

**DYING
AND
SUCCESSION**








**PARALEGAL SHORT COURSE-
NOVEMBER 2012**

Rhodes University Law Clinic

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COURSE OUTCOMES:







By the end of this course you should be able to:

-  Plan for their death and ensuring that their estate will be administered according to their wishes
-  Prepare for the needs and maintenance of your dependants after your death
-  Advise clients and members of the community on the importance of having a valid Will, particularly:
 - The advantages of having a Will
 - The requirements for a Valid Will
 - Appointing heirs and beneficiaries
 - Providing for the maintenance of dependants
 - Being able to Draft your own Will
-  Know what to do in the event of a death such as knowing the difference between testate and intestate succession, what procedural steps need to be taken and which institutions to approach after someone has died
-  Being able to Identify the role and duties of the appointed representative/Executor of a deceased estate
-  Be able to understand and explain the relevant aspects of Customary Law and Succession and how these principles affect traditional beliefs and cultures
-  Know which laws and legislation to consult when faced with a problem relating to succession

CHAPTER 1

INTRODUCTION

At some point in each and every one of our lives, we will be faced with the death of a friend, family member, parent, colleague or child, and in the end, death is a reality which faces us all. It is therefore important that when we die, we have answered the following questions:

-  Who will control your estate when you die?
-  Who will look after your minor dependants upon your death?
-  Who will control any monies for the maintenance of your dependants?
-  Where and how will you be buried?
-  Who will inherit your belongings?
-  Who will pay for your funeral?

The aim of this manual is to assist you in answering the above questions and being able to understand the importance of planning for death as well as what issues need to be considered and addressed after the passing of someone. We will focus on areas such as estate planning, preparing a valid will, as well as what to do after someone as died as well as distinguish between intestate succession and testate succession.

Although many people avoid thinking of their own death and particularly of those of the people they love and care for, it is important that we ensure that the final distribution of our assets and belongings as well as the care and maintenance of our dependants, is done in a fair respectable manner, and the only time we can make these arrangements is when we are alive, and of clear and sober mind. If you do not plan ahead your family may be left with your debt and may have to make very difficult decisions on your behalf.

This manual will also address controversial issues surrounding death such as the impact of current legislation on the customary traditions practised by many African cultures in South Africa.

In dealing with the concept of succession, various Legislation may be consulted, namely:

- **Births and Deaths Registration Act 51 of 1992**
- **Administration of Deceased Estates Act 24 of 1913**
- **Wills Act 7 of 1953**
- **Intestate Succession Act 81 of 1987**

- **Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009**

CHAPTER 2

IMPORTANT DEFINITIONS:

1. **Administration:** Organising and managing something.
2. **Assets:** anything of value that belongs to you.
3. **Autopsy:** an examination of a body after death to determine the cause of death or the character and extent of changes produced by disease.
4. **Beneficiary:** A person who qualifies to benefit from a deceased's person estate, either as an heir or legatee.
5. **Bequest:** The gift of personal property under the terms of a will.
6. **Codicil:** This is an addition made to supplement or amend an existing will. A codicil must comply with the same requirements as a will in order to be valid. A codicil need not be signed by the same witnesses who signed the original will.
7. **Cremation:** To burn a dead person's body, usually as part of a funeral ceremony.
8. **Custody:** Taking care of a minor child and providing for their everyday needs
9. **Customary Succession:** Dying in terms of traditional African Law.
10. **Death:** Death occurs when life stops. The moment of death is an important aspect in the law of succession and has been defined as the moment when breathing and heartbeat are no longer present
11. **Death Certificate:** A document issued by the Department of Home Affairs showing the particulars of a dead person.
12. **Death Notice:** A Government Notice identifying the cause of death of the deceased.
13. **Debt:** Money which you owe to someone- also referred to as liabilities.

14. **Estate:** The deceased's estate consists of all the assets (belongings) and liabilities (debts) as at the time of death. This also includes any contractual obligations capable in law of being transferred into the deceased's estate
15. **Executor:** The Executor is the person who administers your Estate. He will report the Estate to the legal authorities, collect all monies and pay all the debts of the Estate. You can appoint an Executor in your Will and he will distribute your estate according to your wishes in your Will.. The Executor can be your husband or wife, family member or friend. If they are not professional people, they can be assisted by an attorney.
16. **Funeral:** A ceremony or group of ceremonies held in connection with the burial or cremation of a dead person.
17. **Guardian:** the person who will make decisions and act on behalf of your minor children (children under the age of 18 years).
18. **Guardian's Fund:** State fund where a minor child's inheritance is invested until the child attains 21 years of age.
19. **Heirs:** Heirs are the people to whom you want to leave your assets. You can choose whoever you want - your immediate family, grandchildren, nephews or nieces or adopted children and loved ones. If such person inherits in terms of a will, they are known as a testamentary heir. If there is no valid will or the will does not appoint a valid heir, the heirs nominated as per the laws of intestate succession, are known as heirs *ab intestate*.
20. **Inheritance:** The residue of the estate that goes to the heirs.
21. **Intestate:** When you die without a will and your property is distributed according to the laws of intestate succession.
22. **Legacy:** A specific item such as Money or property bequeathed to another in a will.
23. **Legatee:** A legatee is a person to whom the testator has bequeathed a specific thing or a collection of things or money. If there is no Will, there can be no legatee.
24. **Letters of Authority:** Document issued by the Master of the High Court which entitles the nominated representative to administer the estate without following the full procedure set out in the Administration of Estates Act.

- 25. Liabilities:** Money that you owe to others.
- 26. Master of the High Court:** Government official whose duty is to oversee the proper administration of deceased estate.
- 27. Marital Regime:** The type of marriage contract that you have entered into. The laws relating to that type of regime will govern your marriage.
- 28. Milestone:** An important event in a person's life; a significant turning point.
- 29. Next of Kin:** A term used to describe blood relatives.
- 30. Residue:** This refers to what is left of the deceased's estate after funeral expenses, costs of administration and liquidation, taxes and debts have been paid.
- 31. Revoke:** To cancel or remove something.
- 32. Spouse:** The person to whom you are married to
- 33. Testate:** When you die with a will
- Testator:** The Testator (male) or Testatrix (female) is the person drawing up a Will. It is his or her Estate that is to be distributed in terms of the Will. Any person of the age of 16 years or over may make a Will.
- 34. Undertaker:** A professional involved in the business of funeral rites. These tasks often entail the embalming, burial or cremation of the dead, as well as the planning and arrangement of the actual funeral ceremony. They may at times be asked to perform tasks such as dressing (in garments usually suitable for daily wear), casketing (placing the human body in the container), and cosmetizing (applying any sort of cosmetic or substance to the viewable areas of the person for the purpose of enhancing appearances).
- 35. Will:** A legal declaration of how a person wishes his or her possessions to be disposed of after death.
- 36. Winding Up:** Closing down a person's estate, a person's property

CHAPTER 3

PREPARING FOR DEATH

OUTCOMES:

- ✚ Being able to identify the emotions, challenges and planning associated with death
- ✚ Understanding the concept of estate planning
- ✚ Understanding the importance of preparing for death/estate planning
- ✚ Understanding the importance of safeguarding and updating important documentation throughout your lifetime
- ✚ Understanding the consequences of not planning for your death and why people are reluctant to plan ahead.

3.1 ICE BREAKER:

Death is an eventuality of life that many people are afraid to speak about, or often even think about. Most of us may have had to deal with the loss of a loved one and often the emotions, experience and challenges which we are faced with in the event of a death differs amongst various age groups, cultures, religions and genders. It is therefore important that we are able to identify different emotions and challenges which our friends, family or colleagues could be experiencing in times of a loss.

EXERCISE 1

What you will need:

1. Pen
2. Paper
3. Spontaneous thinking!

Time: 10 minutes

What you need to do:

1. Sit down and quietly think of a loss you or someone you know have had.
2. Under each column below, write down:
 - a. the emotions/fears that were felt,
 - b. The Challenges that were experienced
 - c. The planning that had to be done or had already been done by the deceased prior to his/her death
3. When you are complete, each person will have a turn to firstly introduce themselves and thereafter read out the thoughts listed under each column

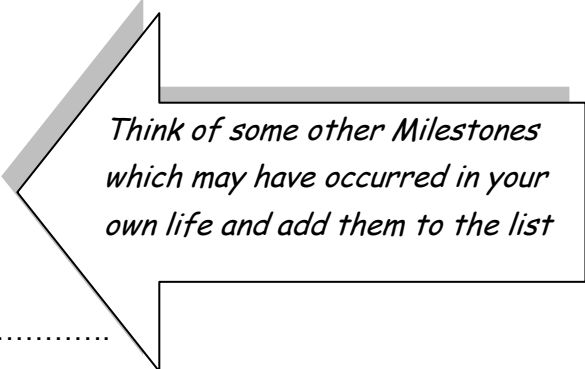
EMOTIONS/FEARS	CHALLENGES	PLANNING

3.2 IMPORTANCE OF ESTATE PLANNING

Whenever we celebrate a special occasion or achieve something in life we tend to tell our friends and family about these events as they are important to us and they have great impacts on our lives. Often the most important events in our lives are planned well ahead of time and a lot of time and strategic thinking is invested in ensuring that the event is exactly as we had envisaged it in our heads.

Throughout our lives we plan, celebrate and document important milestones in our lives. Examples of important milestones:

- Getting married
- Birth of a child
- Going to school for the first time
- Obtaining your driver's licence
-
-
-



*Think of some other Milestones
which may have occurred in your
own life and add them to the list*

Often, these events also require some formalities, such as:

- Registering your marriage or the birth of a child with the Department of Home Affairs
- Passing a driver's test and getting a drivers licence card at the Traffic Department
- Enrolling at the school/university and completing an application form

3.2.1 What is Estate Planning?

Estate planning is formally **planning and preparing** for what will happen to your financial affairs, your children and your belongings after you die.

The same way in which we plan for various occasions in our lives, such as marriage, university, retirement, so we have to also plan ahead and ensure that the necessary and important arrangements have been provided for in the event of your death.

By planning for your death, **YOU** are able to decide what should happen to your assets and your children. This will also prevent unnecessary arguments between family members as your wishes will be set out in your Will.



NOTE: The same way in which we take steps to ***plan, execute and formalise*** certain milestones in our lives, it is important that we also plan and prepare for the final milestone in our lives- death.



GROUP DISCUSSION 1: (3 Min)

In groups of 2-3, discuss reasons why it is important for people to plan ahead for their death as well as reason why people may find it difficult to plan for death

POSSIBLE ANSWERS:

- ✓
- ✓
- ✓
- ✓
- ✓
- ✓
- ✓
- ✓
- ✓
- ✓
- ✓
- ✓
- ✓
- ✓

3.3 EXECUTING A VALID WILL

As discussed earlier, there are a number of issues which one needs to bear in mind when planning for your death. The most important part of estate planning is being able to decide for yourself what will happen to your assets and family when you die. The only way in which the law will recognise your intentions of what should happen to your estate, is if your intentions/wishes is documented in writing, in the form of a Will. Should you fail to prepare a valid Will prior to your death, you will be said to have died *intestate*, and the laws of intestate succession will determine how your estate is divided. If however you leave behind a valid Will, you are considered to have died *testate*, and your estate will be distributed as per your wishes.

The execution of a valid will as well as other issues associated with wills in general, will be discussed more fully in Chapter 5, which deals with the laws of testate and intestate succession.

3.4 SAFE GUARDING IMPORTANT DOCUMENTATION

When preparing for one's death, it is very important that any relevant and important documentation is kept in a safe place. It is also important that this documentation is kept up to date and in order. A common mistake which is often made by people is that they fail to store their important documents in a safe place. Sorting out your important papers is a vital part of succession planning.

The following table shows a list of documents that may be important after you die. The table also sets out when the document could become relevant. You may add in any other reasons why you think a specific document could be relevant on the spaces provided for.

