INTERNATIONAL INHERITANCE FORUM

REPORT
ON
REPUBLIC OF SOUTH AFRICA

INTERNATIONAL INHERITANCE FORUM

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1. THE HISTORICAL BACKGROUND TO TESTATION IN THE REPUBLIC OF SOUTH AFRICA

In South Africa we have 11 Official Languages and 9 Provinces.
The original Apartheid Legislation protected the interest of the White population and there were separate provisions for Black and White inhabitants.
South Africa's legal system is based primarily Roman Dutch Law with the influences of English Law being incorporated due to the various occupations in its history. In the past 30 years, more and more the influence of Customary Law, Religious law (Sharia Law), Case Law and Common Law, together with our Constitution of 1994, the law has adapted to try as much as possible to be inclusive and Equality is paramount.

Our law on Testate devolution, encompasses – The Wills Act, Administration of Deceased Estates Act, Matrimonial Property Act, Civil Unions Act, Maintenance of Surviving Spouses Act, Recognition of Customary Marriages Act, Trust Property Control Act

In terms of intestacy, The Intestate Succession Act governs the rules to be followed in intestate situations.

Our law entrenches Freedom of Testation, subject to certain limitations namely:

- Maintenance
  - Maintenance of Surviving Spouse Act,
  - Children while minors, common law duty
- Public Policy

We have no forced heirship rules (except in intestacy).
We may disinherit everybody, including spouse, children etc subject to the limitations of a maintenance application.

2. MARRIAGE AND THE CONSEQUENCES OF OUR MARITAL REGIMES

Marriage in the Republic of South Africa, or indeed marriage outside of the Republic of South Africa by South Africans who have as their domicile, South Africa, is governed by:

The Marriage Act Matrimonial Property Act
Civil Unions Act (including same sex unions)

Currently there is no recognition of any Common Law spouse in our law (as in living together but not marred).

Th Matrimonial Property Regimes are:

- In Community of Property; and
- Out of Community pf Property (with an antenuptial contract).

The standard is In Community of Property leading to the consequence that all assets and liabilities are shared 50/50 between the spouses.

In the event that the couple have entered into a marriage contract before marriage, electing to be married Out of Property with or without Accrual, the contract will set out what assets fall into the marriage and what are excluded, and how the profit and loss is dealt with at dissolution of the marriage due to death pr divorce.

The requirements for the contract to be valid and enforceable is:

There must be a valid marriage or civil union entered into.
The contract must be concluded and attested to prior to Marriage; (it is possible after marriage but then a Court Order is required).
It must be signed and attested before a Notary.
The contract must then be registered at the local Deeds Registry.

The Accrual calculation of a claim at death or divorce – accounting calculation to share growth of assets during marriage.

It is imperative that the Will Drafter / Estate Planner / Estate Administrators – must always ascertain applicable marital property regime.

Marital Power was abolished.

3. COURT CASE –

Jane Bwanya v Master of the High Court, Cape Town and Others
The majority judgment penned by Madlanga J stressed that permanent life partnerships are a legitimate family structure and are deserving of respect and given recent developments of the common law, entitled to legal protection. The judgment held that the definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act is unconstitutional and invalid insofar as it omits the words "and includes the surviving partner of a permanent life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate". The judgment ordered that these words be read into the definition. "Spouse" and "marriage" are also declared to include a person in a permanent life partnership. The declaration of invalidity was suspended for 18 months to afford Parliament an opportunity to cure the constitutional defect. Additionally, the majority judgment confirmed the declaration of invalidity of section 1(1) of the Intestate Succession Act made by the High Court. Likewise, this declaration of invalidity was suspended for 18 months for the same reason as above.

4. ADMINISTRATION OF TRUSTS AND DECEASED ESTATES IS OVERSEEN BY

The Master of the High Court, which is a creature of statute. Various Acts regulate the duties and powers of the Master of the High Court.

The Master's Offices execute inter alia the following functions:

- The administration of estates of deceased and insolvent persons. This is in accordance with the applicable statutory prescriptions.
- The protection of the interests of minors (under the age of majority which is currently 18) and legally incapacitated persons.
- The protection and administration of the funds of minors, contractually incapacitated and undetermined and absent heirs, which have been paid into the Guardian's Fund.
- The determination and assessment of estate duties in terms of the Estate Duty Act, 1955 (Act 45 of 1955), by virtue of a delegation by the South African Revenue Services.
- The supervision of trusts in terms of the Trust Property Control Act, 1988.
- The safeguarding of all documentary material received by the Master in respect of estates, insolvencies, liquidations, trusts, etc.
- The processing of enquiries by executors, attorneys, beneficiaries and other interested parties.
- The appointment of impartial and capable persons as executors, trustees, curators and liquidators.

