

INSIGHTS

NATIONAL WILLS WEEK

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Be in control of the legacy you leave behind

● The public can have a basic will drafted for free by participating law firms, writes Lynette Dicey

The Law Society of SA (LSSA) has been successfully hosting National Wills Week, a public outreach programme, since 2008.

This year, the programme runs until September 20. During this period, the public can have a basic will drafted free of charge by law firms registered with the society to participate in the initiative. The LSSA website includes the list of participating law firms per province.

Why is it so important to have a will in place? The main reason is that having a will in place ensures your assets are disposed of according to your wishes after your death. The LSSA recommends getting an attorney to draft your will as they have the knowledge and expertise to ensure that a will is valid and an attorney is nominated as the executor. The society says a will drawn up by somebody who does not have the necessary legal knowledge to ensure all the requisite legal



requirements are met, risks being invalid.

However, your executor doesn't have to be an attorney. What's important, says the LSSA, is that the executor is familiar with the directions contained in your will, knows where your assets are, has generation information about your family affairs, is in a position to wind up your estate and carry out transfer registrations of any fixed property timeously, and has specialised legal knowledge of the administration process.

If you die without a valid will in place, your estate and its assets will be distributed according to the provisions of the Intestate Succession Act.

The LSSA says the provisions of this act are generally fair and ensure your

possessions are transferred to your spouse and children, or grandchildren if a child has died leaving children. If there are no descendants the parents will inherit and, in their absence, siblings will inherit or extended family in terms of degrees of relationships and those that were dependant on you for financial support.

There are, however, numerous potential problems to not having a will. First, your assets may not be left to the person of your choice, your estate will receive a court-appointed executor, and this may take some time and, lastly, there can be extra and unnecessary costs incurred.

When someone dies, leaving – irrespective of whether or not they have a valid will in place – the surviving spouse or, if no

surviving spouse, the nearest relative living in the district in which the death has taken place must report the estate to the master of the high court within 14 days. The master of the court will then appoint an executor by issuing a letter of executorship if the deceased's assets have a gross value of more than R250,000 or a letter of authority if the deceased's assets are worth less than R250,000.

The role of the executor is to collect the deceased's assets, settle his or her liabilities, pay any legacies and distribute the balance to the heirs in terms of the will, or according to the provisions of the Intestate Succession Act if the deceased died without a valid will in place. The executor is also responsible for determining the value of the assets and liabilities

in the estate and requesting any claims against the estate to be lodged. This request needs to be published in the Government Gazette and one or more newspapers in the district in which the resident was normally resident. An account of the liquidation and distribution of the estate needs to be submitted to the master of the high court and, once approved, the account must be made publicly available at a magistrate's office for 21 days.

In certain circumstances, the Administration of Estates Act will allow a surviving spouse to take over the property of the deceased – or a portion of the property – if there is adequate security provided by the surviving spouse to secure a minor's portion. The heirs are also entitled to enter into a redistribution agreement, although this needs to be submitted to the master of the high court for approval and acceptance. In these circumstances, an attorney's advice is a good idea.

The executor is allowed to release an amount of money and any property in the estate to provide for the deceased's family or household but needs the consent of the master of the high court. The executor can also make advances to the heirs if the estate is solvent and there are sufficient funds

Online service makes will creation easier

An estimated 70% of South Africans don't have a will, potentially leaving their dependants and families in a tough spot when they die.

Creating a valid will is crucial for deciding how assets are distributed after death and for ensuring that minor children are properly cared for. With about 15-million children under the age 14 in SA, all parents – regardless of their wealth or status – need to understand the importance of having a will.

"Wills aren't just for the wealthy; they are for anyone who wants to secure their family's future and ensure their wishes are respected," says Hilton Michels, CEO at Old Mutual's Online Wills.

"Without a will, the law decides who gets what, often leaving loved ones without the support they need. Assets can be tied up, and funds for minor children may be locked away, inaccessible when they are needed most."

Historically, the legal intricacies of drafting a will – such as ensuring witnesses are not beneficiaries, and understanding the cost associated with dying – meant that most people believed they should be hiring a professional. This can be costly and inaccessible for many. While these challenges have discouraged will creation, advances in technology are changing this.

Old Mutual has introduced an online will creation service



Hilton Michels... helping people protect what matters most.

which not only makes legal will creation more accessible but also allows more South Africans to create a legal will, empowering them to decide how their legacy will be honoured and protecting their loved ones from legal complications and financial burdens.

"Our online will creation service provides an efficient and legally compliant way for South Africans to create a will, in the process removing many of the

USER BEHAVIOUR ON THE WILL CREATION SERVICE PLATFORM IS ENCOURAGING, WITH MORE THAN 75% OF CUSTOMERS COMPLETING THE PROCESS WITHOUT NEEDING SUPPORT

barriers that have traditionally been in place," says Michels.

"It's an intuitive step-by-step process which is easy to follow and helps individuals to make informed decisions about asset distribution, guardianship, living wills and more, all from the comfort of their own home."

The value of offering an online will creation service where the creation and storage of the will is at no cost to the user is clear. Michels says user behaviour on the will creation service platform is encouraging, with more than 75% of customers completing the process without needing support, and nearly 30% doing so on mobile devices.

