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NEST EGGS

Drawing up a will - RSA edition

We often abdicate the structure of our will and estate to a bank or lawyer who may have vested interests. This eBook uncovers the things you really need to know.

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SO WHAT IF I DIE WITHOUT A WILL?

Dying without a legal will is called dying intestate. This means that the master of the court will appoint an executor and the estate will be distributed in terms of the rules of succession as you have not made your wishes known. These succession rules are fairly complex but essentially the estate will be divided among your spouse and children, with your spouse getting a “child’s share”, if the children are minor their portion of the estate will be managed by the Guardian’s fund – this could result in the sale of assets like the family home if there is not enough liquidity in the estate for the children. You will also not be able to make use of the ‘4q deduction” whereby all assets left to your spouse, irrespective of their value. Do not attract estate duty. Proceeds from life policies that should go to a minor child will be given to the Guardian's fund to invest and distribute. In short, a very bad idea.

Recommendations: Irrespective of the size of your estate a will is vitally important. This can be done by a lawyer, Certified Financial Planner or the bank. Do not try to do it yourself unless you are qualified to do so.

WHAT IS THE DIFFERENCE BETWEEN A TESTAMENTARY AND INTER VIVOS TRUST?

A testamentary trust is initiated in terms of a will (testament) usually if there are minor children or disabled beneficiaries to take into consideration, an inter vivos trust is founded while you are still alive (and is fairly costly, and has onerous reporting and auditing requirements that add to the expense). The “Testamentary Trust Deeds” will be triggered by the will so the following conditions must be added : Names of the trustees, how the proceeds can be paid out to the beneficiaries before majority (education, board and lodging etc, car at 18 etc.), The age at which the remaining capital can be paid out (typically 21 or 25. It is a good idea to make sure that at least one of the trustees is business savvy and will be able to make sound investment decisions.

Recommendations: If there is a chance any of your beneficiaries are minors it is imperative to specify a testamentary trust with the conditions under which the proceeds may be distributed to keep the funds out of the Guardian's fund.

WHAT IS AN EXECUTOR AND WHAT DOES HE/SHE CHARGE?

An executor is the person that will 'wind up' the estate, pay all the outstanding creditors, transfer the assets and pay out the beneficiaries. This person will be nominated in the will, but has to be accepted by the Master (which is not a forgone conclusion). The **maximum** fee that can be charged by an executor is 3.99% plus VAT. If an executor has been nominated in the will (for example a bank or lawyer) then they will charge the full amount, irrespective of the amount of work involved – they have no obligation to negotiate the fee down. If however you nominate someone as an executor giving them the power to nominate another executor (a spouse or child perhaps) then the executor's fee is now negotiable (and VAT is usually removed too).

Recommendations: Nominate a spouse or family member as an executor or joint executor giving them the power to appoint a professional executor and negotiate a reasonable rate. Let me give you an real example of the effect this can have on an estate. If the only asset a spouse has in her name is a R10m house which is left to the other spouse on her death - then all the executor has to do to wind this part of the estate up this is call a conveyancing attorney to effect the transfer (which he will charge for). Simple, however he/she is entitled to charge R399 000 for this simple act. Nice work if you can get it.

WHAT IS ESTATE DUTY ?

Currently estate duty is only levied on estates worth more than R3.5 million. In terms of section 4q this duty can be aggregated and deferred if the estate is left to a spouse. In other words if the entire R3.5 m estate is left to a spouse, his/her estate duty rebate will now increase to R7m and estate duty will be deferred until their death. For years there has been talk of estate duty being abolished (replaced by ever increasing CGT) but nothing has happened yet.

Recommendations: The use of usufructs and other complicated mechanisms are no longer required to maximise the 4q deductions to the spouse as these now roll over.

WHAT EFFECT WILL CGT (CAPITAL GAINS TAX) HAVE ON MY ESTATE ?

