



THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



ESTATE PLANNING TRUSTS WILLS ESTATES BENEFICIARY FUNDS

Making provision for a fixed property in your will

If you own a property, ensure that you have a valid will, else it may not end up in the hands of the person/s you wanted to inherit the property.

What is the best way to include a property in your will?

A property must be described with sufficient clarity in a will to avoid any confusion, but exactly how this is done depends on the circumstances. A residential property, be that a freestanding home or a sectional title or share block, is best described by way of a street address, an erf number, or a unit number. Farmland is best described by the name on the title deed of the particular piece of land.

What happens if you die without a will?

If you die without a valid will, the rules of intestate succession apply. These rules also apply to fixed property such as a house or block of flats.

In a nutshell, the rules of intestate succession work as follows:

- If the deceased person leaves a spouse without children, the spouse inherits the entire estate but only after the payment of debts, costs and taxes. A 'spouse' in this context also means a partner in a customary or religious marriage, or a same-sex partner in a long-term relationship.

- If the deceased person has a spouse and children, the spouse inherits a child's share or R250 000, whichever is the bigger amount. Note that this applies only to the deceased's own and adopted children but not the spouse's children from another marriage or relationship, unless they were formally adopted by the deceased. To determine a child's share, the spouse is counted as a child together with the deceased's own and adopted children.
- If the deceased does not leave a spouse or children (or other descendants), the estate is split 50/50 between the deceased's two parents (natural or adopted parents). If the parents are no longer alive, the inheritance will go to their descendants, such as siblings of the deceased or their descendants.
- Adopted children inherit from their adoptive parents and not their natural parents, and vice versa. Upon adoption all ties between the adopted child and its natural parents are broken, and the adoptive parents are regarded as the adopted child's only parents.

It may be difficult in practice to apply the rules of intestate succession. For example, assume the deceased leaves a spouse and two children and he/she owned a fixed property worth R3-million, as well as other assets worth R1-million after taxes, debts and costs have been settled. The surviving spouse will inherit a child's share, which will be one third of R4-million. Practically this means the surviving spouse will end up as a joint owner of the fixed property with the children. If the surviving spouse is not the natural parent of the deceased's two children this may not be a desirable situation, or what the deceased intended.



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How are joint heirs of a property impacted?

Other than agricultural land, which by law cannot be left to more than one person, all other fixed property can be bequeathed to more than one person, who become joint owners. This may be completely impractical in a situation where the joint heirs are not on speaking terms. Leaving a property to a trust or company may be a solution, but this should not be attempted without professional advice.

How can you protect a property from being sold when the estate is wound up?

It is very important when planning to ensure that there will be enough cash available in the estate after death to cover the cash needs while the estate is under administration. The cash will be used to pay debts such as settling the bond and other debts, paying municipal rates and taxes, income tax, estate duty, and the costs of administration. An example of further costs is valuation fees for fixed property. The executor will pay all debts, costs and taxes first from the available cash in the estate, followed by special bequests (also called legacies), with the rest going to the heir/s appointed in the will to inherit the residue.

When there is insufficient cash available, the executor can sell the deceased's assets to raise the cash required. This is not ideal as it could have further negative tax consequences. The only way to avoid this is if the heirs are willing themselves to pay cash into the estate to cover those costs.

Bear in mind that fixed property (like a house or a flat) usually cannot be transferred in the Deeds Office unless a rates clearance has been issued by the local authority, confirming that all municipal bills have been paid. The Deeds Office is responsible for the registration, management and maintenance of the property registry of South Africa.

Who transfers the property into the heir's name?

This is handled by the executor of the deceased estate, who instructs an attorney to see to the transfer in the Deeds Office. The executor will request the personal particulars the Deeds Office requires from the heir(s) to whom the property must be transferred.

Why use a fiduciary practitioner?

Appointing a fiduciary practitioner relieves the heirs in an estate from the burden of the administration of the estate and dealing with financial institutions, municipalities, the Master of the High Court, the SA Revenue Service (SARS) and other state agencies. A professional fiduciary practitioner has the legal knowledge and experience, can provide unbiased advice, and is duty bound to make decisions that are in the best interests of the estate.