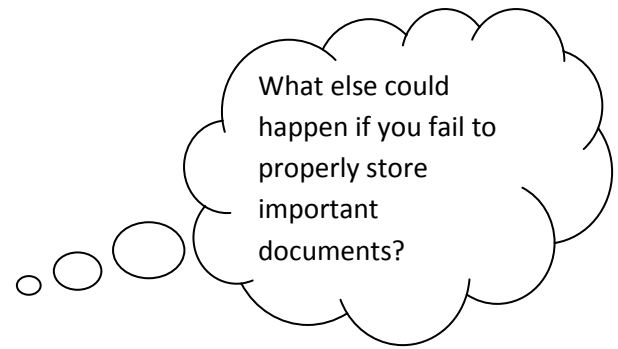
DOCUMENT	RELEVANCE
Identity Document	<p>To report your death/for various claims such as benefits arising out of policies/To apply for a death certificate and Letters of Authority or Executorship</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>
Marriage Certificate	<p>To claim spousal benefits/appointment of Representative in event of no Will</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>
Title Deed in respect of immoveable property	<p>To prove ownership of your property, especially in the instance of a property dispute OR to transfer property to your heirs or beneficiaries, OR to identify any co-owners of property.</p> <p>.....</p> <p>.....</p> <p>.....</p>

Payslips/UIF Card	<p>To claim UIF benefits OR for proof of Pension or Provident Fund membership OR to claim any overtime or wages owing to your estate</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>
Bank & Policy Documents	<p>To be able to withdraw any monies held in your accounts/to be able to manage or cancel your bank account/to determine whether there is any overdraft or loan monies owing to any banking institution/ as well as determine if there is any money owing to your estate by the banking institution or company as well as proof of membership to a company an insured amount</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>
Birth Certificate/s of children	<p>To be able to establish who your heirs/beneficiaries are/ submit claims on their behalf</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>

Your Will	To lodged the Will with the Master of the High Court/For the proper administration of your estate as per your wishes
OTHER DOCUMENTS

Failure to store your documents in a safe place could result in:

- ✓ Your family having to search for papers and documents after you have passed
- ✓ Inability to lodged a claim on your behalf
- ✓ Difficulty in administering your estate



- ✓
- ✓
- ✓
- ✓
- ✓
- ✓

LETS REFRESH: Choose the correct answer

Estate Planning is:

- a) Planning for your holiday at a golf estate
- b) Fornally planning and preparing what will happen to your personal belongings, money and children (if any) after you die
- c) Planning your life for when your children get married

It is very important that whilst we are alive we:

- a) Keep safe and in order all important documents in our lives
- b) Draw up a will
- c) Both a & b

An example of a milestone is:

- a) Paying your clothing accounts
- b) Graduating from University
- c) Failing your drivers licence

Keeping your Records Updated:

It is vitally important that you keep your records and documents up to date, and particularly replace any documents which you may have been lost or misplaced. It often occurs that during our lives we lose our **Identity Documents, children's birth certificates, marriage certificates, title deeds or policy and/or Fund membership agreements**. Always ensure that you take the necessary steps to obtain new copies of any lost document as this will save your family a lot of time and effort after your passing.

Below we will briefly illustrate the steps which can be taken when a particular document has been lost/misplaced or stolen:

IDENTITY DOCUMENT/MARRIAGE CERTIFICATE/BIRTH CERTIFICATE

Proceed to the Department of Home Affairs OR write them a letter, requesting a new certificate. You will need to give them the following:

1. The details of the type of certificate you want to apply for.
2. The full names and ID numbers of the person you are applying for.
- 3.1 For a New Marriage Certificate- Full names & Identity Documents of both the husband and the wife
- 3.2 For a New Birth Certificate- Full names of the child and both parents needs to be given as well as a copy of the parents Identity Documents- See Annexure A for example of such letter.

if you are sending a letter, address it to:

DEPARTMENT OF HOME AFFAIRS

REGISTRAR OF BIRTHS, MARRIAGES AND DEATHS

PRIVATE BAG X114

PRETORIA, 0001

In the event that you are unable to secure a new birth certificate from Home Affairs, you will then need two or more of the following documents in order to prove the Applicants identity:

1. A record of birth from hospital or clinic where you or the child was born
2. A baptism certificate
3. Clinic Cards from when the person was a baby
4. A duly commissioned affidavit from someone who can attest and verify the Applicants Identity, such as:
 - a. The Chief of the area where the person was born
 - b. The midwife who was present at the time of birth
 - c. Anyone else who was present at the birth
5. The Identity Documents of any siblings born in South Africa
6. Any school records or affidavit from the Principal confirming the Applicants age
7. Any other valid original document which contains the particulars of the Applicant

Usually the caseworkers at an Advice Office can assist an individual who wishes to apply for a new Identity Document, Marriage Certificate or Birth Certificate.

TITLE DEED OR PROOF OF OWNERSHIP

If you have lost or misplaced the Title Deed to your immovable property, you can write to the Deeds Registries Office and request that they furnish you with a copy of your Title Deed. You will need to do the request in writing and you will need to give them the following information:

- ✓ Your details
- ✓ The Erf Number or Street Address, as well as the Town and Province where the immovable property is situated.
- ✓ Proof of payment of the prescribed fee for a copy of the Title Deed (You will be required to pay a set fee to the Deeds Office prior to applying for a copy of your Title Deed) NOTE: Certain Registrars such as Cape Town, will require you to request an invoice when you apply for a copy. They will then send you an invoice and once you've paid they will forward you a copy of the title deed. (See Annexure B for an example of such a letter)

You can also approach your local Department of Housing or a private firm of attorneys and request them to conduct a windeed search on your property. The search will reflect any property/ies registered on your name as well as the particulars of such property.

CONCLUDING NOTE: It is therefore important to ask yourself the following questions when planning for your death:

- 1. *Have I got all my important documentation in order and up to date?*
- 2. *Have I placed it in a safe place?*
- 3. *Have I told someone I trust where to find these documents after my passing?*
- 4. *Have I decided what I want to happen to my estate when I die?*
- 5. *Have my wishes been formally written down*

It is important that you tell someone that you trust where to find all your important documentation, especially your Will.

Should you fail to store your documents securely they may land up in the wrong hands and this could result in unwanted problems.

Can you think of what other problems you could face? Write your answers on the space provided →

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3.5 FINAL THOUGHTS WHEN PLANNING FOR YOUR DEATH

Did you know that you can save someone's life by donating your healthy organs after your death?

"The Gift of Life"

The Organ Donor Foundation is a non-profit organisation, which aims to address the critical shortage of organ and tissue donors in South Africa. There are well over 3,500 people waiting for organ and cornea transplants. Unfortunately, due to the shortage of organ donors, less than 1 000 people will only receive a transplant per year. We can all help save a life by becoming a member of the Organ Donor Foundation, and together we can make a difference. See Annexure C for an interesting story on organ donation.



For more information you can contact:

Toll Free: 0800 22 66 11- Organ Donor Foundation or go online at:
<http://www.odf.org.za>

EVALUATION EXERCISE:

- 1. Give 3 reasons why it is important to plan for our death:
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.....

- 2. Why do you think it is important for us to safeguard important documentation throughout our lives?
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- 3. Briefly discuss *how* and *where* you would apply for a new birth certificate, in the event of the original being lost or misplaced:
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- 4. If you have lost or misplaced your Title Deed to your property, who can you apply to for a copy of the Title Deed?
.....
.....

5. Give 5 advantages of having a will before you die:

.....

.....

.....

.....

6. Consider the following statements and answer true or false. If you have chosen false, give reasons for your answer.

6.1 *Your organs can be donated after you die to help save someone's life*

.....

.....

6.2 *If you die with a valid will, your estate will be administered according to the instructions contained in the will*

.....

.....

6.3 *It is not necessary to safeguard UIF and employment documents such as PaySlips and Provident and/or Pension Fund details*

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CHAPTER 4

WHAT TO DO WHEN SOMEONE DIES?

OUTCOMES:

- ✚ To understand the formalities which need to be attended to immediately after someone has died
- ✚ To be able to identify the various institutions that must be approached after someone has died
- ✚ Being able to advise your clients on which documents need to be submitted to these institutions and government bodies
- ✚ Being able to identify and understand the arrangements and financial obligations involved in planning a funeral and being able to consider various options available to the family of a deceased person.
- ✚ To understand the role of a funeral parlour/director during the burial process

4.1 OBTAINING A DEATH NOTICE

Steps involved:

1. When a person dies, a medical practitioner (such as a doctor) or a legally competent person will examine the body.
2. He will then certify the person as being dead.
3. They will also then issue a certificate which sets out the cause of death. This however is not a death certificate, but rather a death report that the person has died and how he died.

In areas where there is no medical practitioner or person legally competent to certify the death, the tradition healer in that area will need to complete a Death Notice. See Annexure D for example of a death notice.

4.2 OBTAINING A DEATH CERTIFICATE

It is important that a family member or next of kin (such as a spouse, surviving child, parent) reports the death of a person to the Registrar of Births and Deaths at Home Affairs as soon as circumstances permit. If there is no Home Affairs in the area of death, the death must be reported at the nearest Police Station.

Obtaining a death Certificate at Home Affairs:

1. *If the death takes place in a rural area-* the Death Notice must be handed in at Home Affairs within 14 days from date of death
2. *If the death takes place in the city-* The Death Notice must be handed in at Home Affairs within 24 hours of being issued.

When you go to Home Affairs to Apply for a Death Certificate, take the following with you:

1. The Cause of Death certificate or Death Notice
2. The deceased Identity Book
3. Your Identity Book
4. Marriage certificate of the deceased, where applicable

See Annexure E, which is the “Application for Death Certificate” which you will need to complete at Home Affairs.

Once the death has been reported and registered with Home Affairs, the family or next of kin of the deceased will receive a Death Certificate and a burial order. These documents allow for the burial of the deceased.

The Death Certificate is also important for the administration of the deceased estate. The Executor or Representative of the deceased's estate will need to make certified copies of the death certificate, as they will need to present these certified copies whenever a transaction is done on behalf of the deceased's estate. E.g. when closing accounts or cancelling memberships or even claiming money, the Representative or Executor needs to show a certified copy of the death certificate. See Annexure F for a certified copy of a death certificate.

4.3 REPORTING THE ESTATE

When must you report an estate?

- ✚ When any person dies in South Africa, and leaves behind any property or valid will, or
- ✚ When a person dies outside of South Africa South but has property or a valid will in South Africa;

Then the estate of such person must be reported

Where do you go to report an estate of the deceased?

- ✚ The estate must be reported to the Master of the High Court, in whose jurisdiction the deceased was living at the time of his/her death

Where the deceased was not living in the Republic of South Africa at the time of his/her death, the estate may be reported to any Master of the High Court, provided it is reported to only one Master.

- ✚ From 5 December 2002, all Magistrates' Offices are designated service points for the Master of the High Court and estates can be reported there. However, these service points have limited jurisdiction. All estates with wills, as well as estates that exceed R50 000 in value, will be transferred to the provincial Master's Office. Therefore, it is advisable to report these estates directly the Master's Office.

When and by whom must estates be reported?

- ✚ The estate of a deceased person must be reported to the Master of the High Court within 14 days of the date of death of the deceased.
- ✚ Any person who has control over the possessions of the deceased OR is in possession of the will of the deceased, may approach the Master to report the estate.

How do you report an estate to the Master or to a service point of the Master of the High Court?

You will submit to the Master of the High Court the Death Notice, as well as reporting documents (These will be discussed below). The type of reporting documents that you will need to attach will differ slightly depending on **the value of the estate** and the **type of appointment required**- In other words, a Representative or an Executor:

If the value of the estate exceeds R125 000:

- ✚ letters of executorship must be issued.- See Annexure G
- ✚ The full administration of the estate must take place as set out in the Administration of Deceased Estates Act

However, if the value of the estate is less than R125 000:

- ✚ The Master of the High Court may issue letters of authority in terms of Section 18(3) of the Administration of Estates Act, (Act 66 of 1965). See Annexure H for an example of a Letters of Authority.

What documents will I need to submit to the Master if the value of the estate exceeds R125 000?

