



## THE POWER OF INDEPENDENT ADVICE

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# WHY A WILL & TESTAMENT MATTERS

*By Rozanne Heystek-Potgieter - Wills And Estate Planning*

## FIVE KEY QUESTIONS

**Death and how your estate will devolve as well as its implications for the loved ones you leave behind is more often than not a much avoided topic, due to its presumed fate-tempting nature.**

It is imperative to discuss the consequences of not having a valid will and a matching concise estate planning strategy. Many successful and educated individuals do not have a will - one could only assume it is because they do not understand the repercussions of not having one.

### 1 - WHO NEEDS A WILL?

**We are afforded the freedom and right of testation, the ability to decide exactly, within limits, how our assets shall devolve on our passing.**

If one does not have a will, or if a will is declared partially or completely invalid, then the division of ones deceased estate is governed by the Intestate Succession Act 81 of 1987, as amended.

The division of an intestate deceased estate will depend on whether the deceased left behind a spouse (or spouses) as well as any dependents and/or ascendants.

If you do not have a will, any inheritance due to a minor must be deposited in to the Guardian's Fund, a government run fund that safeguards the inheritance of a minor until they have reached the age of majority (18).

JHB: +27 (0)11 799 8100  
 PTA: +27 (0)12 347 8240  
 CPT: +27 (0)21 418 1236  
 BELLVILLE: +27 (0)21 914 9646

**Having a will ensures that you decide how your estate is divided and above all you nominate an executor, the person who will be responsible for the winding up of your estate.**

Not having a will means the law will prescribe who will inherit your assets, how a minor's inheritance will be dealt with and who will act as an executor. In short, if you have assets, you should have a will.

## 2 - IS YOUR CURRENT WILL VALID?

Some people decide to draft their own wills and feel at ease that their affairs are in order. More often than not, this couldn't be further from the truth.

The Wills Act 7 of 1953 prescribes certain formalities that have to be met for a will to be considered valid. These formalities relate to the capacity to act of the drafter, who can witness the attestation of a will and the discretionary powers of the Master of the High Court in declaring certain wills valid or invalid.

**In summary, a valid will must be in writing, a testator must be over the age of 16 and be capable of appreciating the nature of the effect of the act, the testator and witnesses must sign the will in the presence of each other and the testator, and the witnesses must be over the age of 14 and not receive any benefit in the will.**

If you have drafted your own will, it would be best to have a professional review it to ensure specific and necessary clauses have been included, such as: the revocation of all previous wills, the exclusion of collation, naming of a residuary heir and exempting the executor from providing security, to name a few.

## 3 - ARE ALL THE CLAUSES IN YOUR CURRENT WILL ENFORCEABLE?

To add on to the validity of a will, certain clauses in a will might be deemed against public policy or plainly not enforceable. Even though we are granted the freedom of testation, a testator's right to dispose of their estate as they see fit is not absolute.

Any racially exclusionary provisions in your will or testamentary trust provisions, or leaving your entire estate to your loyal golden retriever must be avoided and it is best to not "rule from the grave".

**The best way to test whether a provision will be enforceable, note that - if you cannot do it while you are alive, you are most likely not able to make it a provision in your will.**

Vengeful or punitive conditions have no place in a will, and could be declared invalid by the courts. Take into consideration that an heir who challenges a condition in a will might delay the entire estate administration, and it could lead to a cost order against the estate.

## 4 - WHAT HAPPENS TO AN INHERITANCE DUE TO A MINOR?

Although Trusts no longer serve as the favorite tax evading vehicles of years gone by, it is still the only way to protect a minor's inheritance and avoid it from having to be deposited into the Guardian's Fund.

**It would be best to include a testamentary trust that will only be created once certain conditions are met in the will. This trust will safeguard a minor's inheritance, ensure that funds are utilized as directed by the testator as well as allow for growth.**

## 5 - HAVE YOU NEGOTIATED YOUR NOMINATED EXECUTORS' FEE?

The current tariff determined by the Master of the High Court is 3,5% exclusive of VAT. If the executor is registered for VAT then they are entitled to claim it over and above their fee.