5. TESTATE AND INTESTATE WILLS TESTATE

Where there is a will that has been validly executed in terms of the formalities laid down in the Wills Act, and the said will has been accepted by the master of the High Court as valid (or if not, a Court Order declares it to be valid) then the estate will be administered as a Testate Estate.

6. CERTAIN KEY POINTS ON WILLS.

Revocation – intention is most import animus revocandi (the testator must have the intention to revoke)

- A later will with a Revocation Clause will revoke.
- Destruction of a will, including defacement requires the actual destruction plus intention. Therefore, if a will is destroyed by mistake, it is not revoked.
- If a valid original will cannot be found that was in a Testators possession, revocation can be proven on application.

Revival – it is held that a will may be revived, by a subsequently produced testamentary document, but it is unclear in law, so rather re-execute than revive.

The Wills Act sets out formalities for a Valid Will:

1. It must be signed by Testator/trix in front of two competent independent Witnesses (not related to the testator or benefitting in terms of the will) who also sign.
2. If in a will an Executor/Guardian/Benefit/ is nominated, and such party witnesses the will, it will not invalidate the will, but the party will not be allowed to benefit or be appointed.

An Executor/Guardian can be beneficiary of Estate, if the do not witness the will.

Freedom of Testation allows for no restraints on testation, but there are some limitations on namely Public Policy, Spouse,

- Amendment of A Will.

Will is Valid prima facie – Onus on person challenging the Will to prove on application to court that:

1. Lack of Formalities have been complied with; or
2. Forgery – signature of testator or witnesses is not real.
3. Incompetence or Incapacity of the testator at time of testation
4. Duress or Undue Influence was brought to bear on the testator.

In South Africa we have no Wills registry. The only time the will is recorded and kept is upon death and the same being lodged with the master of the High Court. until death.

Will is not in operation until accepted by the Master of the High Court.

Pactum Successorium - Agreement on disposal of assets on death generally invalid but some Buy- and Sell Agreements sail close to the Wind. To try and negate this, it is suggested that Buy and Sell Agreements be executed in the in same way as a Will.

Capacity to inherit – there are no restrictions on age/race/residence/jurisdiction/domicile/

- Witness Wills (can inherit intestate portion)
- Minor' unless held in Trust in terms of a Will then inheritance to be held by the Guardian's Funduntil Majority.

The only exclusion would be if the heir was an Unworthy heir– "*De bloedige Hand erf Niet*". This is the situation where it is proven that the heir or beneficiary, was the cause of the death of the testator.

7. SIMULTANEOUS DEATH

No presumption of simultaneous death in South Africa. It will be adjudicated on a Question of Fact and medical evidence would be required to prove who died first. Thus, in practice, the will drafter will make provision for death within period of each other (90 days).

Vesting of property in heirs:
Dies Cedit on death, *Dies Venit* at end of administration process. In our law, the benefit vests at death in the hands of the beneficiary, but it may only be that they can exercise that right at a later stage due to a formal transfer process in the administration.

8. INTESTATE

Dying without a Will or a Will that is Invalid – Intestate Succession Act

- Entitlement conferred by Legislation;
- Spouse and Children (Spouse get child's share or R250k whichever is the greater) failing which descendants or ascendants following the bloodline (based on degrees of relationship);
- Spouse entitled to claim from Marital regime – either In CoP or Accrual Claim;
- Adopted Children – deemed for all purposes to be children of Adopted parents and not biological parents. Formal adoption process;
- "Spouse" – Matrimonial – Customary – Civil Union – Religious marriages Hindu and Muslim.

9. ADMINISTRATION

Intestate and Testate Estates Administered in terms of Admin of Deceased Estates Act – follow same process

All deceased Estates reported to the Master of the High Court where the Deceased Resided / Died or Owned Immovable Property

- Master has oversight over administration process and can review the fees charged by Executors which have a statutory limit of 3.5% of the gross Value of the Estate plus VAT (15%) and 6% on Income collected by the Executor during the administration of the Estate (post death and prior to distribution) plus VAT (15%)

- Court will appoint an Executor if Estate >R250,000 or Master's Representative I Estate value < R250,000

- Testate – Executor nominated in terms of Will Intestate – Executor nominated by Family

- Executor formally appointed in terms of Letters of Executorship. Prior to this no person can Act on behalf of the Estate. If the Executor is a lay person such as a family member, the Executor must be assisted by a professional.