The following reporting documents are required (these forms are available online at <http://www.justice.gov.za/master/forms.html>):

- Completed death notice (form J294) See Annexure D
- Original or certified copy of the death certificate – Annexure F
- Original or certified copy of a marriage certificate (if the deceased was married)
- Any will or codicil (if any)
- If the deceased did not leave a will, then a Next-of-kin affidavit must be submitted (form J192) See Annexure I
- Completed inventory form (form J243) See Annexure J
- In the case of an intestate estate, a Nominations Form, completed by the heirs for the appointment of an executor, must be submitted- See Annexure K

- Where there is a will, but no executor has been nominated, or the nominated executor has died or declines the appointment, then a Nominations form which is completed by the heirs of the deceased, must be submitted.
- Completed acceptance of trust as executor forms in duplicate by the person(s) nominated as executor(s) (form J190) See Annexure L
- Undertaking and bond of security, unless the nominated Executor has been exempted from providing security in the will, or is the parent, spouse or child of the deceased (form J262) See Annexure M1 & M2
- Affidavit by the next-of-kin of a deceased person who has died without leaving a valid will, to the effect that the estate has not already been reported to another Master or service point (if applicable) See Annexure N

What documents must I submit to the Master or the Magistrate Court if the value of the estate is less than R125 000?

The following reporting documents are required (these forms are available online at <http://www.justice.gov.za/master/forms.html>):

- Completed death notice (form J294)
- Original or certified copy of the death certificate
- Original or certified copy of a marriage certificate (if applicable)
- All original wills and codicils or documents intended as such (if any)
- Next-of-kin affidavit if the deceased did not leave a valid will (form J192)
- Completed inventory form (form J243)
- List of creditors of deceased (if applicable)
- Nominations by the heirs for the appointment of a representative in the case of an intestate estate or where no executor has been nominated in the will or the nominated executor declines the appointment.
- Undertaking and acceptance of Master's directions (form J155) See Annexure O
- Declaration confirming that the estate has not already been reported to another Master's Office or service point of the Master.

LETS REFRESH:

Choose the correct answer:

If there is no medical practitioner in a certain area, the following person can certify a person as being dead and complete the death notice:

- a) a policeman
- b) a priest
- c) a traditional healer

If there is no Home Affairs in an area where someone has died, the death must be reported at:

- a) The nearest school
- b) The nearest police station
- c) The nearest church

If the value of a deceased's estate is less than R125 000.00, the Master will issue:

- a) Letters of Authority
- b) Letters of Executorship
- c) Letters of Trustees

If there is no Master's office in a certain area and the value of the deceased's estate is less than R125 000.00, at which of the following places can you go and report the deceased's estate?:

- a) The Funeral Parlour
- b) The Magistrate's Court
- c) Both a & b

4.4 PLANNING A FUNERAL

A vital aspect of death in most cultures, involves the burial of the deceased. The manner in which a person is buried often differs from culture to culture. It is however important to acknowledge any burial wishes the deceased may have provided for in his/her will. It is also acknowledged in most cultures that the deceased be given a respectable and dignified burial.

Group Discussion 2

Consider the following scenario, and thereafter all participants must discuss and answer the questions that follow. Participants are given 5 minutes to read the scenario & think about their answers.

Sandy and Hilpert were married for many years. Hilpert suffers from asthma, and tragically passes away from an asthma attack. On the day of this death, Hilpert's only brother, Sive arrives at Sandy's home and demands that she hand over all the policy documents, Identity card, bank card and payslips of Hilpert as he will be managing all Hilpert's affairs.

Sandy is confused as Sive and Hilpert were never close, and Sive last visited or made contact with Hilpert 10 years ago. Sive arranges the entire burial and Sandy is in no way involved in the decision making process.

A few days after the funeral, Sandy approaches Sive and asks him if there is any money left over that she may use to pay odds and ends in the home as well as for the maintenance of the two minor children she shares with Hilpert. Sive advises her that he used all the money from a funeral policy as well as all the money which Hilpert had left under the bed and in his bank account, to pay for the lavish funeral held in memory of Hilpert.

Arrange all the participants in a circle and share your ideas/views on the following questions:

- a) Are Sive's actions common in your community?
- b) Why do you think the Sandy gave in to Sive's demands?
- c) What is the effect of the brother having taking control?
- d) What needs to happen in our communities to give woman like Sandy more control over a male relatives estate?

You will need:

Paper & Pens



Creative Thinking



Time:



15 minutes

Who is responsible for planning a funeral?

It is usually the responsibility of the deceased's closest relative or next of kin to arrange the burial, unless otherwise directed in the deceased's valid will. In different cultures different customary rules apply as to who should be tasked with this duty.

For example, in African customary law, the eldest male relative would have inherited the deceased's estate and this also meant that the wife and children would have no say in where or how the deceased would be buried.

Another issue of concern is that of polygamous marriages where the wives cannot agree as to the funeral arrangements of the deceased husband. Where such disputes arise as to who should arrange the deceased's funeral, the dispute may be referred to Court for adjudication. Basically this means that an aggrieved party can now approach the Court by way of urgent Application, requesting that the Court decide who is awarded the burial rights in respect of the deceased person. Such an Application can delay the entire burial process and should therefore be exercised with caution, particularly as it can involve hefty legal fees.

The person appointed to arrange the burial will usually appoint an undertaker or funeral parlour to assist with the necessary arrangements. It is not advisable that one attempt to carry out the duties of funeral director by oneself, as this could lead to unwanted legal and health issues. Funeral Parlours and Undertakers are trained in the removal and transportation of bodies and are equipped with the correct equipment to ensure that the body is buried in a dignified manner.



CASE STUDY I

Linda and Tom were living together as boyfriend and girlfriend and share a five year old son, Linto. Linda is a Christian and Tom is a practising muslim. Linto was baptised as a Christian and but is being raised according to both Christian and Muslim traditions. Both Linda and Tom are unemployed, as they were both retrenched from their jobs. They are dependant on social grants and family for financial support. Linda tragically dies in a motor vehicle accident, leaving no will or any funeral policy. The family has requested Tom to arrange the funeral.

Considering the following facts, answer the following questions:

1. what challenges do you think Tom will be faced with when planning Linda's funeral
2. What advice would you give Tom with regards to planning Linda's funeral?
3. What problems may Tom be faced with when raising Linto on his own?

You will need:

Paper & Pens



Creative Thinking



Time:



15 minutes

Possible Answers:

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Appointing a Funeral Parlour or Undertaker:

A Funeral Parlour can take care of all your needs, assist you in making decisions as well as sort out all the documentation necessary to report the death and organise the funeral. In essence, a Funeral Parlour or Undertaker can take away a lot of the stress and burdens associated with the administration and organisation involved after a death.

Funeral Parlours usually handle the following items:

- Obtaining the death notice from the medical attendants
- Registering the death to Home Affairs and collecting the death certificate
- Supplying you with the original and the necessary certified copies of these forms for estate purposes
- Organising death notices in newspapers
- Offer a selection of coffins to choose from
- Preparing and dressing the deceased for viewing / burial / cremation
- Cemetery or crematorium bookings and arrangements
- Local transport of deceased
- Embalming of the deceased for repatriation (where required)

Again, unless otherwise provided for in a valid will, the person appointed to arrange the funeral can choose a Funeral Director or Undertaker that best suits the needs, cultural requirements as well as financial means of the deceased's family and/or person tasked with planning the funeral.

Once a Funeral Parlour has been selected, you will need to take the following with you to the Funeral Parlour:

- A copy of the deceased's Identity Document.
- Next of kin's Identity Document.
- Funeral Policy - (if there is one)
- Marriage certificate (this will be required by the insurance company if you have a policy).
- A photo of the deceased for hymn sheets.
- Clothes - for the deceased to be dressed in.
- Any other items which you wish the Funeral Parlour to include in the burial

In addition to the above, the following may also need to be considered when planning a burial, however this may differ from culture to culture and even religion to religion:

- Whether to have a burial or cremation?
- Where to hold the funeral service- home? Church? Chapel?
- The design of the hymn sheets/funeral programme
- Catering (this is often the most costly part of the funeral)
- Candles and floral arrangements
- Musicians like singers or bagpipers or an organist
- A sound system / video/camera equipment set up
- Petals and flowers to sprinkle on the grave
- Personal items belonging to the deceased and special memorabilia to display at the funeral

NOTE: It is illegal to bury someone on your property or in an open plot of land. A person must be buried at an approved burial site.



Paying for a Funeral:

Funerals and burials are relatively costly affairs and caution should be exercised when planning a funeral. Most funeral parlours require either a deposit or full payment upfront. It is therefore important that you ascertain whether the deceased has a funeral policy, and if so, that you hand over the details of such policy to the funeral parlour in order for them to make the necessary inquiries for payment. Alternatively, you can contact the insurance company yourself in order to lodge a claim for payment of the funeral.

If however the deceased had no funeral policy and the family and/or friends have no financial means to pay for the funeral themselves, you can:

- Request the administrator of the deceased's estate to release funds from the estate in advance in order to cover the costs of the funeral; or
- you can arrange with the funeral parlour that he invoices you and then you submit the invoice to the executor/trix of the deceased estate for payment from the estates funds. In other words, the funeral will get paid out of any funds held in the estate of the deceased. **NOTE:** Due to the lengthy process of winding up an estate, most funeral parlours will not accept this method of payment, particularly as the estate may not have any money to pay for the funeral or there may be delays in getting payment.
- Approach a registered credit provider to loan you the money to cover the funeral expenses.

Pauper's Burial (Indigent Burial)

It so often happens that the family or friends of the deceased cannot afford to pay for the burial of that person, possibly because they don't belong to a burial society, the family is poor or the deceased never took out a funeral policy during his/her lifetime.

In such circumstances, the family and/or friends often have to borrow money or come up with ways of paying for the funeral. If however the family and/or friends have no means of repaying a loan for collecting enough money for a burial, they may approach the municipality and apply for a ***paupers funeral***.

If the municipality approves the application, the Municipality will assist the family by providing, in most cases, just a simple coffin made of pine. No tombstone or meals or funeral parlour expenses will be paid by the Municipality. The body will be dealt with by the mortuary (usually state mortuary), unless the family can pay for the services of a funeral parlour.

It is important to note that when making such application for a paupers funeral, that:

1. The death must be **reported & registered**.
2. The person applying must submit the **Identity Document** of the deceased.

What if the Deceased was Receiving a Social Grant?

If the deceased was receiving a social grant from SASSA (South African Security Agency), SASSA needs to be informed of the death. You will do so by:

It is a criminal offence to receive the social grant of a deceased person. If you are found guilty you can be sentenced to imprisonment

- Taking a copy of the death certificate to the official at the pay-point where the deceased was receiving his/her social grant, OR
- If the money was being paid directly into the deceased bank account by SASSA, you can take a copy of the death certificate directly to the SASSA offices in the area in which the deceased was residing.

What to do if the deceased was an Organ Donor?

If it is established that the deceased was an organ donor, it is extremely important that the deceased's organs are removed as soon as possible, in order to ensure successful transplantation.

It is important to note that the organs can only be removed once the donor has been certified as being brain dead, by two independent doctors. Once certified as being brain dead, the family of the deceased donor must consent to the removal of the organs.

In terms of the National Act, 2003, no organs or tissue can be removed from a body without the permission of the deceased's family

WORDS OF WISDOM!

- ✚ Whilst you are alive, consider getting a funeral policy and/or life insurance; in order to avoid leaving your family with the financial burden of paying for your funeral themselves
- ✚ Make sure that all costs are discussed upfront with the Funeral Director/Undertaker-make sure that there are no hidden costs such as storage fees and/or transportation fees
- ✚ When planning a funeral, be careful not to overspend on items such as:
 1. Coffins and tombstones
 2. Flower arrangements- use smaller arrangements if you can or plastic flowers
 3. Refreshments- catering can use up most of your budget so be cautious to not buy excessive amounts of food that will just go to waste. Simple refreshments such as juice/tea/coffee and sandwiches and/or cakes is cheaper than providing large quantities of full meals.
- ✚ Always get proper advice if you unsure of what legal requirements need to be met, such as reporting the estate to the Master or obtaining a death certificate
- ✚ Only pay for what you can afford.

