



IBN INFORMS

Drawing up a Last Will in South Africa

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Introduction

Reluctance to accept our mortality probably explains the high rate of intestate deaths in South Africa, many of which result in untold inconvenience and hardship for dependants. Even if you aren't wealthy, you have an estate made up of assets and liabilities and a responsibility to your loved ones to ensure that your estate can be swiftly and efficiently settled, with the least possible conflict or confusion.

1. Why do I need a last will?

If you have any assets at all, you should have a will. If you die without one, your assets will be divided according to the Intestate Succession Act and the division might not go the way you would have liked. In addition, your dependants could face delays in collecting their inheritance, higher administration costs and tax problems.

2. What should I take into account?

In South Africa, we have "freedom of testation", which means you can nominate your own heirs. But this doesn't mean you can put anything you like in your will – to be valid it must comply with the specific requirements of the Wills Act. It's wise to consult an expert, such as an attorney or trust company, to make sure yours does comply. Keep your will as simple as possible, ensure that it is practical and clear, identify your heirs clearly to avoid confusion after your death and divide your assets equitably to avoid disputes.

3. What should I leave out of my will?

- a) Try not to paint the executor of your will into a corner with instructions that seem wise at the time but might be difficult to execute. For instance, an instruction to sell shares might have to be carried out when the market is weak, and your heirs would suffer an unnecessary loss.
- b) Don't try to describe all your assets in your will – you might leave some out. Instead, describe those assets that you want certain people to inherit and then bequeath the rest of your estate to specific heirs.



- c) Avoid ambiguous terms – these could be disputed later. “Effects”, for instance, is ambiguous.
- d) Don’t use your will to leave instructions about organ donation or about your funeral or cremation. By the time your will comes into operation, it will be too late for organ donation. In the same way, the contents of the will are often made known only after the funeral. It’s best to inform your next of kin of your wishes by means of a Cremation or Burial Directive.¹

4. Why should I name an executor?

An executor is appointed by the Master of the High Court to deal with your estate. You can nominate your own executor – preferably an attorney or a trust company – and the Master will usually rubber-stamp the executor you have chosen. If you don’t nominate an executor in your will or if the executor you nominated dies before you, the Master will consider nominations in writing from your family. He may even convene a meeting to discuss an executor. All this will delay the settlement of your estate.

5. What does the executor do?

The executor’s duty is to collect all your assets and all your debts, to settle your debts and to divide the balance of your assets among your heirs, reporting to the Master of the High Court.

- a) The first step is to put a notice in the Government Gazette and local newspaper inviting your creditors to notify the executor of claims against your estate.
- b) At the same time, the executor collects details of your investments, values your assets and works out your tax liability.
- c) If there isn’t enough cash in your estate to pay your debts, your heirs may be asked to make up the difference, or assets may be sold from your estate.
- d) This “Liquidation and Distribution Account” is submitted to the Master, who must approve it and open it for inspection by anyone concerned for at least 21 days, by putting a notice in the Government Gazette and local newspaper.



e) Anyone who has an objection can approach the Master of the High Court, who will consult the executor and make a decision – with which the executor must comply.

f) Once all objections have been settled, the executor can finalise the estate by paying the creditors and handing over to the heirs their inheritance.

g) When the Master is satisfied that this has been done, the executor's task is complete.

6. How long does all this take?

From start to finish, this process can take up to nine months: three to four weeks for the Master of the High Court to appoint an executor; six to 24 weeks to compile the Liquidation and Distribution Account; two to four weeks for the Master to examine the account; four weeks for the account to lie open for inspection; and two to six weeks to pay out creditors, hand over to heirs and finalise the estate. If part of the estate is a house, or other property, the transfer of ownership from your name to that of your heirs may delay the finalisation of your estate even further.

7. What will all this cost?

Your estate will have to pay the following costs:

- a) Master's fees of R42 to R600, depending on the value of the estate;
- b) Executor's fees, which by law cannot exceed 3.5 percent of the gross assets (before deducting debts or tax) of your estate, plus six percent of any income, such as dividends, rent or interest, which the executor collects on behalf of your estate before it is finalised;
- c) Costs of any valuations the executor may have to do, for instance, of your property;
- d) Costs of advertisements in newspapers;
- e) Costs of security the executor may have to supply to the Master before the Master confirms his or her appointment – from R300 a year;

¹ For further reference please see "IBN INFORMS: Estate Planning & Last Will"



- f) Bank charges on the account the executor, in terms of the Administration of Estates Act, must open in the name of your estate;
- g) Transfer costs on houses and other property and fees for the cancellation of bonds; and
- h) Funeral costs.

8. What documents will my executor need?

Your executor will need your last signed original will, your identity document, your death certificate, your marriage certificate, antenuptial contract, if you have one, your divorce order and deed of settlement, if you are divorced, copies of identity documents and marriage certificates of all heirs, the names and addresses of your employer and your pension fund, details of your medical aid fund, your income tax details, your vehicle registration details and any share or unit trust certificates, title deeds, details of other investments, mortgage bonds, cheque books and credit cards, and details of all your debts and of any contracts into which you had entered, such as short-term insurance policies and life insurance policies. Ensure that your dependants know where to find these documents when you die.

9. How does my marriage affect my will?

If you are married in community of property, all assets acquired before the marriage and during the marriage belong to both of you equally. In this case, when you draw up a will, you can generally only deal with half the assets of the marriage. If you are married out of community of property, any assets you acquired before your marriage remain your own, but assets acquired during the marriage belong to you both – unless you specifically state that assets acquired during the marriage belong to the spouse who acquired them. If you leave assets to your children, the law includes:

- a) Children born of your marriage or any previous marriage;
- b) Children born out of marriage; and
- c) Legally adopted children.



10. Is my estate liable for tax?

The first R2.5 million in your estate (after deduction of debts and any bequests to your surviving spouse) is tax free. Any assets in excess of R2.5 million are subject to estate duty of currently 20 percent.

Assistance through IBN

If you require assistance in drafting a Last Will or need more information on the South African Law of Estate please contact one of our IBN offices. Within the framework of Estate Planning and drafting of the applicable documents we offer:

- Initial Consultation
- Drafting of Last Will
- Drafting of *Live Will* or *Medical Power of Attorney*
- Drafting of *Cremation* or *Burial Directives*
- Taking over the position as Executor of the Estate
- Assisting with wrapping up Estates

Further services of IBN are available on www.ibn.co.za

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