It is vital and within your rights as a testator to negotiate a better rate for your estate, for the benefit of your heirs.

**Consider that even if one can negotiate the fee to be lowered by 1% (VAT excluded), on an estate with a gross value of R3.5m that could be a considerable saving of R35 000 on executor's fees.**

**It is important to have your will reviewed or re-drafted after major life events: marriage, divorce, a death of a named heir or legatee, the birth of children or grandchildren who will inherit, or when major assets have been alienated.**

**You might have what you consider to be a valid will, but if it was drafted and is stored by a bank it might need to be reviewed to ensure that it doesn't lack any of the following, if applicable: important trust provisions to safeguard inheritance of minors, considering ministerial consent for the subdivision of agricultural land bequeathed to multiple heirs, or the correct inclusion of usufructuary or fideicommissary rights.**

If the legal jargon is overwhelming, consider that the process of estate planning, will drafting and actual estate administration is complex, and requires experience and knowledge about applicable tax law, property law, banking processes and how to act in a fiduciary capacity.

## SMART TIP 1



# NO ENDURING POWER OF ATTORNEY IN SA

A power of attorney is utilized to appoint a third party to act and transact on someone else's behalf, it is most commonly used for the handling of their financial affairs.

**A power of attorney terminates the moment the mental capacity of the principal, the person who appointed an agent to act on their behalf, diminishes below the legal threshold.**

Many caregivers and family members who have been appointed as agents are under the impression that the power of attorney is granted up until the death of the person who required their assistance.

**The concept of an enduring power of attorney is not recognized in South African law.** An application for administratorship or curatorship must be made to the High Court, depending on the circumstances. This process can be complex, we strongly recommend you seek legal advice for further information.

## SMART TIP 2



# DEATH OF THE OWNER OF A FIREARM

The Firearms Control Act 60 of 2000 along with the Firearms Control Regulations, 2004 jointly state that an heir and/or next of kin is allowed to take possession of a deceased's firearm and ammunition, in an approved

storage facility and apply for a temporary permit to do so up until when the estate is reported and an executor is appointed.

Once an executor has been appointed and they do not have the required storage facility, then only an heir can store the firearm if they have a license and competency certificate already as well as storage facilities.

An executor cannot finalize the administration of the estate before all firearms have been transferred to the heirs.

**Make sure you bequeath firearms to persons who actually want it, and will be able to acquire a license for it. Contravening the Act and Regulations can lead to an executor or anyone storing the firearm without permission being fined and/or imprisoned.**

## SMART TIP 3



# HOW TO REDUCE ESTATE DUTY

How to avoid paying tax on your hard earned assets is a question asked by most clients during the estate planning process.

**Section 4A of The Estate Duty Act 45 of 1955 allows for a R3.5m abatement, meaning an estate greater than that is dutiable at 20%.**

**The only legitimate way to reduce estate duty before applying the abatement is to either bequeath your entire estate to your surviving spouse (section 4(q)) or if that's not applicable, to a tax exempt public benefit organization (section 4(h)). Any amount bequeathed in terms of section 4 (q) or (h) is Estate Duty exempt.**

Ensure the charity is, in fact, tax exempt before including any organization in your will, as SARS will request a copy of the tax exemption certificate from the executor before allowing the deduction in the Estate Duty Return.

# THE BRENTHURST WILLS AND ESTATES EXPERTS

## ROZANNE HEYSTEK POTGIETER (BA LLB)

### ESTATE PLANNING & DECEASED ESTATE ADMINISTRATION



ROZANNE is head of the Estate Planning division; her duties include the drafting of client wills as well as the administration of deceased Estates.

She completed a LLB degree at the end of 2012 to add to her BA in International Studies and Psychology.

She has completed her contract of articles with a law firm and has passed the attorney's admissions examinations and is pursuing being admitted as an attorney.