EVALUATION EXERCISE:

1. Which person/s can issue a Death Notice?

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2. Consider the following scenario and answer the following questions-

Mandi lives in a rural village called Meddowland with his wife Moly and two (2) major sons. On Monday, 20th of August 2012, Mandi dies at his home after a long battle with cancer. Unfortunately there are no hospitals or medical practioners practising in the village and it is the local herbalist who advises the family that Mandi has passed away. The local police station of Meddowland has offered to take the body to the nearest funeral parlour situated in East London. Mandi's wife, Molly, has informed the family that Mandi did not have any funeral policies or life insurance. The only assets which Mandi had was his house, 10 cattle and a 1992 nissan sentra motor vehicle.

Who will complete the Death Notice and why?

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Assuming that there is no Home Affairs in Meddowland, where can Mandi's family go and report the death?

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Where must Mandi's family take the death notice and when must this be done?

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*What will the funeral parlour in East London be able to assist Mandi's family with?
Give 5 (five) possibilities.*

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Identify 5 (five) things which the family will need to take with to the funeral parlour.

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What options can Mandi's family explore in order to pay for the costs of his funeral?

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CHAPTER 5

DYING WITH OR WITHOUT A WILL

OUTCOMES:

- ✚ To understand the difference between testate and intestate succession
- ✚ Know who can inherit in terms of the laws of intestate succession
- ✚ The understand the principles of customary law and how the laws of Testate and Intestate Succession effect customary traditions
- ✚ Understand the importance of dying with a will
- ✚ To understand the legal requirements for drafting a valid as well as amending or revoking an existing will
- ✚ Be able to draft a simple will

5.1 WHAT IS THE LAW OF SUCCESSION AND HOW IS IT GOVERNED?

The law of succession deals with the rules which apply to the division or distribution of the estate of a person when they die. The law of succession can be separated into two categories:

1. **Testate succession** and
2. **Intestate succession.**

Intestate Succession is governed by the Intestate Succession Act 81 of 1987, and the laws of intestate succession come into operation when:-

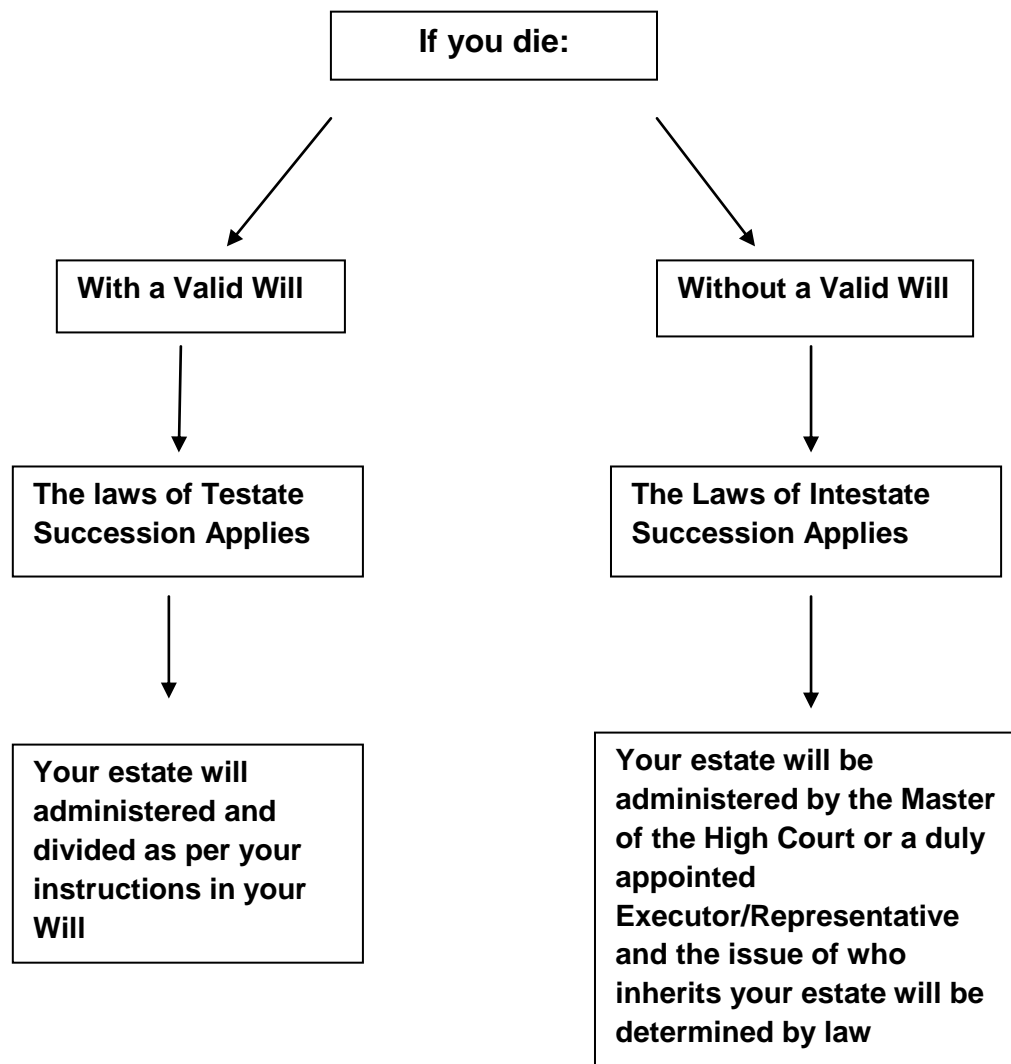
- A person dies without leaving a valid will, or
- Where the deceased has left a will but which only deals with certain parts of the deceased's estate;- For example: your will only leaves your house to your children, but you do not say what must happen to the rest of your belongings.
- The heirs appointed in the will are unable or unwilling to inherit or
- The Heir or beneficiaries have died before they could inherit and the testator has failed to nominate someone else to inherit in their place.

Testate Succession on the other hand is regulated by the Wills Act 7 of 1953, and the provisions of this Act become applicable when:

- when a person dies leaving a valid will.

These two branches of law, are ideally important as they will regulate and formalise the manner in which your estate is administered upon your death. It is therefore important for us to understand the importance of planning for our death as well as what the consequences will be should we fail to prepare a valid will whilst we are alive.

Illustrative Diagram:



5.2 TESTATE SUCCESSION (DYING WITH A WILL)

As discussed in Chapter 3, preparing a valid will whilst you are alive is a very important aspect of planning for your death. Having a valid will gives us peace of mind that when we die, our wishes will be followed and those things or people which were valuable to us when we were alive, will be provided for and taken care of the way we would want it to be after our death.

TOOLS REQUIRED:

Brainstorming



Paper & Pens



Time: 10min



GROUP DISCUSSION 3:

“Do People Really Need Wills?”

Consider the following statement:

“Wills are only for rich people and do not benefit middle class or poor people.”

Now: discuss whether you agree or disagree with this statement, giving reasons to the larger group as to why you agree or disagree. You may write your thoughts in the space provided for below:

Preparing a will requires careful consideration and planning. You need to be mindful of your assets as well as your debts as well as who you want to leave your belongings to, bearing in mind issues such as:

- your marital regime
- the future of your children and your spouse as well as;
- who do you want to be responsible for making sure your last wishes are fulfilled after your death? In other words, appointing someone you can trust and who will administer your estate as per your instructions.

1. What do we mean by marital regime?

In South Africa, we have 3 marital regimes, each with its own consequences should one of the spouses die. These regimes are as follows:

1. *Marriage in Community of Property*- Both parties share a joint estate and unless you prepare an ante nuptial contract, this regime will automatically apply to you. When you die, your spouse is automatically entitled to his/her half share in the estate. This means that you cannot bequest your spouse's half share to someone else.
2. *Marriage Out of Community of Property*- Both parties have a separate estate. In order for your marriage to be governed by this marital regime, you need to draw up an ante-nuptial contract. Upon the death of either spouse, the surviving spouse is not automatically entitled to a half share in the deceased spouse's estate.
3. *Marriage out of Community of Property with Accrual*- Both parties have separate estates but at the end of the marriage and if one of the spouse's die, they will share in the accrued profits made during the marriage.





Frequently Asked Questions:

Question: **What is a Will?**

Answer: *A Will is a formal legal document which sets out in writing what will happen to the our property upon our death. A Will comes into effect after we die*

Question: **What are the Advantages of Having a Will?**

Answer: *If you prepare a valid Will, you may:*

- *Decide who will get what from your estate and in what proportions*
- *Make provision for the substitution of heirs in the event of a heir dying before you do*
- *Make financial provisions for your heirs and minor children*
- *Incorporate provisions to reduce Inheritance Tax*
- *Decide who you wish to act as your Executor or Executors*
- *Decide who you wish to act as the Guardian of your minor children*
- *State how you want to be buried and if you have any specific requests regarding your burial.*
- *Donate items or money to a Charity or any specific person*

Question: **What Legislation will I need to comply with when drafting my will?**

Answer: *The execution or the drafting of Wills is governed by the The Wills Act 7 of 1953 (The Wills Act).*

LET US REFRESH:

Choose the correct answer:

The law of Intestate Succession applies when:

- a) Someone dies without a will
- b) Someone dies with a will but doesn't make provision for certain parts of his/her estate
- c) The entire will of a person has been declared invalid
- d) All of the above

If you die without a will, your estate will be administered by:

- a) The laws of the Intestate Succession Act and the Master will appoint an Executor or Representative to administer your estate
- b) The laws of intestate succession and your estate will be administered according to your last wishes
- c) Your family as a whole
- d) None of the above

In South Africa there are 3 marital regimes, namely:

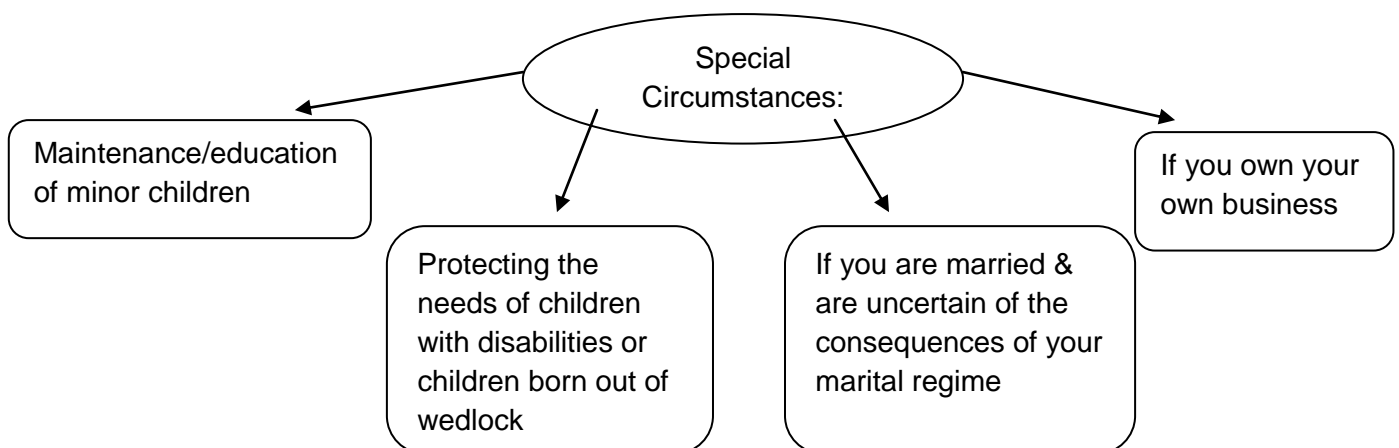
- a) In community of property, out of community of property including the accrual and out of community of property excluding the accrual
- b) In community of property, customary unions and out of community of property
- c) In community of property, same sex unions and civil unions
- d) None of the above

The Wills Act

The Wills Act provides certain strict requirements which must be adhered to when drafting and executing a Will. If you fail to meet these requirements, the Will may be declared invalid by the Master of the High Court and your estate will be administered according to the laws of intestate succession. In other words, it will be as if you died without a will. (see Annexure P for copy of the Act)

Section 2 of the Wills Act Provides that any testamentary writing shall not be valid unless the formalities contained in the Act have been complied with. The reason for these strict requirements is to prevent people from committing fraud and misrepresenting the true intention of the testator.