- Master can always request security be provide by an Executor.

Estate assets used to settle debts of deceased as a first claim against the Estate. Should assets be insufficient to settle Estate Liabilities then Insolvent Estate unless the heirs elect to contribute sufficient liquidity to make the Estate solvent and protect the assets. Heirs cannot be held personally liable for the deceased's debts.

Renunciation – Heirs always entitled to renounce any inheritance. Set rules apply in the event of a family relationships to deceased. For example, renunciation can devolve on surviving spouse or descendants in certain circumstances.

Steps

1. Reporting of Estate;
2. Application for appointment as Executor;
3. On receipt of Letters of Executorship (formal document) placing of adverts confirming the Estate Number and details in Government Gazette and local Newspaper;

4. Opening of E/L Bank account into which all Estate liquid funds to be paid (no requirement to liquidate no cash assets) and from which Estate debts will be paid;
5. Obtain valuation for all Estate Assets and Liabilities;
6. Draft and submit to Master formal Estate Account (L&D Account) which gives effect to Will or Intestate requirements;
7. Lodge Estate Duty Return and Final Taxes with SARS;
8. Respond to Master's Queries on L&D Account;
9. Once Master satisfied with L&D Account then place final advert notifying creditors, heirs etc that they can access the L&D Account at Master's office and to lodge any objections;
10. Upon Expiry of 21-day period and subject to no claims being lodged v L&D Account – then Distribute Estate as per L&D Account.

A more comprehensive step by step guide is per the below "What has to be done in the Administration of a deceased Estate" document.

10. LIST OF APPLICABLE LEGISLATION ACTS

The Wills Act 7 of 1953

https://www.gov.za/sites/default/files/gcis_document/201505/act-7-1953.pdf

The Intestate Succession Act 81 of 1987

https://www.justice.gov.za/legislation/acts/1987-81.pdf

The Administration of Deceased Estates Act 66 of 1965
https://www.gov.za/sites/default/files/gcis_document/201503/act-12-1984.pdf

The Trust Property Control Act 57 of 1988
https://www.gov.za/sites/default/files/gcis_document/201505/act-57-1988_0.pdf

The Marriage Act 25 of 1961

https://www.gov.za/sites/default/files/gcis_document/201505/act-25-1961.pdf

The Matrimonial property Act 88 of 1984

https://www.gov.za/sites/default/files/gcis_document/201505/act-3-1988_1.pdf

The maintenance of Surviving Spouses Act 27 of 1990

https://www.gov.za/documents/maintenance-surviving-spouses-act-4-mar-2015-1224

The Civil Unions Act 17 of 2006

https://www.gov.za/documents/civil-union-act#:~:text=The%20Civil%20Union%20Act%2017,provide%20for%20matters%20incidental%20theret o.

The Recognition of Customary marriages Act 120 of 1988

https://www.gov.za/documents/recognition-customary-marriages-amendment-act-1-2021-1-jun- 2021-0000

11. GUIDE FOR SIGNATURE OF WILLS AND CODICILS

If your Will or Codicil is not signed in terms of the prescribed Legal formalities it may be invalid.

We therefore urge you to ensure that you comply with the prescribed formalities, as follows:

1. The Will must be signed (a full signature rather than initials):

    1.1. by the Testator or Testatrix (being the person making the Will) or, if a joint Will, by boththe Testator and Testatrix; **and**

    1.2. by 2 (two) **independent** Witnesses (i.e. they **and their spouse** may not be an heir or legatee or other beneficiary nor can they be appointed as Executor or Trustee) **in thepresence** of the Testator/Testatrix and each other; **and**

    1.3. at the bottom of each page; **and**

    1.4. at the end of the Will.

2. A person under the age of 14 (fourteen) years is not competent to act and/or sign as Witness.

3. The place and date of signature must be filled in where indicated at the end of the Will.

4. If the Testator/Testatrix wish to make a simple alteration to the Will, they **and** the Witnessesmust sign in full next to the alteration.

5. Certain additional formalities apply if the Testator/Testatrix is blind, partially sighted or signs by means of a mark such as a cross or fingerprint or if the capacity of the Testator/Testatrix to makethe Will may be an issue. As these additional formalities are complex, we request that you contact our offices and we will assist you directly.

6. All the formalities described above apply equally to the signature of a Codicil.

Should you wish to make sure that the formalities are complied with, you are welcome to sign your Will or Codicil at our offices where our staff are trained in these procedures. While we take great care in assisting our clients in ensuring that they correctly sign their Wills, we cannot accept responsibility foran unsigned Will.

