



**IBN INFORMS about
South African Law of Estates and
the Drafting of Testaments**

Edition: 25 January 2012

Edition update of 25 January 2012 by:

IBN Consulting Johannesburg
Twickenham Building, The Campus
Cnr. Culross Road & Main Road
Bryanston 2021

Ph: +27 (11) 575 7173 * Fax: +27 (11) 575 6000 * johannesburg@ibn.co.za

WEB: www.ibn.co.za



Introduction

As opposed to the widely applied principle of universal succession all of the testator's assets will automatically be transferred to the *Master of the High Court* instead of to the legal heirs under South African Law. This procedure is not affected by whether or not it is an *intestate* or *testate succession*. The *Master* appoints an *executor*, who will draw up a scheme of distribution within 6 months. The scheme will be displayed at the court for 21 days and in the event of no objections the executor will take up his work without being bound to any time lines.

Intestate / legal order of succession

The legal foundation of the succession is the *Intestate Succession Act Nr. 81 of 1987*. Pursuant to the Act the following succession order applies including adopted and illegitimate children on equal terms with biological children:

1. **Spouse** is the sole heir (provided there are no children)
2. **Spouse** and **children** in equal shares (*representation per stirpes*)
3. **Deceased children** are succeeded **by their children** in equal shares
4. **Parents**, if there is neither a spouse nor any children or grandchildren alive
5. **Children of the parents**, half to the children of the mother in equal shares and the other half to the father's children also in equal shares
6. Nearest **blood relatives** in equal shares, provided that none above survived the deceased
7. **Treasury**, provided that within 30 years none above could be found alive

However, there are certain special cases:

CASE 1 – “small bequest”

The spouse of the testator is entitled to a minimum of ZAR 125,000 of the bequest. If the deceased has children and the bequest is smaller than ZAR 250,000, the children will only inherit the remaining amount exceeding ZAR 125,000 in equal shares.



CASE 2 – “community of property”

In the case of the status „*community of property*“ the marital estate is considered to be jointly owned by the spouses. After one spouse passes away the executor will wind up the joint estate by firstly discharging liabilities and only afterwards transferring half of the remaining estate to the surviving spouse and the other half to the children in equal terms.

Testate succession

Every natural and contractually capable person of at least 16 years of age is legally allowed to draw up a valid last will and testament. Up until today there are two different forms of the written last will. There is the testament and the codicil, the former being the first written copy and the latter being all other copies containing amendments. Both forms are legally considered equal pursuant to the *Wills Act of 1953*.

Regarding the content of the will the testator is at a greater liberty than in most other countries since there are no claims to a compulsory legal portion in South Africa. He, therefore, may freely decide on:

1. Heirs
2. Legal succession
3. Distribution of assets
4. Requirements for accepting an inheritance or part of it
5. Allocation of individual assets to heirs (*preference legacy*)
6. Allocation of individual assets to third parties (*legacy*)
7. Separate allocation of title and usufruct

When erecting a testament or codicil the following formal requirements must be met:

1. Personal signature underneath the text of each page **or**
2. Signature of a third person in presence of and at the disposition of the testator (see case 3 below) **and**
3. Signatures of two witnesses present at the same time at the bottom of each page of the document



In South Africa the text of the last will does not have to be written by one's own hand. Yet, it may not be written by one of the heirs or by any beneficiaries, otherwise his or her appointment of heir or legatee will not be recognised by law. The testator may, nonetheless, dissent from this rule by a written declaration of intent. However, it is not advised as it leaves room for the last will to be contested. It is rather advised to write the last will on a computer or typewriter.

With regard to the witnesses, they both must be at least 14 years of age, they must be present at the signing and may not benefit from the last will since otherwise the last will may be considered null and void.

The following cases will deal with some other special circumstances:

CASE 3 – “Signature of a third party and xxx”

In the – valid – case that the testator signs the disposition using only a symbol (e.g. xxx) or a third party signs the disposition in the presence and on behalf of the testator, the disposition will only be valid if, in addition, there is a *magistrate, justice of the peace, commissioner of oaths or public notary*, who will confirm the identity of the testator and the fact that the disposition is his or her last will.

CASE 4 – “Substitutional or reversionary inheritance and legacy”

The testator is at liberty to appoint a person as heir or legatee (the *fiduciary*), and at the same time determine that the bequest or an individual asset of it will be transferred to another person (the *fideicommissary*) at a certain time or under certain conditions. The term for this rule is *fideicommissum* and it corresponds to the principle of substitutional or reversionary inheritance or reversionary legacy. However, the difference is that there must be a minimum amount remaining to the *fiduciary*, the so-called *residue*.