If you are uncertain of whether or not your will complies with the Wills Act, it is advisable to approach an attorney or other experienced professional person who can assist you in checking your will and making sure that your intentions are clearly communicated and that your will is legally binding and procedurally valid. It is particularly important to have someone with experience to check your will if you are drafting a will in which special circumstances needs to be considered:



FORMAL REQUIREMENTS FOR DRAFTING A VALID WILL:

The most basic formalities provided for in section 2 of the Wills Act can be summarised as follows:

- ✓ The person drawing up a Will (The Testator), must be 16 years old or older and they have the mental capacity to understand fully that the document they have prepared or are signing is their Will
- ✓ The Will must be in writing, either typed or handwritten.
- ✓ The Will must be signed in the presence of at least two witnesses, who sign in front of each other and in front of the testator.
- ✓ Each and every page must be signed by the Testator as well as the two witnesses, and in the presence of each other.
- ✓ If any person signing a Will is unable to write his signature on the Will, they must make their mark in the presence of a Commissioner of Oaths.
- ✓ The Will must be dated.
- ✓ Any changes made to the Will must comply with the Wills Act.

We will now examine the requirements for the Execution of a Valid Will in more detail:

Capacity to Make a Will- Section 4 of the Wills Act

The Act specifies that the person executing the will (the testator), must be 16 years of age or older and must be mentally capable of understanding the nature and effect of his act at the time of making the will. This is known as *testamentary capacity*. If it is found that the testator did not have the mental capacity to execute the will, then the will may be declared invalid.

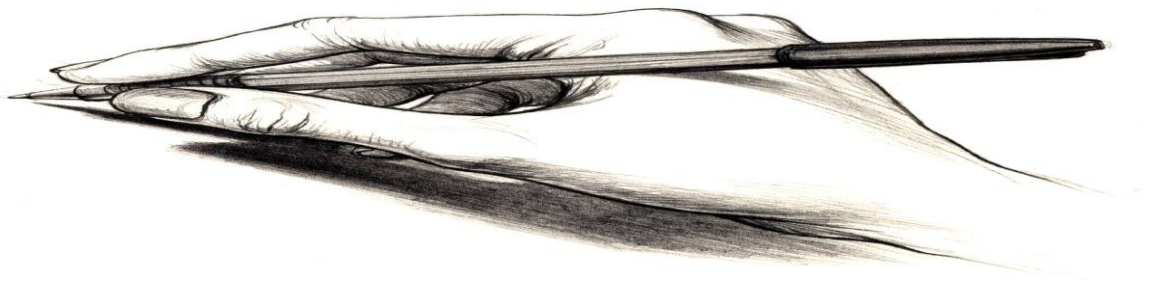
You **do not** have mental capacity if:

- You cannot remember what you have done
- You cannot think clearly
- You do not understand the consequences of your actions

If anyone argues that the testator did not know what he was signing or did not know what he was doing, then that person must prove this. Such person must inform the Master of the High Court, and will need to bring an Application in the High Court to declare the will invalid. A medical practitioner will usually be able to give evidence regarding the mental capacity of an individual and whether the testator was aware of what he/she was doing.

The Will Must be in Writing-

Any verbal instructions you convey while you are still alive, will hold no weight unless reduced to writing. For example, the African tradition of “ukutolela” is regarded as being significant in the African culture, but legally it is not binding. Our law requires that a will, in order to be considered as binding, must be in writing. This does not necessarily mean that it needs to be typed, but rather that it must be written. It is not a legal requirement that an attorney or qualified professional draft the will, but it is advisable to do so as they if are not experienced in drafting wills.



Signature of the Will-

It is a strict requirement that the testator must sign on all pages of the will including the last page, in the presence of **2 (two)** witnesses. The witnesses are required to sign on the last page of the will, but if the testator so requires, they can also initial on every other page.

NOTE: The witnesses **MUST** sign in the presence of the testator! **ALSO-** A person who is going to inherit in terms of the will cannot sign as a witness! The reason for this is so that people are prevented from committing fraud. If a witness does not sign in front of the testator and the other witness, then the will may be declared invalid.

Who can sign as a witness?

Any person aged 14 or older and who is competent to give evidence in a court of law, can sign as a witness to a will. The reason for this is that should the will be disputed in a Court of law, that the witness is able to give oral evidence as to the circumstances in which the will was drawn up. Please note, any person who stands to inherit in terms of the will **MAY NOT** sign the will as a witness.

What if I cannot sign my own name?

If the executor cannot sign his/her own name, he can make his mark by marking his thumbprint instead or marking an "X".

IMPORTANT NOTE: Should an executor make a mark with his thumbprint or an 'X', then this must be done in front of a commissioner of oaths. In other words, the commissioner of oaths must be present when a testator marks his signature with his thumbprint or an 'X'. The Commissioner of oaths has to certify that the person who made the mark is in fact the testator. (See schedule 1 of Annexure P for an example)

Changing or Updating Your will:

It is important that you update your will every few years or whenever something significant occurs in your life, such as the birth of a child, a divorce or even the acquirement of new assets. The last thing you want is for certain assets or persons not to be provided for when you die. It is therefore best to update your will as need be and further to ensure that you have updated it in accordance with the Wills Act. This is simply to avoid any changes being declared invalid.

What happens should I divorce?

It is vitally important that you update your will after your divorce. The reason for this is that, any bequest made to a spouse before you get divorced, will not necessarily become invalid. The Wills Act states that if:

- You die within 3 months after your divorce- any bequest that you had made to your wife will be revoked, in other words it will not be valid and your ex-spouse will not inherit in terms of your will.
- You die after 3 months of getting divorced and you have not made any changes to your will, any bequest to your ex-wife/husband will remain valid and s/he will inherit in terms of the will.

The reason for this rule is to give you a chance to change your will after your divorce, should you wish to do so, and should you die without getting an opportunity to do so, the law assumes that you probably would have wanted to remove or change the bequest but just never had the opportunity to do so. If after 3 months no change has been made, the law assumes that you wanted your ex wife/husband to inherit in terms of your will.

How can I ensure that my will is altered or revoked (cancelled) correctly?

Our law recognises that people may want to change their will before they die. A will can be amended or cancelled at any time before the death of the testator. It is therefore good practice that you review your will on a regular basis, particularly when one faces life changes or reaches certain milestones in our lives. If you do not change or revoke your will, it will remain valid and enforceable after you die.

A will can be amended by:

- a. Deleting certain sections;
- b. Adding new bequests or instructions;
- c. Altering the will

When you make an amendment to a will, you must ensure that:

1. The testator acknowledges the amendment by placing his signature next to the amendment, OR if the testator does not sign, he can direct someone else to sign next to the amendment on his behalf (this person must sign in the presence of the testator). **NOTE:** the signatures must be made as close as possible to the amendment.
2. If someone else has signed next to the amendment on behalf of the testator, then that person must sign in the presence of two competent witnesses as well as the testator. The witnesses must also sign next to the amendment and they must sign in front of each other as well as the testator AND the person who signed on behalf of the testator.
3. If any person signing next to an amendment, does so by making his mark or thumbprint, then such mark or thumbprint must be made in front of a commissioner of oaths. The Commissioner of Oaths must certify on the will that he/she has satisfied him or herself as to the identity of such person making his mark on behalf of the testator.

If you want to cancel or terminate a will, you must want to do so. In other words, you must have the intention to cancel or terminate the will. You also cannot simply say that you want to cancel your will.

You can cancel your will by:

1. **Executing a new will** in which you expressly revoke all previous wills and codocils executed by yourself.
2. **Destroy the will** e.g by burning it or tearing it up.
3. **Cancel the will by drawing lines though it**- This must be done in the presence of two competent witnesses. You must acknowledge such cancellation with your signature as well as the signature of the two witnesses, which signatures must be made in the presence of each other. If you don't want to cancel the whole will, but only certain sections, then you must only draw lines through those sections you want to cancel. The rest of the Will will remain valid.

NOTE: You must be mentally alert when you make any changes to your will. In other words, you must know what you are doing and you must want to do it.

LET US REFRESH

Choose the correct answer:

In terms of the Wills Act,:

- a) A person who signs as a witness to a will must be over the age of 14 years old
- b) A person who signs as witness to a will must not stand to inherit in terms of the will
- c) A person who signs as witness to a will must not be mentally unstable
- d) All of the above

CONTENTS OF THE WILL:

Choosing an Executor:

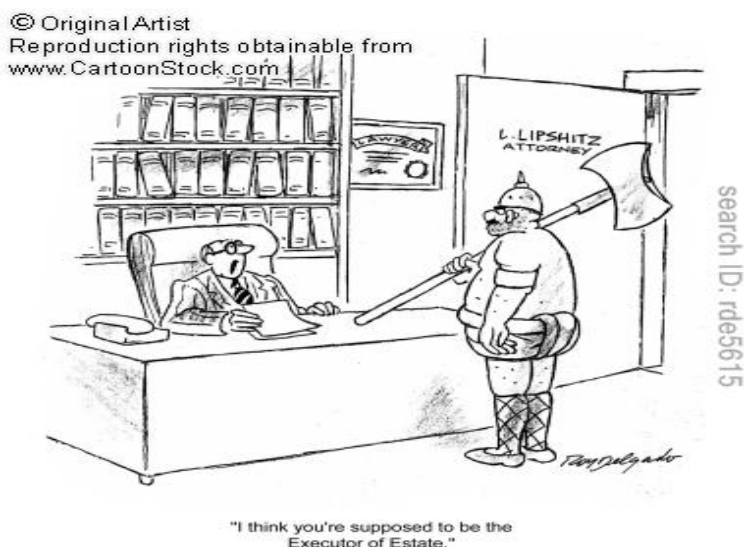
As discussed earlier, an important aspect of estate planning is that you have the right to choose who you want to handle your affairs after your death as well as who you want to inherit from your estate.

The person who we choose to handle our affairs and take control of our estate after our death is known as the executor (if male) or executrix (if female). You need to give careful consideration to who we want to appoint in such position, as this person will:

- ✓ have the power to manage your financial affairs
- ✓ Make decisions on behalf of your estate
- ✓ Be in charge of distributing your belongings and money as per your instructions in your will

It is therefore important that you choose someone who is trustworthy, responsible and who is able to manage finances well. Your executor must also be solvent (not be in bad debt) and over the age of 18 years. Your executor does not have to be a family member or friend, but can also be an attorney or even financial institution such as your Bank. The choice is yours as to who you want to appoint and no one can force you to choose them to manage your affairs.

TIP: It is always a good idea to ask the persons you propose to name as executor if they are willing to act as executor of your estate.



Choosing your heirs and beneficiaries:

In your will, you will set out what will happen to your assets upon your death. The most common practise is to leave your property, whether moveable, immoveable, or monetary to a specific person or even organisation. Below we will look at the type of people or institutions you can nominate to inherit in terms of your will:

Unborn children

Unborn children and even children who are not yet conceived can inherit in terms of a will.

Adopted and extra-marital children

Adopted and extra marital children are not treated any differently from children born within a marriage

Class of Persons (Known as a class bequest):

You can make a bequest to a class of persons, such as all your grandchildren, or all your nieces or all the ladies in your gardening club. When such a bequest is made, the entire bequest will go to all the grandchildren or perhaps all your surviving nieces, whether born before or after the will was drafted.

Institutions/Organisations:

You are allowed to nominate a specific organisation or institution to inherit from your estate. For example, you may donate all your clothes to a charitable organisation or perhaps leave money to the SPCA.

An example of such a bequest is as follows:

“I bequeath an amount of R10 000.00 to the Shining Star Children’s Home in Grahamstown.”