12. WILLS GLOSSARY

accrual	a method for calculating the division of **assets** on death or divorce;
adopted	all legally adopted children are deemed to be a **descendant** of their adoptive parents;
asset	something owned such as property, a vehicle or money in the bank;
assumption	the power granted to an **Executor** or **Trustee** to nominate another person to be appointed to assist them as Co-Executor or Co-Trustee;
beneficiary	a person who benefits in terms of a **Will** or from a **trust**;
bequeath	to give something in a **Will**;
bequest	something given in a **Will**;
bequest price	something to be given or paid by a **legatee** in return for receiving a **bequest**; **codicil** an alteration to an existing **Will** which must be signed in the same manner as a **Will** is signed;
collation	the legal obligation of an **heir** to bring into an **estate** any benefits received from a **Testator/Testatrix** during their lifetime;
Community of Property	a marital property system in terms of which spouses share equally their assets and liabilities;
descendants	a person's children, grandchildren and all others descending from that person;
discretionary trust	a **trust** in which the **Trustees** decide who from a specified list of **beneficiaries** will benefit from the **trust** and what they will receive;
estate	all a person's **assets** and liabilities;
Executor / Executrix	a person appointed to administer and wind-up an **estate** on death;
Guardian	**a** person who looks after the interests of people, such as children, who cannot look after their own affairs
habitatio	a right to inhabit the **immovable property** of another while generally remaining liable for the costs of habitation;

heir / heiress	a person appointed in a Will to receive the whole or a portion of an **estate**;
immovable property	land and the fixed structures built on it;
inter vivos trust	a **trust** created by its founder during his/her lifetime;
issue	a person's children, grandchildren and all other lineal **descendants**;
legacy	something left to a person in a **Will** as a preferential **bequest**;
legatee	a person receiving a **legacy**;
Master of the High Court	the Court's representative who oversees the administration of deceased estates, trusts, insolvent estates and the care of Minors;
Minor	a person under the age of 18 who has not achieved majority through marriage or acourt order;
power of assumption	the power granted to an **Executor** or **Trustee** to nominate other persons to beappointed as co-Executor or co-Trustee to assist them;
representation per stirpes	where a nominated **heir** dies before the **Testator/Testatrix** and the deceased **heir**'s**issue** inherit the deceased **heir**'s inheritance in equal shares;
residue	all that is left of an **estate** after all debts, taxes, **legacies** and **bequests** have beenpaid;
revoke	to cancel or withdraw;
s47 of Act 66 of 1965	requires an **Executor** to sell property of an **estate** in the manner and subject to theconditions required by the **heirs** who have an interest in that property;
security	property or an undertaking provided to guarantee that amounts or property heldon behalf of another will be paid to them;
testament	see **Will**;
testamentary trust	a trust created in terms of a **Will;**
Testator / Testatrix	a male / female person who makes a **Will**;
Trust	an agreement in terms of which property is held for one or more **beneficiaries** by a **Trustee** or **Trustees**;
Trustee	a person who holds property and looks after it on behalf of someone else;
usufruct	a right to enjoy the "fruits" of another's **asset**;
Will	a legal document in terms of which a person's wishes for the distribution of their **estate** on their death are recorded.

DISCLAIMER: This Wills Glossary is provided for information purposes only and does not constitute legaladvice. We would prefer you to contact us directly with any questions you may have in this regard.

13. WHAT HAS TO BE DONE IN THE ADMINISTRATION OF A DECEASED ESTATE?

13.1 The process step by step

Every step in the Estate administration process must comply with the formalities and legal requirements. In order that you may appreciate and understand the steps and processes, we have set them out in an abbreviated form hereunder.

(NOTE: If an estate has an asset value of **R250,000.00** or below, the steps are much shorter, the requirements much less and the Estate is administered under Section 18(3) of the Administration of EstatesAct.)

(a) The first step is to report the Estate to the Master of the High Court under whose jurisdiction thedeceased was residing or in whose jurisdiction the death occurred.

(b) The appointment of an Executor by the Master of the High Court is made once certain "reporting"documents have been lodged, and the Will (in the case where there is a valid Will) has been accepted.