**JOHANNESBURG and PRETORIA OFFICES**

**Tel:** +27 (0) 11 799 8100  
**Email:** rozanne@brenthurstwealth.co.za

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## MALISSA ANTHONY (BCOM LLB)

### LEGAL AND COMPLIANCE



MALISSA joined the Brenthurst team at the beginning of July 2014. She has a BCom Law degree from the University of Johannesburg as well as a post-graduate LLB degree from UNISA and will soon be admitted as an attorney in the High Court of Cape Town.

Malissa is currently heading the Legal and Compliance department, where she is responsible for all legal and compliance matters, as well as the drafting of clients wills.

She is also the executive personal assistant to Cape Town's senior financial planner and managing director of Brenthurst Wealth Management, Brian Butchart. Malissa is currently studying for the Postgraduate Diploma in Financial Planning.

**CAPE TOWN and BELLVILLE OFFICES**

**Tel:** +27 (0) 21 418 1236  
**Email:** malissa@brenthurstwealth.co.za

## ESTATE PLANNING LEXICON

<b>INTESTATE</b>	:	Passing away without having a will.
<b>BEQUEST</b>	:	A legacy or inheritance, something left to someone in a will.
<b>LEGACY</b>	:	A bequest consisting of a determinable amount of money or specified immovable or movable property (i.e. cash, a house, a car).
<b>LEGATEE</b>	:	A person who receives a legacy.
<b>HEIR</b>	:	A person who receives an inheritance.
<b>INHERITANCE</b>	:	A bequest consisting of the whole, a percentage or the residue of the estate.
<b>USUFRUCT</b>	:	A limited real right to the use and enjoyment of the fruits of an asset that belongs to someone else.

# BRENTHURST WEALTH CERTIFIED FINANCIAL PLANNERS:

Brenthurst Wealth Management (PTY) Ltd is a registered financial services provider and is a fully-fledged financial and investment services company with offices in Johannesburg, Pretoria and Cape Town.

All our Financial Planners are CFP® Professionals and members of the Financial Planning Institute of Southern Africa. They are highly qualified to give advice on all investment matters.

## MAGNUS HEYSTEK

EMAIL: [magnus@heystek.co.za](mailto:magnus@heystek.co.za)

TEL: +27 (0)83 692 8635

MAGNUS is a director of Brenthurst Wealth and is in charge of investment strategies, research and client communication.

## BRIAN BUTCHART CFP®

EMAIL: [brian@brenthurstwealth.co.za](mailto:brian@brenthurstwealth.co.za)

TEL: +27 (0)82 335 5117

BRIAN BUTCHART is managing director of Brenthurst Wealth and head of financial planning at the CAPE TOWN OFFICE. Brian is also responsible for compliance and operations throughout the three offices in JHB, PTA and CPT.

## JOHAN BURGER CFP®

EMAIL: [johan@brenthurstwealth.co.za](mailto:johan@brenthurstwealth.co.za)

TEL: +27 (0)82 732 8655

JOHAN BURGER is a director of Brenthurst Wealth and head of financial planning at the PRETORIA OFFICE.

## RICHUS NEL CFP® ACCA

EMAIL: [richus@brenthurstwealth.co.za](mailto:richus@brenthurstwealth.co.za)

TEL: +27 (0)78 260 4013

RICHUS NEL is the head of financial planning at the TYGERVALLEY WATERFRONT OFFICE in BELVILLE. Richus is a fully registered member of ACCA (Association of Chartered Certified Accountants).

## RENEE EAGAR CFP®

EMAIL: [renee@brenthurstwealth.co.za](mailto:renee@brenthurstwealth.co.za)

TEL: +27 (0)83 233 9373

## SONIA DU PLESSIS CFP®

EMAIL: [sonia@brenthurstwealth.co.za](mailto:sonia@brenthurstwealth.co.za)

TEL: +27 (0)83 260 4055

## MAGNUS L HEYSTEK CFP®

EMAIL: [magnus1@brenthurstwealth.co.za](mailto:magnus1@brenthurstwealth.co.za)

TEL: +27 (0)72 071 5567

## SUZEAN HAUMANN RFP™

EMAIL: [suzean@brenthurstwealth.co.za](mailto:suzean@brenthurstwealth.co.za)