Persons Excluded from Inheriting:

- ✚ A person who intentionally and unlawfully causes the death of the testator cannot inherit in terms of the will.
- ✚ Any person who writes the will or a part thereof for the testator
- ✚ Also, as mentioned earlier, a person signing as a witness to the will cannot inherit in terms of the will either.
- ✚ It is also accepted that anyone who coerces or forces the testator to bequeath something to them, cannot inherit, as the will would be regarded as invalid- the will cannot be valid if the will does not reflect the true intentions of the testator

Providing for the Guardianship of your Children in Your Will

As discussed earlier, one important aspect which needs consideration when preparing your will, is the needs of your children. It is important that whilst you are alive you decide who will be responsible for the day to day care of your child/ren and well as who will make all legal decisions on behalf of your minor child/ren. When dealing with the issue of the care and control of child/ren, the law provides two distinct forms of care and control:

1. *Custody*- this involves the day to day care and maintenance of a child, which includes providing for educational, emotional and spiritual needs of the child; and
2. *Guardianship*- this involves the legal care of a child. It requires a person to look after and control the property of the child as well as acting on behalf of the child in respect of any legal proceedings or decisions.

It is important that you understand that you if you are married, that you cannot appoint someone else in your will to be the guardian of your minor children. The other parent will become the Guardian of your minor children. It is only if you had sole guardianship of your children before your death that you can appoint someone else other than the other parent, to be the guardian of your minor children. A person would have sole guardianship, if for example, they never got married to the biological father/mother of the children.

It is important that when choosing someone to be your child/ren's guardian, that you choose someone you can trust and who will make the right decisions for your child. If such person is to also take care of the day to day needs of the child, it is important that you make some sort of financial provision which will enable the Guardian of your child to maintain your child/ren and provide for their everyday needs. It is also important that you first discuss this nomination with the person you wish to appoint, so that they can be fully aware of their role and duties as the Guardian of your child/ren, and also to ensure that they want to be appointed as the Guardian of your child/ren.

An example of a clause in a will providing for Guardianship is as follows:

"Upon my death, I nominate my sister, Alice Adelaide, or failing her, my aunt, Beatrice Beauty, to be the Guardian of my minor children. Such Guardian will be exempted from furnishing security to the Master for the appointment as such."

It is also vitally important that you never leave your money or property directly to a minor child. If you do this, the assets will be entrusted to the State by way of administering your child's inheritance through the Guardians Fund. The role of the Guardians Fund will be discussed more fully in Chapter



Legacies:

In your will you may leave a specific amount of money to a specific person. This is known as a legacy. In other words, a legacy is a cash bequest to a specific person. An example of a legacy in a will is as follows:

'I bequeath the following legacies:

- i) The sum of R5000.00 to my daughter Angelina Jones*
- ii) The sum of R2000.00 to my niece Andrea Bolt, on the condition that she is not married at the time of my death.'*

Please note that interest is not payable on cash bequest, unless you specifically provide for such in your will.

Bequests:

A bequest is a gift or personal item or property which you leave to a specific person in your will.

Substitution of heirs:

In your will you are allowed to provide for the substitution of heirs in your will. This means nominating a second or third person who will inherit the bequest in the event that the nominated heir dies before you do or perhaps that heir is excluded from inheriting for some or other reason.

An example of a clause dealing with substitution of heirs is as follows:

“ In the event of any of my children dying before receiving their inheritance in terms of this will, I direct that such inheritance shall devolve upon the lawful issue of our children [in other words the children of your children], in equal shares.”

Repudiation and Adiation:

Every person who stands to inherit in terms of a will is entitled to decide whether or not he wants to inherit it not. The right to choose whether you want to accept the inheritance is known as *adiation*. If you reject or decline an inheritance, it is known as *repudiation*.

In your will you can include a class which sets out that your beneficiary is allowed to decline an inheritance in your will.

LET US REFRESH

Choose the correct answer:

An Executor is a person who:

- a) Marries your wife/husband
- b) Who manages your estate when you die
- c) Inherits everything in your will when you die

Which person cannot inherit in your will:

- a) Your illegitimate child
- b) The person who drafted your will
- c) Your unborn child/grandchildren

CASE STUDY 2:

Jennifer's mother passed away after a long illness. When Jennifer was called to the lawyers office for the reading of the will, she was surprised to find John, her mother's tenant, also sitting inside the lawyers office. She was even more surprised when she found out that her mother had left everything to John in her will. Jennifer could not understand why her mother had done this, especially since she barely knew or trusted John. Jennifer also remembered that her mother had once told her that she was afraid of John as he use to get drunk a lot and threaten her with violence.

Jennifer had been the one to take care of her mother in hospital before she died, and whilst she was in hospital her mother had told her that she wished for Jennifer to inherit everything. Jennifer was very confused and upset .

Jennifer was not sure who she should turn to, so she wrote a letter to the Master of the High Court, in which she informed the Master that she suspected that her mother's will was written by someone else, particularly as it did not reflect her mother's true intentions. Jennifer soon received a response from the Master stating that the will was prima facie valid- in other words, from the face of it, it appeared to be valid.

Jennifer then took the letter from the Master and sought legal advice. She was advised by her lawyer that if she had good reason to suspect that fraud had been committed in respect of the drafting of her mothers will, then she would need to contest the will. Jennifer was asked to make some inquiries surrounding the execution of her mothers will, and this is what Jennifer found out:

1. The will was signed by her mother the day before she died
2. Jennifer's mother was on high doses of morphine to help alleviate her pain. The morphine affected her mindset and often left her drifting in and out of consciousness
3. Although the will was in writing and looked like it had been properly drafted, there were some concerns regarding the signature of her mother. The signature of the testatrix did not look like Jennifer's mother's signature
4. The witnesses were people unknown to Jennifer or her mother. Jennifer learnt that they were the signatures of the nurses who worked at the hospital where her mother had died.
5. The witnesses confirmed that John had asked them to sign the will as witnesses

Jennifer then brought an Application in the High Court in which she challenged the validity of her mothers will. The Court found that:

1. Due to the high volumes of morphine in the deceased body, Jennifer's mother did not have the mental capacity to appreciated what she was signing and what the contents thereof was as well as the consequences.
2. That the witnesses had not signed in the presence of the testatrix.

In the end, it was established that fraud had been committed by John and therefore the will was invalid and Jennifer's mother died intestate. Jennifer, being the only living relative of her mother, inherited everything.

Living Wills and Powers of Attorneys

When planning for our death, particularly the drafting of our wills, we often need to sit back and think about situations which may arise before we actually die, such as ill health and the need for continued medical attention. Have any of us actually answered the question:

If I were to get very ill and required hospital machinery to keep me alive, would I want to continue living like that, or do I want them to rather switch off the machines?

Or

For how long do I wish to be reliant on medical treatment to keep me alive?

OR

Who would make medical decisions on my behalf if I was unable to do so?

These questions relate to end of life decisions, which require us to decide what needs to happen in certain unforeseen circumstances, such as:

- ✓ Being brain dead
- ✓ Surviving on life support
- ✓ Being unable to afford further medical treatment
- ✓ Being unable to make medical decisions due to lack of capacity or consciousness

It is possible to answer the above questions in the form of an **advance directive**. An advance directive is a legal document which sets out instructions regarding future medical decisions in the event that we are no longer able to make those decisions ourselves. There are 2 kinds of advance directives, namely:

1. The Living Will, and
2. A Power of Attorney

The Living Will

This legal document allows you to give instructions regarding the type of medical treatment you wish to receive when your quality of life has severely depreciated or even instructions as to no medical treatment being received at all. An illustration of what a living will could look like can be found at Annexure Q of this manual.

The Power of Attorney

A Power of Attorney is a legal document which allows you to appoint someone whom you trust to make certain or even all decisions regarding your medical treatment in the event that you are unable to make such decisions yourself. For an illustration of what a Power of Attorney looks like, see Annexure R of this manual.

CASE STUDY 3:

Clark V Hurst NO 1992 (4) SA 630 (D)

In 1992 the wife of a patient who was in a permanent vegetative state approached the High Court for an Order authorizing her to withhold the intravenous feeding from her husband so that he could starve to death.

The patient, a Dr Clark, had been a medical practitioner who suffered a heart attack during 1988. Although they were able to resuscitate him, he unfortunately suffered severe brain damage and became deeply comatose. Dr Clark had to be fed through a tube and was in a persistent vegetative state for about 4 (four) years, without further improvement. Dr Clark had signed a Living will in which he stated: "I direct that I be allowed to die and not be kept alive by artificial means or heroic measures".

His wife then approached the High Court to get an Order giving her the power to stop further treatment of her husband as well as stop the hospital from feeding him through the tube.

The Court found that while the patient was legally still alive, there was no possibility that the patient would emerge from his vegetative condition and that his brain had "*permanently lost the capacity to induce a physical and mental existence at a level which qualifies as human life*". This meant that "judged by society's legal convictions, the feeding of the patient does not serve the purpose of supporting human life as it is commonly known". The Court looked at the moral as well as legal convictions of society and found that considering the medical position of Dr Clark that his wife would not be unjustified in discontinuing his feeding, even if it resulted in his death.

As Dr Clark was legally alive, but he lacked the capacity for human life, the Court granted the Order in favour of Mrs Clark.

Checklist on drafting your own will

- ✓ Give your full names and Identity Number
- ✓ State your address (the one you currently living at)
- ✓ State your marital status, and if married, give your marital regime as well as ID number and full names of your spouse
- ✓ Write down that it is your last will and testament and that you revoke all other wills that you have made before this one
- ✓ Name someone who you wish to administer your estate after your death. In other words, nominate an executor
- ✓ Set out in specific detail how you want your property divided, giving the full names, addressed, ID numbers and genders of the persons you wish to inherit your belongings.
- ✓ If you minor children, make provision for someone to look after them when you die as well as providing for them financially
- ✓ State any other last wishes you may have, such as how you want to be buried etc.
- ✓ When completed, get 2 competent witnesses.
- ✓ You must then initial each and every page of the will in front of both witnesses.
- ✓ You, and your two witnesses must then sign on the last page of the will and you must insert the date on which you all signed together. Make sure that you sign as close to the last line of writing in the will to avoid someone adding something in.

Example of a simple will:

LAST WILL & TESTAMENT OF MOSES JACOBS (870206 556 897) of 27 Whites Road, Butterworth married to SALLY JACOBS (840506 556 985) OF 27 Whites Road, Butterworth, In Community of Property.

1. I hereby cancel all wills made by me before this time.
2. I appoint as my executor, my brother, John Jacobs (ID No 790804 663 321) of 23 Morning Road, Butterworth.
3. I direct that my executrix shall have the power to appoint a professional to assist her and shall be exempt from having to furnish security to the Master of the High Court.
4. I bequeath the sum of R5000.00 to my sister, Mary Josephs of 55 Dew Street, Grahamstown.
5. Should my wife die before me, I nominate my best friend Joan Chris (ID No 810903 663 654) as the legal guardian of my minor son, Paul Jacobs, born 5 May 2000.
6. I bequeath the residue of my estate to my wife Sally Jacobs, and if she dies before me, my son Paul Jacobs will inherit in her stead.
7. I direct that my remains must be cremated and the ashes thrown into the ocean.

Signed at Butterworth on this 12th day of August 2010 by the testator of this will in the presence of the two undersigned witnesses.

TESTATOR..... **THUMBPRINT MADE**

WITNESS 1.....

WITNESS 2.....

NOTE:

As long as your heirs are clearly identified, a will remains valid. Therefore, even if you don't have the Identity Number or address of the beneficiary or heir, the will won't be declared invalid and the Master can simply confirm those details at a later stage.

Certificate in terms of section 2 (1) (a) (v)

I, (full name of Commissioner of Oaths).....of (full address).....in my capacity as commissioner of oaths certify that I have satisfied myself as to the identity of the testator (full names)....., and that the accompanying will is the will of the testator.

.....
Signature of the Commissioner of Oaths

.....
Date

.....
Place

EXERCISE 2: DRAFTING A WILL

Using the facts below, prepare a simple will for your client.