CGT will potentially have a greater impact on an estate than estate duty. Capital Gains is the difference between the base cost on 1/10/2001 and the date of sale of the asset or other CGT event (like death). Assets left to a spouse are transferred at **base cost** and CGT is "deferred" until his or her death. Assets transferred to other beneficiaries or a trust have to be transferred at the **new base cost** after CGT, and the estate pays the CGT. This can cause liquidity issues in an estate. There are rebates for primary homes and on death which your advisor will outline in an estate plan. Because the need for valuation of a property was widely publicised in 2000/2001 most people have got valuations from that time. If you don't then speak to your financial advisor as to how the property will be valued on its sale or your death. This calculation should form part of any estate plan and placed in your RED FILE (see end). This is quite complex (and boring) but basically everyone MUST keep receipts associated with any major renovations or additions to the home as this will reduce the potential CGT.

Recommendations: Once the value of your primary home is in excess of R2m and you have other property an estate plan is in order. keep all invoices related to major renovations to your properties (keep in the RED FILE) as these can be used to reduce the CGT.

WHAT IS DONATIONS TAX ?

In order to prevent the 'leakage' of estate duty and other taxes one is restricted to donations to anyone (except charity – treated differently) , including family members to R100k per person per annum. Thereafter a donations tax of 20% will be levied (not coincidentally the same as estate duty). The biggest use of this is in the formation of inter vivos trusts when founders want to move assets into the trust. This is both a CGT and donations tax event and must be carefully considered.

Recommendations: The most common way to get round this punitive donations tax in a trust is to create a loan account which can be whittled away R100k at a time. Speak to your financial advisor about this.

WHAT SHOULD I LOOK OUT FOR IN MY WILL?

Get your will assessed by a CERTIFIED FINANCIAL PLANNER or lawyer because there are some nasty pitfalls if you have tried to do it yourself or do it on the internet. Is there a testamentary trust for potential minors and does it give some detail on how and the proceeds should be paid? Is every page signed by each testator or testatrix and initialled by the witnesses? Are the witnesses completely independent –no beneficiaries, not the author of the will, guardians, trustees or executors? Is there a clause removing the inheritance from the COP or accrual assets of a married beneficiary?.

Recommendations: There are better places to cut corners than your will. Keep it simple but make it legally correct. Don't try and rule from the grave. Make sure your beneficiaries know where the latest copy of your will is kept and DESTROY the old ones. If the proceeds of a will are not specifically removed from the marital regime of a beneficiary they become part of his or her estate and on divorce or death the surviving spouse can claim their share.

WHAT ARE THE IMPLICATIONS OF BEING MARRIED IN 'COMMUNITY OF PROPERTY' ON MY WILL?

On death of one of the partners in a community of property marriage the estate is aggregated, i.e. lumped together. All liquid assets of both partners will be frozen (bank accounts etc). It is vital that your estate plan takes the liquidity shortfall for the surviving spouse into consideration to prevent additional stress. In this instance it is even more important to choose your executor carefully. Because the estates are aggregated you will pay executors fees on the entire estate. In short you will pay double executors fees – he/she will then charge the full amount on the second spouse's estate too.

Recommendations: Make sure the executor's fee can be negotiated (above)

WHAT ARE THE IMPLICATIONS OF ACCRUAL ON MY WILL ?

When you enter into an anti-nuptial agreement with accrual you agree that any assets acquired after your marriage will be split 50–50. Assets before marriage have to be listed and valued and will then be excluded. On divorce the difference in the accrued estates will be determined and the difference used in the divorce negotiations. On death it is potentially much more onerous. If the deceased spouse has a claim on the other's spouse's accrual share this has to be settled before beneficiaries are paid. If the estate is left to the spouse then this is not a problem, but if the major beneficiaries are not the spouse, then there is a large potential problem. Take the following example: Both parties enter into the marriage with zero assets, but during their lifetime, one spouse builds up a significant business worth say R100m and the other spouse has no assets. The business owner spouse then leaves the entire business to his children. The surviving spouse is entitled to R50m of this business which has to be provided by the estate or the children in terms of her accrual share. This can cause a major liquidity issue (finding the cash to pay out the spouse without selling the business). In the opposite scenario where the business owner is the surviving spouse the he/she will have to settle the accrual claim (if it hasn't been left to him/her) – usually in cash – causing even more grief and financial strain.

Recommendations: If you are married in the accrual system and considering leaving assets to someone other than your spouse get an estate plan done to find out if there are potential liquidity issues. These can be mitigated with buy-and-sell agreements (and/or policies), or by placing businesses in trusts from the outset.

