplaced your will, it is strongly recommended that you draft a new will, which must explicitly revoke all previous wills and codicils (additions or supplements to a will).

• *Sue Torr is the managing director of Crue Invest, a financial planning practice in Cape Town.*

Your wishes are not cast in stone under all circumstances

PATRICIA HOLBURN

The executor of your estate is obliged by law to carry out your wishes as stipulated in your will. But if those wishes are contrary to public policy, they may be unenforceable, and there are certain instances in law when your will can be overruled.

"Freedom of testation" holds that you are entitled to dispose of your property upon your death as you see fit, and your heirs and executor are bound to carry out your instructions.

"South African law holds freedom of testation very highly. Freedom of testation encapsulates the freedom to dispose of assets freely, but also includes putting into effect the wishes of the testator as they are recorded in the will,"

Professor Francois du Toit of the Faculty of Law at the University of the Western Cape, told the Fiduciary Institute of Southern Africa's annual conference held in Sandton recently.

Freedom of testation is in the public interest. You, as an individual, need to know that your wishes will be followed. In a Supreme Court of Appeal case, *BoE Trust Limited and Another (2013)*, Acting Justice NC Erasmus affirmed that a person's wishes must be followed. "The view that section 25 [of the constitution] protects a person's right to dispose of their assets as they wish upon their death ... is ... well held."

This means it is extremely difficult to contest a will successfully and have its provisions changed. But it doesn't mean you can put what you like in your will.

"Freedom of testation is not unlimited," Du Toit says.

He identifies two areas where freedom of testation is limited:

1. STATUTORY CLAIMS

• **Maintenance claims and claims by dependants.** Under common law, minor children have to be cared for and have a claim on an estate. The Maintenance of Surviving Spouses Act allows for maintenance claims from an estate. If a will excludes such dependants from an estate, they could be reinstated as beneficiaries.

• **Claims against retirement funds.** The Pension Funds Act stipulates that trustees must identify all possible dependants who might have a claim to a pension benefit before distributing the deceased's share of the fund, irrespective of what the fund member states in his or her will.

2. BEQUESTS CONTRARY TO PUBLIC POLICY

The second limitation is where the wishes in the will are contrary to public policy (*contra bonos mores*) – in other words, harmful to the welfare of society – or contravene section 13 of the Trust Property Control Act.

Du Toit said section 13 has been used to negate discriminatory exclusions in testamentary charitable trusts. The Act empowers the High Court to change the provisions of trust instruments and wills.

There are several examples in South Africa where bequests have been left to public institutions but where only individuals of a certain gender, race or religion can benefit from the bequest:

• In *Minister of Education v Syfrets Trust Ltd (2006)*, the bequest stipulated that only white men who were not Jewish could benefit from a charitable trust.

• In *Emma Smith Educational Fund v the University of KwaZulu-Natal and Others (2010)*, only European girls born of British South African or Dutch South African parents could benefit from an educational fund set up in terms of a will.

On the grounds that these

bequests were discriminatory, the courts struck these exclusions from the wills.

"Bequests must be able to pass constitutional muster. Freedom of testation will lose the battle if there is racial discrimination," Du Toit says.

What is not clear-cut is where a condition must be met in order to inherit.

Freedom of testation was upheld in the case of *Ex Parte Dessels (1976)*, where a man left his estate to his wife and daughter, but made certain conditions, including clauses that stated they were not allowed to "utter after my death any derogatory remarks about me", nor should the spouse follow "an immoral lifestyle".

Du Toit pointed out that this is a fairly old case and that today a court may come to a different conclusion. "I think today the result may be different, and the court may frown upon imposing personal life choices," Du Toit says.

He cautioned against ruling from the grave.

"You have a right to put conditions in your will," Harry Joffe, the head of legal services at Discovery, says. But where those clauses become too restrictive, or contravene the constitution, they can be challenged and struck from the will.

An extreme example would be where a bequest is left on condition that a beneficiary commits a crime.

Joffe gives another example: a bequest is left to a daughter on condition that she divorces her husband. "You cannot encourage the break-up of a marriage," he says.

If you include specific conditions of inheritance in your will, your attorney needs to advise you of the implications of the conditions. Would they be valid? Could they be carried out, or could they be successfully contested? Are you infringing on rights guaranteed in the constitution?

Make sure that your will contains your wishes, but also that those wishes can be carried out.