- My name is John Doe Smith, Identity number 850231 552 632 and I reside at 55 Makana Street, Grahamstown.
- I am married to Susan Smith (born Lene), Identity number 840206 556 856 also residing with me. We are married in community of property.
- We have no children.
- I have a previous will but I wish to draft a new one as I am not happy with my old one.
- I want my mother, Jenny Smith, with Identity Number 630208 558 446, residing at 23 Boko Street, Grahamstown, to control my estate when I die and make sure that my wishes are fulfilled. I don't want her to have to furnish security to the Master of the High Court for execution of her duties and she can appoint someone she trust to help her administer my estate.
- When I die, I want my best friend Cindy Lotus of 6 Sunny Street, Grahamstown, to inherit R50000.00. Cindy is single and I don't know her ID number.
- I want to leave my black 2011 BMW 320i, to my father, Henry Smith, Identity Number 650812 556 847. My father lives with my mother.
- Whatever is left over must go to my wife Susan.



You will need:

Paper &
Pens



Creative
Thinking



Time:



20 minutes

5.3 DYING INTESTATE (DYING WITHOUT A WILL)

When a person dies without leaving a will, that person is said to have died *intestate*.

When a person dies intestate, the assets and property of that person is distributed in terms of the Intestate Succession Act 81 of 1987. (herein after referred to as the Act). In other words, the Act will determine who inherits what. Should you die intestate, only certain people, called beneficiaries, can inherit from your estate. The following persons qualify as beneficiaries:

The deceased's-

1. legal spouse
2. biological or adopted children
3. Blood relatives

It is possible for a person to die completely intestate or only partly intestate. An example of the latter is where a testator specially bequeaths one portion of his estate in a valid will, but does not deal with the rest of his or her assets in the will. In this instance the portion that has been bequeathed by will, will devolve in terms of and subject to any conditions contained in the will, while the rest of the estate will devolve according to the rules of intestate succession.

How will an intestate estate be distributed?

A deceased's estate consists of both assets (property, money, furniture, etc) and liabilities (debts). If the deceased was married in community of property, his/her spouse will inherit a half share of the joint estate. If however the deceased died out of community of property with accrual, the surviving spouse has the option of lodging a claim against the deceased's estate for his/her accrual share. Once the surviving spouse has been apportioned his/her half share in the joint estate, or alternatively his/her share in terms of the accrual system, the debts of the deceased must be paid. Once all the debts of the deceased has been paid, then the residue of the deceased's estate can be distributed.

CASE STUDY 4:

Pamela is married in community of property to Joko and they have a 5 year old daughter, Phumeze. Pamela's aged mother lives with them. Pamela always worries that Phumeze and her mother will not be taken care of after her death but fails to write down her wishes of what Phumeze and her mother should inherit after her death. Pamela then suddenly dies without having prepared a will. Joko is left in charge of Pamela's estate and because Pamela did not have a will in which she provided for her child and her mother, Joko, puts Pamela's mother out of the house with no money to sustain her. Joko inherits half of Pamela's estate and Phumeze only receives a small portion of the residue of the estate. Pamela's mother inherits nothing.

5 minutes

[illegible]

Below is a short excerpt taken from the Intestate Succession Act , which sets out how an intestate estate will devolve:

1. If after the commencement of this Act a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and -
 - (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;
 - (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;
 - (c) is survived by a spouse as well as a descendant -
 - (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the *Gazette*, whichever is the greater; and
 - (j) such descendant shall inherit the residue (if any) of the intestate estate;
 - (d) is not survived by a spouse or descendant, but is survived -
 - (i) by both his parents, his parents shall inherit the intestate estate in equal shares; or
 - (j) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving spouse shall inherit the intestate estate; or
 - (e) is not survived by a spouse or descendant or parent, but is survived -
 - (i) by -

descendants of his deceased mother who are related to the deceased through her only, as well as by descendants of the deceased father who are related to the deceased through him only; or

descendants of his deceased parents who are related to the deceased through both such parents; or

any descendants mentioned in subparagraph (aa), as well as by any of the descendants mentioned in subparagraph (bb),

AND SO ON.....

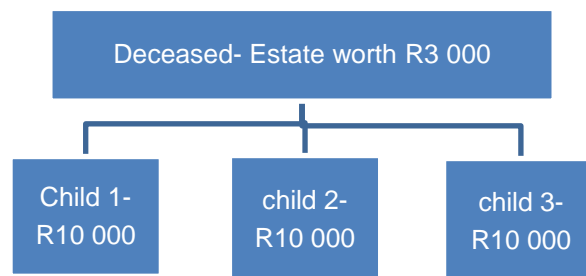
The abovementioned excerpt is rather complex to understand, and therefore the following examples can be of use in simplifying the division of an estate according to the law of intestate succession:

1. *If the deceased was married but had no children-*

- The surviving spouse will inherit everything
- In the case where the deceased was a husband in more than one customary union, the surviving spouses will inherit the estate in equal shares.

2. *If the deceased was unmarried but is survived by children-*

- The children will inherit equally
- See illustration below:



3. *If the deceased dies without a spouse or children-*

- The estate will be divided equally amongst the surviving parents of the deceased
- If only one of the deceased parents is alive the half share of the deceased parent will devolve upon the deceased's parents children or grandchildren. If such deceased parent has no children or grandchildren, the surviving parent will inherit the entire estate.



4. If the deceased is survived by a spouse and children-

- Both the spouse and the children will inherit
- A child's share will be calculated as follows:
 - You divide the value of the estate by the number of children of the deceased, plus one (the surviving spouse).
 - In terms of law, the spouse will receive R125 000 or a child's share, whichever is the higher amount
 - Therefore, if the residue of the estate is R125 000.00 or less, the spouse will inherit the entire estate

Calculation of the child's share:

First subtract a spouse's half share in the estate:

R600 000- R300 000
(spouses half share of the estate)= R300 000

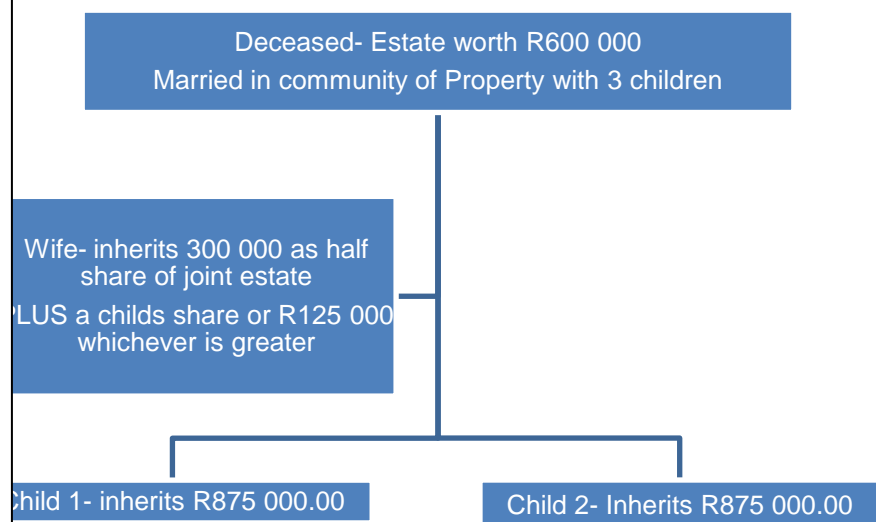
THEN:

R300 000 divided by 3 (2 children + spouse) = R100 000

Wife therefore inherits R125 000 (greater than R100 000)

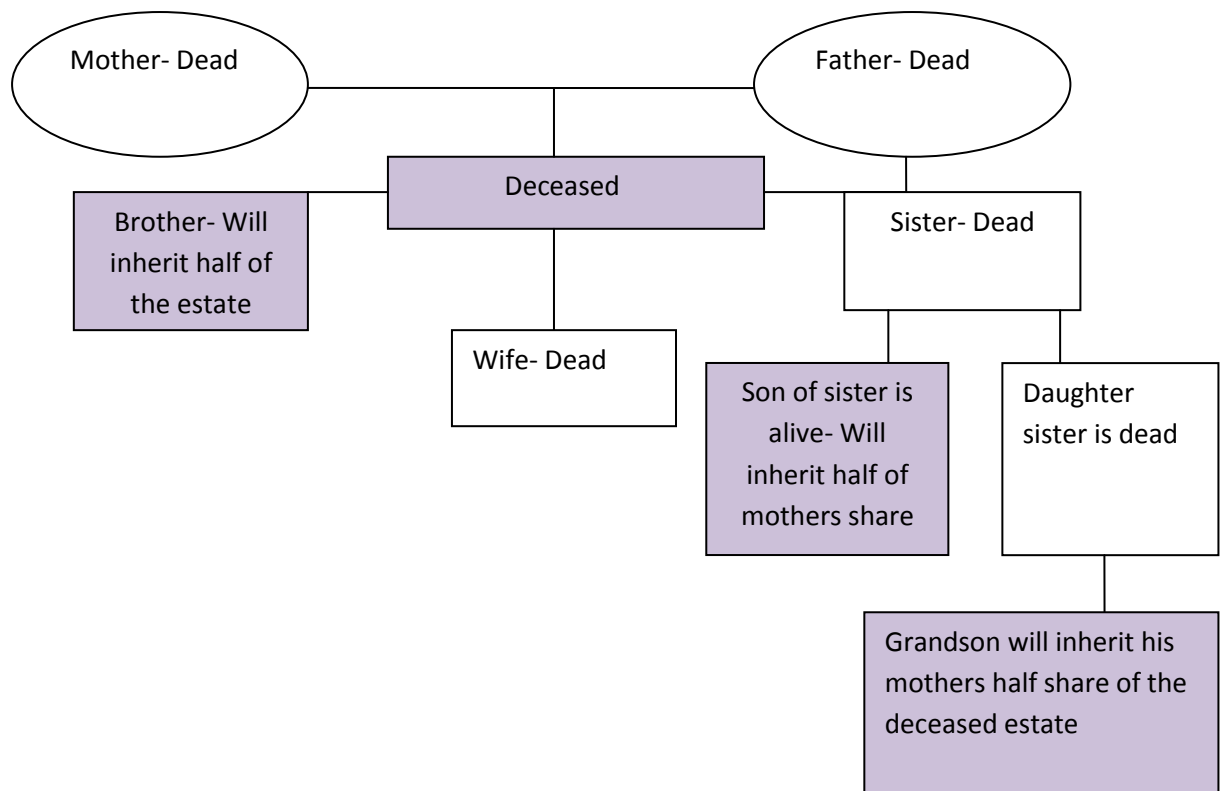
Therefore, a child will receive:

R300 000 – R125 000
(Spouses share) = R175 000 divided by 2 (the children) = R875 000 per child



5. *If the deceased dies and has no surviving spouse, children or parents-*

- The estate will be divided equally amongst the deceased siblings
- If one of the siblings predeceases the deceased, that sibling's share will devolve upon his/her children or grandchildren, or if the deceased sibling has no children or grandchildren, his/her share will be divided equally amongst the surviving siblings



6. *If the deceased does not have a spouse, children, parents or siblings-*

- The closest blood relative of the deceased will inherit.
- The closest blood relations are usually uncles, aunt, cousins

7. *If the deceased is not survived by any relative-*

- The estate will devolve upon the state- ie, the state will inherit the deceased's estate

8. *Adopted Children?*

- Although an adopted child can inherit from his/her adoptive parents or their blood relative, an adopted child cannot inherit from his/her biological parents or their blood relatives.
- The same applies to the biological parents, who cannot inherit from such child. The only manner in which such persons can inherit is in terms of a will

NOTE:

All the children of a deceased person is entitled to inherit. It makes no difference whether they were born from a civil marriage, customary marriage, were adopted or born out of wedlock.

This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Let's now engage in a physical exercise which can help illustrate how the estate of a deceased person can be devolved where they have died without a will:

EXERCISE 3:

TOOLS REQUIRED:

People



Chairs



Time: 15-20min



The Scene:

Meet the Khosa and Gumede Family- Mr & Mrs Khosahave two children: Harry & Sally. Mrs Khosa's parents, Mr & Mrs Gideon Gumede are alive and well. Mrs Khosa has an older brother called John Gumede.

You will now act out the following scenarios to show how an intestate estate can be divided:

Scenario A:

Mr Khosa, a wealthy businessman lives a very stressful and unhealthy lifestyle. He is diagnosed with cholesterol, but refuses to change his eating habits. One day during a very stressful meeting at work, Mr Khosa suddenly dies of a heart attack. Mr Khosa never prepared a will. Who will inherit from Mr Khosa?