(c) The family and/or nominated Executor must lodge the following documents with the Master of the High Court:

Court Documents

- A Death notice
- A Provisional Inventory of the deceased's assets
- An Acceptance of Executorship **in duplicate**
- Confirmation the estate has not been reported in another jurisdiction
- Confirmation of deceased's marital status as date of death
- If no Will, then an Affidavit of next of Kin and nomination of Executor by intestate heirs

Family Documents

- The original Will, if any. If there is a handwritten Will, further particulars are required as to who wrotethe Will and full details of witnesses
- A certified copy of the Death Certificate
- Certified copies of identity documents of the Executor and the deceased as well as any

marriage certificates and antenuptial contracts if the deceased was married (Note: an appointed Executor needsto provide updated FICA documents every 3 months)

(d) The Master will issue the Letters of Executorship, formally appointing the Executor in terms of theWill by way of Letters of Executorship.

(e) In practice we find that the issuing of the Letters of Executorship can take between 4 – 6 weeks depending on the nature of the Estate and the *workload* being experienced by the Master's Officeat the time.

(f) The Letters of Executorship empowers the Executor to take control of the assets in the Estate andadminister them.

(g) The next steps are as follows:

i. A formal notice must be placed in the Government Gazette and in a local newspaper,requesting creditors of the Estate to submit their claims and debtors to inform the Executor of the claims in favour of the Estate. The advertisement period must run for a period of 30 days. The current costs to place the relevant notices are R37.82 forthe Government Gazette and approx. R926.28 (Cape Times) for the newspaper advert.

ii. The Executor must open an estate late bank account in the name of the deceased into which all funds received must be receipted, and from which account all payments must be made.

iii. Valuations of all the assets and certificates of balance for all investments must be obtained by the Executor and all cash must be received and deposited into the Estate Late bank account. Full details of assurance/insurance policies and other investments, as well as proof from creditors are collated.

iv. The Executor must as soon as possible establish the solvency and liquidity of the estate and then begins the process of liquidation and distribution in terms of the provisions of the Will (or in terms of the law of intestate succession if there is no validWill).

v. A full account of assets, liabilities, credits, debits and disbursements to heirs and legatees must be drafted and is called the Liquidation and Distribution Account. ThisAccount must be submitted to the Master of the High Court within six months of theMaster issuing the Letters of Executorship.

vi. Once the Liquidation and Distribution Account has been accepted and approved by the Master, the Executor must then advertise it for public inspection by way of another formal notice in the Government Gazette and in a local newspaper for a period of 21 days. A copy of the Liquidation and Distribution Account must also be delivered to the local

Magistrate's Office, where applicable. The current costs to place this further notice are R37.82 for the Government Gazette and R774.70 (CapeTimes) for the newspaper advert.

vii. If no written objections to the Account are lodged with the Executor within this period, the Master will authorise the Executor to continue with the distribution of the Estate within 60 days.

viii. The Executor can then attend to all assets being formally transferred to the heirs, legatees and beneficiaries. This step can only take place if no written objections arereceived within the 21 day period and the Master has authorised distribution.

ix. It may be that at this step the Estate can only be provisionally distributed as, where applicable, amounts need to be reserved to provide for the following as yet finalisedclaims:

a. South Africa Revenue Service amounts for final Income Tax, Estate Duty andCapital Gains Tax Assessment, which may delay the process
b. Interest on interest-bearing claims
c. Property rates and taxes
d. Other unforeseen expenditure.

Proof of payment of all claims and inheritances must be submitted to the Master of the High Court and the Executor will sign a final affidavit confirming that the Estate has beendistributed and that all heirs and legatees have been paid in the Estate. The Estate bankaccount is then closed and the final closing statement together with all other statementsmust be lodged with the Master.

13.2 Useful Hints

To assist with the process and speed it up as much as possible, where practical try to ensure or assist with the following matters:

* Any accounts that attract interest such as mortgages, loans, retail accounts must not be stopped unless the full balance due can be settled as interest does not cease at death.

* Insurance must be confirmed as being in place and retained for immovable and movable property, such as fixed property, vehicles, valuables and firearms.

* Firearms must be in safe custody at all times and where possible handed in to the

South African Police Service for destruction.

* Vehicles may under no circumstances be used without any valid insurance cover being in place, and the interests of the deceased estate must be noted against the policy

* Continue to pay municipal rates, water and telephone accounts to prevent them from being disconnected.

* Make sure that all income tax returns are completed and submitted.

13.3 What can cause delays?

A. Incomplete documentation provided to the Executor by the family at the reportingstep;

B. If the deceased passed away in the circumstance of unnatural death the post-mortem and police investigation may delay the initial steps;

C. Property may need to be sold and the sale of other assets may require marketing;

D. Business interests, foreign assets may require complex unforeseen administrativeformalities.