HOW LONG DOES IT TAKE TO WIND UP AN ESTATE?

A simple estate with a decent executor should only take a couple of months. With a poorly motivated executor it can take 2 years. If there are complications caused by accrual shares etc. it can take even longer.

Recommendations: Have an up to date estate plan in your RED FILE so your executor knows exactly what he/she needs to do and where the liquidity has been planned. This will cut the amount of work required by an executor substantially.

WHAT INFO SHOULD I PUT IN MY RED FILE?

Your RED FILE should contain copies of all your important documents, contact details, estate plan etc so that anyone can pick up one file and start putting things in motion should you be incapacitated. The contents page and instructions page should be personalised and updated frequently. If you would like us to send you a template for this file please email dawn.ridler@mweb.co.za. From an estate planning perspective you need to have a copy of your latest estate plan in the file in addition to all the important documents related to every aspect of your life from title deeds and income tax returns to invoices used in house renovations.

BASIC WILL INPUT FORM?

Below is a basic will input form. These are the factors to take into consideration:

- 🔥 Make it as simple as possible. If you have specific bequests like your Royal Dalton tea set must be left to Aunt Mary, put this in your list of wishes attached to but not part of your will. The reason is that if you specify an asset in the will and the executor can't find it (because your light fingered cousin nicked it during the funeral) then they would have to find a replacement or pay out the beneficiary.
- 🔥 Males are Testators, females Testatrixes
- 🔥 Joint wills when the estate is simple – leaving to spouses and children all from the one union – is the easiest way to go. The will should then contain alternate beneficiaries should something happen to you both at the same time.
- 🔥 If you leave your entire estate to your spouse then no estate duty will be applicable and the R3.5m abatement will be rolled over to the second passing. If you leave a portion of the estate to beneficiaries other than your children then the amount will be deducted from the R3.5m abatement before being rolled over.
- 🔥 If there are or might be minor children then make provision for a testamentary trust which will only be formed in this unlikely scenario. You will also need to nominate guardians in case you both pass at the same time. Bear in mind a surviving spouse is likely to get guardianship even if the spouse had been given custody and guardianship of a child in a divorce. In these cases I

recommend separate wills with the child's share going into a testamentary trust. The surviving ex-spouse may be able to petition the estate for funds to care for the child prior to majority. This can also be enforced by a maintenance court.

- ✦ Make sure at least one of the trustees is financially savvy and can make good investment decisions.
- ✦ Bequests are handled first in the estate so be careful what you put here. If you want to bequeath a percentage of the estate to a charity for example, make sure that there is sufficient liquidity to allow for this without selling assets, or specify which assets are to be sold to effect this in your estate plan. Rather make it a specific asset or a fixed amount which can be updated from time to time. The estate after the bequests is called the 'residue'.
- ✦ When choosing the executor, or the person who will be charged to nominate an executor, make sure that they are financially savvy, know the process involved in winding up an estate and the role of an executor. The master is becoming increasingly strict in who he will allow to be an executor so your nominee may not necessary be able to take on the job, but they need to understand the process of securing a professional executor and more importantly negotiating the fee from a basic liquidation and distribution report (which should be in your estate plan). I recommend that the executor be instructed to call on your Financial Advisor that did your estate plan to do this with him or her.
- ✦ Update your will annually with your Financial advisor

TESTATOR/TESTATRIX	TESTATOR	TESTATRIX
First Name		
Second name		
Surname		
ID number		
Residential address		
Contact number		
Wishes	Attach separate list	
Bequests		
Beneficiary 1, full name		
Date of birth/ID		
Relationship		
% of estate		
Beneficiary 2, full name		
Date of birth/ID		
Relationship		
% of estate		
Beneficiary 3, full name		
Date of birth/ID		
Relationship		
% of estate		
Trust for minors?	Yes	Yes
Trustees for trust Name and Id numbers (at least 2)		
Guardians for children, full names, ID numbers and residential address		
Alternate beneficiaries (if testatrix/ testator and beneficiaries all die together)		
Executor/ name of person charged with nominating executor		
Other		