Recognition of foreign testaments

Even though there is a *numerus clausus* of testaments in South African Law and therefore there is a limited manifestation of a last will, two exceptions are recognised: Any *notary will* erected in Germany before 1954 and all *holographic wills* in which the heirs of first degree are not disinherited are recognised in South Africa.

CASE 5 – “Joint Testament”

Any two people may erect a mutual testament. It is irrelevant in which way they are related to each other and whether or not they are married. Again the witnesses of the testament should not write the testament, as they will then be rejected as beneficiaries. As long as both authors are still alive each of them may at any time revoke the joint testament.

Testamentary contract

Besides erecting a testament the testator may also regulate the succession by concluding a testamentary contract, a so-called *pactum successorium*. This contract is part of a marriage contract and as such it must meet the formal requirements for such contracts. Like the *ante-nuptial contract* (ANC) the marriage contract will be registered at court in South Africa.

The marriage contract offers the spouses the opportunity to also appoint themselves mutually or their children as heirs. The revocation of the contract must meet the same formal requirements as the conclusion thereof. It should be beard in mind that each beneficiary of the contract has become a party to the contract and therefore, all of the beneficiaries' consent is needed for revocation or amendment of the contract.

Testamentary trust or trust „from warm hands“

Sometimes it is the testator's wish that his or her inheritance will be preserved as a whole and e.g. the heirs will receive the revenues instead of selling the assets and allocating the capital to them. Another reason for establishing a testamentary trust is wanting to protect the heirs from disadvantageous influence by others or from their own inabilities.



Such a testamentary trust is established with the testator's death. However, the testator may also determine that the trust is established during his or her life time. Such *inter-vivos trust* is also colloquially called trust „from warm hands“.

The *inter-vivos trust* may also be used to save on estate duty. If the testator grants a loan to the trust and the trust in return will purchase his or her assets, then there will only be estate duty payable on the loan and not on the assets since the capital gain occurred within the trust.

Liability of the heirs

Due to the transfer of the inheritance to the *Master of the High Court* there is no risk of liability. The heirs will not be held liable for any debts. They will only receive any remaining profits after discharging liabilities. Thus, in South Africa everyone may inherit something without having to fear to be held liable for any liabilities.

Inheritance adjustment

Nonetheless, there may be an exception to the above-mentioned rule. All presents, which the children who have become heirs have received, will be taken into account when allocating the inheritance shares. The value of those benefits will be added to the inheritance and each heir will then only receive an inheritance share minus such value of the benefits received during the testator. This is called *collation*.

The collation does not apply to the grandchildren of the deceased provided that their parents have been alive at the time of death of the deceased. In the event that the parent is not alive anymore, both the presents to the parent and the ones to the grandchild must be taken into account when calculating the inheritance shares.

The testator may determine that the collation does not apply to all or to specific children. He or she must either exclude the application of collation in total or declare that the children are to be considered pre-dated legatees.

Executor and procedure

As mentioned in the beginning the *Master of the High Court* appoints the executor although he is bound by the last will if the testator has determined, who the executor should be. If the executor has been determined by the testator and neither nonage nor incapacitation or imprisonment conflicts with the choice, the executor is appointed as *Executor Testamentary*.



People may also be determined as assistants to the executor who are called *Executors Assumed* or *Co-Executors*.

Did the testator not exercise the option to determine the executor or is the determination invalid, unfeasible for whatever reason or denied by the executor, then the Master appoints an executor who is called *Executor Dative*.

The executor's task is to discharge liabilities to the benefit of the heirs. This can be a very difficult task and due to the specific knowledge needed the job should only be carried out by persons with the necessary expertise like specialised lawyers and not family members or friends without special qualification.

An executor appointed by the *Master* must, in general, deposit a security at the *High Court* to guarantee the fulfilment of the demands of such public office. It is very common to obtain a guarantee from an insurance company securing an amount as high as the amount of the estimated bequest. The premium is part of the administration costs for which the bequest is liable. It becomes apparent that it is difficult for a friend to provide such an insurance guarantee and the court only sometimes desists on the provision of such guarantee, namely when the children the surviving spouse or the parents of the deceased are the executor and the deceased has determined to exempt them from providing such security.

According to the law the costs for the execution of a will are 3.5% of the value of the bequest. Furthermore, the executor may charge 6% commission of all income of the bequest during the time from the occurrence of the succession until completion of the execution of the will.

CASE 6 – “Minor Heir”

If there is the possibility that one or more heirs will still be minors at the time of death, the testator should authorise the executor to also administer the minors' share of bequest until they are of full age.¹ If no such authorisation is given, then the High Court may place the minors' share of the bequest into a fund¹ but the fund will only be paid a 2% interest on.