TEL: +27 (0)21 914 9646

## CLIENT SERVICES & EXECUTIVE ASSISTANTS:

JHB: +27 (0)11 799 8100

### CHRISTOFF POTGIETER

[christoff@brenthurstwealth.co.za](mailto:christoff@brenthurstwealth.co.za)

### CELESTE PHAKHATI

[celeste@brenthurstwealth.co.za](mailto:celeste@brenthurstwealth.co.za)

### ERNA MARÉ

[erna@brenthurstwealth.co.za](mailto:erna@brenthurstwealth.co.za)

### DANINE VAN SCHALKWYK

[danine@brenthurstwealth.co.za](mailto:danine@brenthurstwealth.co.za)

### NICCI VAN HEERDEN

[nicci@brenthurstwealth.co.za](mailto:nicci@brenthurstwealth.co.za)

PTA: +27 (0)12 347 8240

### MARISE NEL

[marise@brenthurstwealth.co.za](mailto:marise@brenthurstwealth.co.za)

### ESMERIE LOOTS

[esmerie@brenthurstwealth.co.za](mailto:esmerie@brenthurstwealth.co.za)

### YOLANDI BURGER

[yolandi@brenthurstwealth.co.za](mailto:yolandi@brenthurstwealth.co.za)

### MAGDA KAMFER

[magda@brenthurstwealth.co.za](mailto:magda@brenthurstwealth.co.za)

### PHONET NCUBE

[phonet@brenthurstwealth.co.za](mailto:phonet@brenthurstwealth.co.za)

CPT: DE WATERKANT

+27 (0)21 418 1236

BELLVILLE: TYGERVALLEY

+27 (0)21 914 9646

### RONELLE STIPP

[ronelle@brenthurstwealth.co.za](mailto:ronelle@brenthurstwealth.co.za)

### DIRECTOR AND HEAD OF MARKETING: SUE HEYSTEK

[sue@brenthurstwealth.co.za](mailto:sue@brenthurstwealth.co.za)

### CLIENT COMMUNICATION: MICHELLE BURGER

[michelle@brenthurstwealth.co.za](mailto:michelle@brenthurstwealth.co.za)

### MEDIA LIAISON EXECUTIVE: DALEEN VAN WYK

[pr@brenthurstwealth.co.za](mailto:pr@brenthurstwealth.co.za)

### TAX AND ACCOUNTS: GAVIN BUTCHART

[gavinb@brenthurstwealth.co.za](mailto:gavinb@brenthurstwealth.co.za)

### WILLS AND ESTATES: ROZANNE HEYSTEK-POTGIETER

[rozanne@brenthurstwealth.co.za](mailto:rozanne@brenthurstwealth.co.za)

### LEGAL AND COMPLIANCE: MALISSA ANTHONY

[malissa@brenthurstwealth.co.za](mailto:malissa@brenthurstwealth.co.za)

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## JOHANNESBURG

Tel: +27 (0) 11 799 8100  
Fax: +27 (0) 11 799 8101

Unit 2B, Cedar Office Estate,  
Cedar Road, Fourways, SA

PO Box 10150, Fourways East,  
2055, Gauteng, SA

## PRETORIA

Tel: +27 (0) 12 347 8240  
Fax: +27 (0) 12 347 0601

494A Lois Avenue, Erasmuskloof  
X3, Pretoria, SA

PO Box 32593, Waverley,  
Pretoria, 0135, SA

## CAPE TOWN (DE WATERKANT)

Tel: +27 (0) 21 418 1236  
Fax: +27 (0) 21 418 1304

29 Chiappini Street, De Waterkant,  
Cape Town, 8001, SA

Postnet Suite 275, Box X22,  
Tygervalley, 7536, Cape Town, SA

## BELLVILLE (TYGERVALLEY)

Tel: +27 (0) 21 914 9646  
Fax: +27 (0) 21 914 6515

Tyger Waterfront, Block 2, Waterfront  
Road, Carl Cronje Drive, Bellville, SA

Postnet Suite 275 P/Bag X22,  
Tygervalley, 7536, Cape Town, SA



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