

The way you got married – or didn't – will affect you

The intestate rule on the previous page assumed the deceased and surviving spouse were married out of community of property. Below, we highlight how the estate is affected in different scenarios.

✦ **Married in community of property:** the surviving spouse owns half of the assets in the estate. The remainder of the estate is divided by the intestate succession rule, as was explained on the previous page.

✦ **Married with antenuptial contract (out of community of property) with accrual:** if the surviving spouse's estate shows less accrual than the deceased's estate, then the surviving spouse can claim for half the difference between the two net-accrued estates. For example, each spouse brings R500 000 into their marriage. One spouse stops working, the other's assets rise to R5 million by time of death. The surviving spouse has a stake in the *increase* in value of the deceased's assets, worked out as follows:

deceased's estate assets at time of death, minus what was brought into marriage is R4,5 million (R5 million less R500 000), divided by two is R2,25 million. This payment is dealt with first; the balance of

'Without a will, heterosexual couples who don't marry won't inherit'

the estate is then divided by the intestate succession rule (see the previous page).

✦ **Unmarried same-sex partners living together:** in a landmark Constitutional Court case in November 2006, it was ruled that, in a same-sex partnership where the couple had lived together in a committed relationship, the surviving partner shouldn't be denied the right to inherit if the other partner died without a will, because, at the time, they couldn't legally get married. This ruling was upheld in a second case in November 2016 for technical reasons, despite the fact that same-sex marriage had since been legalised in South Africa.

✦ **Unmarried heterosexual partners living together:** it's an anomaly that, while SA courts recognise intestate rights of same-sex unmarried partners, these rights aren't given to unmarried heterosexual partners. A 2005 Constitutional Court ruling said these couples must accept consequences of their decision not to marry when, legally, they can marry. No will, no right to inherit.

Make sure that the right people benefit

WRITE A WILL Without a will you'll have no say over important decisions, like who'll become your kids' guardian. A will must be written in a certain way to be valid. If you slip up by not having the document correctly witnessed, for example, your will can be challenged and deemed invalid. Best to get expert advice when writing a will, so it's less likely to be challenged after you die.

Without a will, you'll also lose the chance to nominate an executor. This is the person who will handle your estate's division. Legally, estates worth over R250 000 must be handled by an executor. Many banks offer a free will-drafting service; but this is often on condition that you nominate the bank as executor. Executors are entitled to charge a fee of up to 3,5% (excluding VAT) of your estate's value, and a fee of up to 6% of all income generated after death until the estate is finalised. For simple wills, many executors agree to a lower fee. Agree to the fee in advance and specify this in your will.

To find someone to help you draft a will or act as executor, see the member list on the Law Society of SA site (Issa.org.za) or on The Fiduciary Institute of Southern Africa site (www.fisa.net.za).

SET UP A TRUST Trusts ensure your underage or disabled kids are cared for after you pass away. They must be set up by a trust-law expert, who often acts as trust administrator, and registered with the Master of the High Court and SARS. Registration and legal fees often cost from R5 000 to R12 500. Once set up, trustees must be appointed to oversee it. You also pay ongoing fees to your trustees and trust administrator.

Trusts can be set up while you're alive, or in your will to apply after you die. There are different types:

✦ There are two trusts taxed as 'special trusts'. If you have a child with a mental or physical disability who won't cope on their own, set up a trust to take care of the child's material needs. A special trust can also be set up to protect your kids' assets if you die before they're 18. Your will-appointed trustees manage your assets on your kids' behalf until they can take over the responsibility.

✦ Want your money to be used for something specific, like your grandkids' education? Set up a trust where you transfer ownership of your assets to your nominated trustees, who make this happen. Taxes on this trust may be higher than those for 'special trusts'.

Estate duty changes?

Last August, the Davis Tax Committee (DTC) suggested changes that may later come into effect. Ronel Williams explains:

"Under current rules, when someone dies, they're taxed an estate duty of 20% on their assets' value (only after the cut-off point of R3,5 million). An exception is 'spousal abatement' – when a spouse dies and their estate passes to the surviving spouse, it will only be taxed (at 20% for values over R3,5 million) when this spouse dies.

Because unmarried couples and singles don't benefit, the DTC suggested doing away with spousal abatement. The DTC also proposed the cut-off point be increased to R15 million with estate duty taxed at 20%, and that estates valued over R30 million should be taxed at 25%."



Don't give it to the tax man

Estate duty tax could see a chunk of your wealth going to SARS – not your heirs. Estate duty tax is paid to SARS by your executor. You're taxed 20% on any portion of your estate over R3,5 million. If your estate's net value is R4 million, for example, you're taxed on R500 000, liable to pay R100 000 in tax (20% of R500 000). Here are two ways to lessen this tax burden:

✦ **Pass your estate on to your spouse** Current rules say that amounts inherited by a spouse, or donated to a spouse, are free from estate duty tax, donations tax, and capital gains tax. That means if you leave your R20 million estate to your spouse after you die, no estate duty is payable.

✦ **Give to charity** Any contribution that you make in your will to an approved, registered charity reduces the value of your taxable estate. And there is no limit on how much of your estate you can donate to charity upon your death. **w&h**