Colliding Legal Systems

As there are different approaches regarding the granting of government securities in South Africa and other countries, there is also a different approach regarding the applicable law in the case of succession of a person with references to both countries.



While in some countries the applicable law is determined by nationality, in South Africa the applicable law is determined by the place of residence, the so called *domicile*. Thus, problems occur in the typical situation that foreigners who immigrate to South Africa and have their place of residence in South Africa die. Then both legal systems are applicable according to their own laws. This is a problem especially regarding the differences of the systems pursuant to the compulsory legal portion of the bequest under the foreign law.

In practice, there often is a split of the bequest. As mentioned above if there are properties outside South Africa or the deceased held shares in a foreign company, then foreign law is applicable to these assets while if at the same time the deceased also owns properties in South Africa, the South African law is applicable to these assets. Regarding the remaining assets firstly the law of the country in which the judgment has been passed is applicable. However, this judgement is only enforceable insofar as its content is in accordance with local law. Consequently, a compulsory legal portion of the bequest will not be recognised under South African Law.

Regarding compliance with formal requirements both countries are generous with the recognition of a last will. Only if there are major violations of the requirements the validation of the testament will be questioned. The same applies for a foreign testamentary contract, which can only be concluded within a marriage contract under South African law.¹ It will also be recognised under South African Law even if it is concluded as a separate contract in that foreign country.

Living Will

While drafting the Last Will very often it is forgotten that this document only comes into force and effect when deceased. It is advisable to draft an additional document, which is often referred to as *Living Will* or *Medical Power of Attorney* and regulates the powers while in a coma or for any other reasons not being able to express his or her intentions and wishes. Besides these powers it also caters for exact instructions when it comes to forced nutrition supplement procedures or the dispersion of any pain-relief medication.

Burial & Cremation Directive

Finally it is also very often overlooked that shortly after the passing, the funeral and respective services will have to be prepared. Since the Last Will is often not available in time or needed



for more important aspects of the Estate, it is further advisable to draft a *Burial or Cremation Directive*, which regulates the funeral arrangements and may also contain a power of attorney to access funds from the Estate or in a bank account in order to pay for certain items or services within this framework. There are no specific formalities to adhere to when drafting such directives, but if they contain the access to parts of the estate or funds, then the format required for a General Power of Attorney will have to be followed.

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

Ralph M. Ertner LLM

Managing Director

Johannesburg, 25 January 2012

For any queries, suggestions other requirements, please contact johannesburg@ibn.co.za

¹ see also the chapter "testamentary contract"



IBN Consulting & Immigration Offices:

IBN Johannesburg	IBN Cape Town	IBN Stellenbosch	IBN Hamburg	IBN Berlin
Twickenham Bldg. The Campus Cr. Culross & Main Road Bryanston 2021	100 New Church Street Tamboerskloof 8001 Kapstadt 8001	1st Floor C2 Black Horse Center Cnr Dorp & Mark Street Stellenbosch 7600	Beim Schlump 36 20144 Hamburg Germany	Helmstedter Strasse 29 10717 Berlin Germany
<i>Ralph M Ertner</i>	<i>Andreas Krensel</i>	<i>Dirk Meissner</i>	<i>Pieter Bouwer</i>	<i>Annekatriin Mehle</i>
Tel. +27 11 5757173 Fax: +27 11 5766000 johannesburg@ibn.co.za	Tel: +27 21 4222620 Fax: +27 21 4222621 capetown@ibn.co.za	Tel: +27 21 8867606 Fax: +27 21 8878435 stellenbosch@ibn.co.za	Tel: +49 40 69643120 Fax: +49 321 21051365 hamburg@ibn.co.za	Tel: +27 30 21807174 Fax: +27 30 86395557 berlin@ibn.co.za

www.ibn.co.za

IBN Johannesburg ist Member of the following Organisations:

- Southern African – German Chamber of Commerce and Industry (SAGC)
- Austrian Business Circle (ABC)
- Trade & Investments South Africa (TISA)
- SAGC National Workgroup for Renewable Energy



Disclaimer: Our “IBN INFORMS” papers offer you a broad range of different information, which we have collected and chosen according to our best knowledge. Though all information provided by IBN Consulting is accurately considered, we still cannot guarantee for the correctness and completeness of the information. Thank you for your understanding.

Copyrights: This paper is protected under all laws regarding the protection of any intellectual property right. Thereby all resulting rights to translation, reproduction, removal of figures, broadcasting on radio or photomechanical reproduction, as well as the data storage remain reserved to the authors, even if only certain extracts of the paper are affected.