However, while Old Mutual's platform is increasing accessibility, Michels acknowledges that there is still more required. "We are making progress, but areas like language, literacy and digital access still requires more progress. Additionally, by law, wills must be signed and witnessed in wet ink. This remains a priority to solve for the industry as a collective. In the meanwhile, we offer secure courier services to collect, store and safeguard your will at no cost to the user."

Michels says the online service will make will creation easy and accessible for everyone. "It's about doing what's right for our communities and helping people protect what matters most."

Use a professional and ensure your affairs are in order

Although anyone with any assets in their name can have a will, the reality is that if the size of the estate is very small, it may be hard to find an executor to take on the task, says certified financial planner Dawn Ridler.

She cautions against using a non-professional.

"There are some crucial clauses that are often omitted from 'do-it-yourself' templates that can hurt beneficiaries, such as not excluding any bequests from the marital estate of that beneficiary and giving a potentially estranged partner another asset to go after or leaving a bequest to an unrehabilitated insolvent, which means the bequest will go to his or her creditors."

"Or leaving a bequest to a minor without making provision for how this is to be

managed until their reach their majority which risks the bequest ending up in the government beneficiary fund," she says.

Executors' fees are legislated at 3.99% plus VAT. "This may not sound like a lot until you do the maths," says Ridler. "Banks and other financial institutions will often do your will for free. Their incentive is that you have to nominate them as the executor. What is not commonly known is that the executor's fee is negotiable. However, if you nominate an institution, you take away that option to negotiate," she says.

"I recommend the surviving partner or one child negotiates a fee with a professional executor. The master of the court is becoming less inclined to allow nonprofessionals to wind up an

estate as their involvement inevitably delays the process by years."

Witnesses to the signing of the will must not be beneficiaries of the will, have any involvement in drawing up the will and must be competent adults over the age of 18.

Ridler says ensuring your affairs are in order goes a long way to winding up an estate timeously and provides more negotiating power with an executor.

"This could be as simple as a single file that summarises all your assets, investments, bank accounts, liabilities, policies, medical aid, deeds and tax details which the executor will need to wind up your estate."

Another area that she says is important to address is estate duty. "Everyone has a R3.5m

'allowance' before estate duty is levied. Any bequest left to a spouse falls under section 4(q) of the Estate Duty Act which means no estate duty is levied and assets are transferred at base cost. On the death of the remaining spouse, the portion of the first spouse's allowance will be added to the second.

"In other words, if all assets are left to the surviving spouse, the allowance becomes R7m. Estate duty below R30m is levied at 20%."

She recommends that both spouses have some liquidity in their own name. "I recommend at least a year's expenses. This doesn't have to be in a savings account and could be in a flexible investment that can be easily sold. A funeral policy often pays out quickly and could be used as a top up."

Bullying of testator does not fly

Anthony Fineberg
PKF Octagon

There are few financial tasks more personal, and with more profound implications, than the planning and taxation associated with estates and trusts.

Estate and financial planning starts with the drafting of a valid last will and testament. This ensures assets are protected, beneficiaries provided for and a legacy secured. It ensures your voice is heard when you are no longer here.

Unfortunately, inadequate planning remains a major hindrance, with a critical issue not just drafting a will, but ensuring it is not found wanting down the line.

It is equally essential to ensure the testator's intentions are clear and they had the required capacity to draft a will.

A recent case, MEK and Another v Pokroy NO, highlights the risks for families when wills are not properly drawn up. It also shows the devious side of human nature,



when ailing testators can be taken advantage of.

The plaintiff in this action, a chartered accountant and a retired pilot, contested the validity of several wills executed by her deceased father a few months prior to his demise after he was diagnosed with pancreatic cancer and in terms of which the plaintiff was excluded. Notably, an ex-wife divorced from the deceased for 17 years was nominated as a beneficiary.

The wills conveniently revoked a will which included the plaintiff as a beneficiary that was executed by the deceased

prior to his diagnosis.

Fortunately, the court smelt a rat. It found that due to his vulnerability, the ex-wife's dominance and his susceptibility to capitulate under pressure and instigation, the testator's wishes were replaced with the wishes of Ms W, such that the will does not reflect his wishes but that of Ms W, who was actively involved in the arrangement for the execution of the wills, deciding on the beneficiaries and the manner of devolvement of the deceased's estate.

Through deception and exertion of pressure on the

deceased, the ex-wife was one of the beneficiaries under the will to the exclusion of the deceased's other natural heirs.

These types of battles become nasty when they happen, and it is important to get all your ducks in a row as a family.

Here are some of the key things to ensure are in place properly to avoid unwanted surprises:

- Meet all legal requirements for a valid will – many cases are coming before courts to have wills amended or declared invalid;
- Get the right executors, administrators and trustees in place and, if not, appoint trusted, unbiased experts to assist in these key roles;
- Ensure the final individual income tax return does not become a problem – tax planning is key;
- Do not get caught out with incorrect or late fiduciary income tax returns for estates and trusts; and
- Avoid nasty litigation surprises.

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