INVESTMENT REPORT

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A VALID WILL IS THE MOST IMPORTANT DOCUMENT YOU WILL EVER SIGN

By Malissa Anthony, FPSA® (B COM, LLB) |General Manager of Brenthurst

There is no secret that the most neglected and least thought of legal document is a will. This is evident considering statistics show that 70% of the South African working population do not have a valid will in place.

Simply, if you have something to leave behind and someone who can receive it, a valid will is needed, enabling you to secure your financial legacy without leaving it to the laws of Intestate Succession to determine who will inherit your assets.

South Africans are afforded the right to freedom of testation, which means that we have the ability to decide, within limits, exactly where and to whom our assets are to be allocated to upon our demise.

Two things in life are certain – **DEATH and TAXES**. It is disconcerting how we neglect to plan for inevitable occurrences, particularly where consequences can be detrimental to our dependants' financial future.

By having a will in place, you are able to plan your estate according to your own wishes and needs and ensure that the process of distribution of your assets to the beneficiaries is a quick and painless one.

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.

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WHAT CONSTITUTES A VALID WILL?

There are several legal formalities prescribed in the Wills Act 7 of 1953 which needs to be met in order for a will to be rendered valid. In summary, a valid will must:

1. **Be in writing;**
2. **The testator must be over the age of 16 and be capable of appreciating the nature of the effect of the act;**
3. **The Testator and witnesses must sign the will in the presence of each other and the Testator must sign on every page; and**
4. **The witnesses must be over the age of 14 and not receive any benefit in the will;**

WHAT FACTORS SHOULD BE TAKEN INTO CONSIDERATION WHEN DRAFTING A WILL?

1. **Adhere to the strict legal requirements when drafting a will**.
Failing to do so could have a negative impact as to the validity of your will.

2. **Who will take care of your minor child; (younger than 18 years)?**
If your minor child does not have a natural guardian, it is important to nominate someone to act as a guardian to your minor child/children. If you have no will in place, it is quite possible that your child may end up with a guardian not of your choosing.

3. **What happens when a minor inherits?**
One needs to be careful when leaving assets to children under the age of 18, as they will require a guardian to sign any documents on their behalf and, most important, are not able to receive their benefit until such time as they reach the age of majority. In this instance one should consider a testamentary trust (if you do not already have an inter vivos trust in place) to be created to administer assets in your child's best interests and to avoid all assets being liquidated. This will also avoid their inheritances being placed in the Guardians Fund, which is administered by each Master of the High Court, and which is only released to them on reaching the age of 18 years. The trust will give you greater control as to how your minor heirs will benefit from their inheritance. When creating a testamentary trust, you need to ensure that all provisions relating to the appointment of the trustees and their powers are clearly defined, as your will ultimately becomes the trust deed.

4. **Have you done effective estate planning?**
If done right it could reduce estate duty and also ensure that there is sufficient liquidity in your estate to cover the costs of winding up the estate and for distribution of specific bequests. Always ensure that you are able to provide for your loved ones in respect of immediate expenses that they would need to settle, e.g. funeral and household expenses and medical bills.

5. **Changes to your personal circumstances will require you to review your will - marriage, divorce, birth of a child or death of a loved one.**
The effect of a divorce can be detrimental in the event that you failed to review your will and you do not wish for your ex-spouse to inherit. In terms of Section 2B of the Wills Act, in the event of a divorce and where you die within three months of the divorce, it will be given effect that your former spouse had died prior to the dissolution of the marriage. However, if you pass away more than 3 months after the dissolution of the marriage and you have not amended your will, your former spouse, if still mentioned in the will, is considered to be the intended beneficiary of your estate.

6. **Know where your will is located.**
Tell someone you trust where your will is stored or who they should notify in the case of your demise.

7. **The possibility of negotiating a reduced executor's fee.**
Many institutions that offer will drafting services will charge the Master's prescribed maximum executor's fee, being (3,5% excluding VAT). Additionally, where there are assets in a deceased estate that generates income after your death, an executor is entitled to a prescribed maximum executors remuneration of 6% (excluding VAT) earned on those assets, until such time as your estate is wound up.

ARE SEPARATE WILLS NECESSARY IF I HAVE OFFSHORE ASSETS?

