

What constitutes a valid Will?

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Something that South Africans take for granted is that we have the right to choose who inherits our fortune when we die. This so-called 'freedom of testation' is, oddly, not a universal right with antiquated European laws often dictating the order in which heirs inherit their parents' wealth.

That is not the case in South Africa, where we can decide, within limits, exactly where and to whom our assets are to be allocated. As long as you have a valid Will, of course.

Which is the crux of this article, because an estimated 70% of the South African working population do not have a valid Will. When you die, your family then loses control of your estate because they have no say how your estate is settled. That process is left up to the courts and attorneys appointed to wind up intestate estates.

With National Will Week having just passed, I thought I'd offer some quick tips and insights into what you need to do, why and how.

What constitutes a valid Will?

For your Will to be legally valid, it has to comply with the Wills Act 7 of 1953. This means:



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1. It must be in writing
2. you must be older than 16 and be capable of appreciating what you are signing.
3. you and the witnesses must sign the Will in the presence of each other, and you must sign on every page
4. the witnesses must be older than 14 and not receive any benefit in the Will.

You can draft the Will yourself, but it's a good idea to have a professional review it to make sure it contains all the necessary elements to make it legally binding.

What to consider when drafting a Will

Here's a snapshot of the most important things to bear in mind when drafting a Will. Be absolutely sure it meets the strict legal requirements of a Will, otherwise it will be deemed invalid.

This is especially important if you have a minor (a child younger than 18) who would be dependent on your estate. Which is also why you should name a guardian who will be charged with looking after your child/ren. Without a Will in place, your family might have no say over who is appointed guardian.

Further considerations regarding your children under 18 is whether to set up a trust that will administer your affairs until they reach legal age. This will avoid all assets being liquidated or being placed in the Guardians Fund, which is administered by each Master of the High Court and is only released to them when they turn 18. The trust will give you greater control as to how your minor heirs will benefit from their inheritance. When creating a testamentary trust, you need to ensure that all provisions related to the appointment of the trustees

and their powers are clearly defined, as your will ultimately become the trust deed.

Although not part of your written Will, a precaution that is worth taking is to provide for your loved ones in respect to immediate expenses and any expenses that they may need to settle in the event of your demise like funeral and household expenses and medical bills. This can be achieved through forward planning and policies to cover these costs.

Lastly, always remember to update your Will when circumstances change. A birth, a death, a marriage, a divorce, a new house or investment portfolio – these all need to be included in your Will to keep it current. It is important to mention that divorce can be detrimental in the event that you failed to review your Will and you do not wish for your ex-spouse to inherit. Therefore, amending your Will should be a priority when there is a change in personal circumstances.

Married South Africans tend to have joint Wills drafted whereby the surviving spouse is typically the sole beneficiary of the first dying spouse's estate. However, in the event of a divorce, people often tend to neglect to amend their Will, which may lead to challenges.

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