There are various factors to take into consideration when dealing with offshore assets and determining whether a separate will, dealing with those offshore assets, is in fact necessary or whether one can deal with those offshore assets (your worldwide assets) in one worldwide will.

Consideration needs to be taken with regards to the type of offshore asset involved and the succession laws of that jurisdiction, and therefore consultations in this regard should be had with a fiduciary professional, as it is quite possible that two separate wills may not be necessary.

One must, however, not be mistaken and believe that by having a separate will you can evade with the requirement to report these assets for estate duty purposes in the country in which you are a tax resident.

In South African, tax residents' worldwide assets are liable for income tax earned on worldwide income, estate duty as well as capital gains tax. Therefore, as per SARS, estate duty is charged on the dutiable amount in respect to the worldwide estate for every person who dies on or after 1 April 1995.

It is, however, important to mention that South Africans may be exposed to double taxation laws in the country of residency and South Africa. South Africa has entered into an estate duty agreement with the following countries only: US, UK, Zimbabwe, Botswana, Lesotho and Swaziland.

WHAT HAPPENS IF YOU DIE WITHOUT LEAVING A VALID WILL?

As mentioned earlier, a person that dies without leaving a valid will, or where a will has been declared partially or completely invalid, the deceased estate will be administered and distributed in terms of the laws of the Intestate Succession Act 81 of 1987, as amended. Whilst the provisions of this Act are generally fair, ensuring that your assets are transferred to your spouse and children, a number of problems may arise, namely:

1. **Your assets may not be left to the person of your choice.**
2. **It may take some time for an executor to be appointed and in addition may not be someone you would have chosen for yourself. This person will be responsible for the winding up of your estate.**
3. **Extra and unnecessary costs are involved.**
4. **Any inheritance due to a minor will be liquidated and deposited into the Guardian Fund.**
5. **Conflicts may arise between your family members as no clear instructions have been made regarding the division of your estate.**

WHY SHOULD A QUALIFIED PROFESSIONAL ASSIST YOU IN DRAFTING YOUR WILL?

A qualified professional will have the required experience and knowledge in this field in order to ensure that your will adheres to the strict requirements with respect to drafting a valid will, and keep up to date with estate planning information, changes to tax rules and trends on a global scale that may be relevant to your estate.

Qualified professionals are also able to identify issues that may arise and advise you accordingly to avoid such issues or mitigate them as far as possible, whilst also ensuring that the will complies with your express wishes and that the assets of your estate are allocated as you have intended.

By nominating a qualified professional, you are also able to negotiate a reduction in executor's fees, as opposed to imposing the maximum executor's fee which is prescribed by the Master of the High Court, being a fee of 3,5% (excluding VAT).

It is important to note that the winding up of a deceased estate is no easy task, no matter how simple or complex the estate may be. A great deal of time is dedicated by the executor to effectively wind up the estate as quickly and smoothly as possible and therefore their fees are well justified. A simple estate can take roughly 16 months to two years to finalise.

Brenthurst Wealth has a team of highly qualified financial advisors to provide guidance as well as fiduciary specialists to manage the drafting of a will and assist with comprehensive estate planning and deceased estate administration. Read more about estate planning.

MALISSA ANTHONY FPSA® (B COM, LLB)

GENERAL MANAGER I WILLS AND ESTATES, LEGAL ADVISOR AND COMPLIANCE

Malissa is the General Manager of Brenthurst Wealth, is the head of our Fiduciary Services Department in the Western Cape and acts as Brenthurst's internal legal advisor and compliance officer.

MALISSA joined the Brenthurst Team in July 2014. She is responsible for general oversight and management functions for Brenthurst, will consultation and drafting, estate planning, deceased estate administration, and all matters of a legal, compliance and human resource nature.

She is a qualified Attorney, admitted as such in the High Court of South Africa (Western Cape High Court), having obtained a B.Com Law degree from the University of Johannesburg, an LLB degree from the University of South Africa (UNISA), and a further certificate in Estate Planning from Milpark.

Malissa also successfully passed her FISA examination in 2017 which awarded and assigned her with the professional designation - Fiduciary Practitioner of South Africa® and has also since 2018 been an accredited member of the Fiduciary Institute of South Africa (FISA).

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