Scenario B:

After the death of her husband, Mrs Khosa never remarries and enjoys her days watching her children grow old. However, one day on their way home from school, both Mrs Khosa's children die in a motor vehicle accident. Neither of her children had children or were married and neither of them had wills. However, they both had money which they inherited from their father's estate. Who will inherit the children's' estate?

Scenario C:

A couple of years after her husband and children's' death, Mrs Khosa's mother passes away from a long fight against TB. Mrs Khosa now only has her father and brother to rely on for support. Tragically Mrs Khosa also suffers a heart attack at the age of 50. She too did not prepare a will. Who will inherit from Mrs Khosa's estate?

NOTE: One of the participants can draw the lines of inheritance on a flipchart as a final illustration and consideration.

CASE STUDY 5:***Example of the spouse & child's share in the event of a monogamous marriage:***

John and Mary were married in community of property. John dies and leaves a joint estate worth R600 000 after payments of debts. He also left behind a wife and two children. Mary has to receive her half share before distribution can occur. R600 000 divided into two is R300 000. Mary will firstly receive R300 000 under matrimonial property law. Mary and the children will then share the remaining R300 000.

A child's share has to be calculated first. R300 000 divided into three (Mary and two children) is R100 000. Because the amount is lower than R125 000, Mary will receive R125 000 and the children will share the rest of the money. In the end, Mary inherits R125 000, and also receives the R300 000 by virtue of the marriage in community of property.

The children will each receive R87500.

If any of the deceased's children have died and have left children of their own (for example, grandchildren of John), the children will take the place of their deceased parent and inherit his or her share. They will then divide the share that would otherwise have gone to their deceased parent equally between them.

CASE STUDY 6:***Example of the spousal & child's share in the event of a polygamous marriage:***

Let's say the value of the intestate estate is R1 000 000. The deceased is survived by two spouses and three children. A child's share amounts to R200 000 (being R1 000 000 divided by five: the three children and the two spouses). The child's share is greater than R125 000. Therefore each spouse will inherit R200 000 and each child will inherit R200 000 (R1 000 000 less R400 000 to the spouses, divided by three).

Who is a Spouse for Purposes of Intestate Succession?

We live in a country of great diversity and often in different cultures the way in which we acknowledge our partnerships as well as our marriage union varies in many ways. Often partners may live together for many years without formalising their partnership or union, and more often the legal requirement for being regarded as someone's lawful spouse is often not met, resulting in much difficulties when one partner dies and the other partner is excluded from inheriting in the absence of a valid will. In order for us to understand when a partner will be entitled to inherit a spousal benefit, we will now look at the various ways in which you can be identified as a lawful spouse for the purpose of inheriting in terms of the law of intestate succession.

Civil Union's

As starting point it can be said that any party to a valid marriage in terms of the Marriage Act, 25 of 1961 (a civil marriage) is regarded as a spouse for purposes of intestate succession. A civil marriage can be in or out of community of property.

A civil union is defined in the Civil Unions Act No 17 of 2006, as:

"The voluntary union of two persons who are both 18 years of age or older, which is solemnized and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act..."

Customary Union's

A party to a customary marriage which is recognised in terms of section 2 of the Recognition of Customary Marriages Act, 120 of 1998 is also a spouse for intestate succession purposes. [Customary law and its effect on intestate succession will be dealt with in more detail later on in this Chapter]. These marriages include:

- customary marriages which were validly concluded before 15 November 2000, and which still existed on 15 November 2000, as well as;
- Marriages concluded after 15 November 2000 and in terms of the Recognition of Customary Marriages Act 120 of 1998. These marriages are deemed to be in community of property unless an antenuptial contract was entered into

Section 7(2) of the
Recognition of Customary
Marriages Act 120 of 1998

Section 3(1) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009, which came into operation on 20 September 2010, made provision for a further group of women who can now benefit as spouses for intestate succession purposes. They are:

- the seed-bearing woman in terms of Customary Law.
- Section 2(2)(b) and (c) of the Act describes these woman as follows:

“(b) a woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse’s house...; (c) if the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased’s house..”

It should be remembered that often couples get married in terms of customary traditions but they have no written proof or record of such customary union. Often when the man or woman dies, they are unable to provide proof to the Master of the High Court that they were married to the deceased and they are unable to benefit/inherit from the deceased’s estate.

How can spouses married in terms of customary law overcome this problem?

Proof in the form of a certificate of registration is required when proving a marriage relationship existed with the deceased.

It is therefore advisable that when a couple marries according to customary traditions without also entering into a civil union, then the marriage must be registered. An application for a registration certificate can be made at the Department of Home Affairs.

Section 4 (5)(b) of the Recognition of Customary Marriages Act 120 of 1998

The Recognition of Customary Marriages Act sets out the requirements for a valid customary marriage entered into after 15 November 2000 (see Annexure S for a copy of the Act). If these requirements are met, a certificate of registration will be issued:

1. Both parties must be over the age of 18 years;
2. Both must have consented to be married under customary law;
3. The marriage must have been negotiated and entered into in accordance with customary traditions;
4. If either of the parties is a minor, both his/her parents or legal guardian must consent to the marriage
5. The parties must not be prohibited from getting married by any customary law eg being blood relatives;

NOTE: **A customary marriage does not need to be registered. However, a certificate of registration is prima facie (written) proof of the existence of the marriage, especially when the family of the husband deny the existence of a marriage, making it difficult for a woman to prove she is entitled to inherit from her deceased husband's estate.**

CASE STUDY 7:

Kaya and Thombi were married according to African Traditions. Although Kaya's family did not approve of Thombi, the couple loved each other and together they built a beautiful home, acquired expensive possessions and Thombi was able to stay at home while Kaya provided for her. When Kaya died without leaving a will, Kaya's father demanded that Thombi leave the house. Thombi went to the Masters Office to advise the Master that she was Kaya's wife and was therefore entitled to inherit her husband's entire estate as they had no children. When the Master asked for proof of marriage, she was unable to furnish the Master with proof her marriage and Kaya's family maliciously denied that the couple were married in terms of customary traditions. Due to her failure to register her customary marriage, Thombi had to approach the Court in terms of section 4 (7) for an Order verifying her marriage.

Hindu & Muslim Marriages

Persons married in terms of Muslim and Hindu religious rites are also regarded as spouses for purposes of intestate succession and are entitled to inherit from their deceased partner in terms of the Intestate Succession Act. Marriages in terms of Muslim and Hindu religious rites are generally regarded as being out of community of property.

Important Judgments dealing with the muslim/hindu marriages and succession:

An important Judgment on this issue of the rights of Muslim woman to inherit, was the case of **Daniels v Campbell NO & Others 2004 (5) SA 331 (CC)**:

- the court recognised the woman in a monogamous Muslim marriage as a “spouse” for purposes of intestate succession and the Maintenance of Surviving Spouse Act, 27 of 1990.

In a further judgment of **Khan v Khan 2005 (2) SA 272 (T)**, the court held that:

- a partner in a polygamous muslim marriage was entitled to maintenance in terms of the Maintenance Act 99 of 1998
- The continued exclusion of the widows of polygamous Muslim marriages from being able to claim benefits provided for in law, unfairly discriminates against Muslim woman and is in conflict with the provisions of section 9 of the Constitution

Permanent Same Sex Partnerships

The Civil Union Act 17 of 2006 provides that partners in a registered permanent same-sex life partnership are regarded as “spouses” for intestate succession purposes, provided that the union has been formalised in accordance with the Civil Union Act.

This means that if you have entered into a valid civil union, the partners to that union could institute claim maintenance against their deceased partners estate in terms of the Maintenance of Surviving Spouses Act.

If however a couple to a same sex permanent partnership have not formalised their union in accordance with the Civil Union Act, they are not defined as a spouse and cannot qualify for spousal benefits upon the death of either of the partners.

5.4 CUSTOMARY LAW AND INTESTATE SUCCESSION:

Look at the following scenarios and then in groups of 2-3, discuss your opinion of the problem faced below as well as the comments which follow:

- [illegible]

Customary Law and the Primogeniture rule:

Customary Law and Succession is primarily based on the principle of primogeniture, which means that only the male line is entitled to inherit. For example, if the deceased father is survived by a wife, daughter and an older son, then the son would inherit everything. The son will usually take over the household when the head of the house dies, and if he wanted to, he could remove any customary wives or children of such wives from the marital home.

Constitutionality of the Primogeniture Rule:

However, in light of our Constitutional principles and our right to equality, the traditional customary law of succession unfairly discriminates against woman and children by excluding them from their right to inherit. This customary tradition has however been successfully challenged against our Constitutional rights, with the result being that laws dealing with the administration of black estate which infringed on our basic human rights have been declared unconstitutional.

Definition:

Unconstitutional

Anything which is in conflict or contradicts the rights contained in the Constitution of the Republic of South Africa.

The Constitutional Court Judgment which made such a far reaching impact on the administration of black estates, is *Bhe and Others vs Magistrates Khayelitsha & Others 2005 (1) SA 580*.

NOTES:

The Bhe Judgment can be summarised as follows:

This case involved two young girls, aged nine and two who with the assistance of their mother, challenged the customary law that only the eldest male descendant of the deceased stood to inherit despite there being female descendants as well.

The two issues which the Court had to deal with was the constitutional validity of section 23 of the Black Administration of Deceased Estates Act, 38 of 1927, as well as the validity of the principles of primogeniture in the context of customary law of succession.

The facts of this case can be briefly summarised as follows:

Two girls has been living in an informal settlement Khayelitsha with both their parents until their father's death. Even though their parents had been living together for 12(twelve) years, they never got legally married. While the deceased was alive he had obtained a state subsidy which he used to purchase the land on which they lived as well as buy materials to build a house. Up until his death, the children and their mother lived with the deceased in the house and they he supported them. Upon the death of the deceased, his estate consisted of the informal shelter, some moveable items and building materials that the deceased and the children's mother had acquired jointly. The deceases did not have a will and therefore died intestate.

In accordance with section 23 of the Black Administration Act, the father of the deceased, who lived in the Eastern Cape and nowhere near Cape Town, was appointed as Executor of the deceased estate.

In accordance with customary laws of succession, the grandfather of the two girls made it clear that they could not inherit from the deceased's estate and furthermore he demanded that they vacate the shelter as he intended on selling it. In terms of customary law, the house of the deceased father would devolve upon the deceased's eldest male relative, which in this case, was the father of the deceased.

The mother of the children then brought an Application in the High Court on behalf of her two minor children, to seek an order preventing the grandfather from selling the house. They also challenge the appointment of the grandfather as representative of the deceased's estate.

The Court found that the principles of primogeniture, particularly the provisions of the Black Administration Act had to measured against the principles contained in our Constitution, namely our right to dignity an equality, and the rights of children. The court found that since the two minor children were the only descendants of the deceased, that it would be just and equitable that the deceased's estate devolve in terms of the Intestate Succession Act. It found that the principles of customary law discriminated unfairly against females and as a result the tow children of the deceased were declared the deceased sole heirs and were given the right to inherit equally.

EXERCISE 5: MINI MOOT

Procedure:

For this exercise, the class needs to consider the Bhe Judgment, and decide whether they are *in favour* of the Bhe Judgment or *against* it, or undecided. The group must then divide themselves into three groups. One group will consist of all those learner's who are in favour of the judgment (the supporters), the second group will consist of all those against the Bhe Judgment (the opposers), and the third group will consist of all those who are undecided.(the deciders) [2 min]

Once three groups have been formed, the supporting and opposing group will have 5 minutes in which to prepare an argument supporting the reasons for their opinion. [5 min]

The supporters and opposers will then present their arguments to the deciders, who in turn are allowed to put questions to both groups. Each arguing group will also then be given one chance to rebut the argument of the other group. [10 min]

Once both groups have presented arguments as well as rebuttal, the deciders will be given 2 minutes to vote on the group they wish to join. The group with the most votes wins their case.



Effect of the Bhe Judgment:

All deceased estates are now distributed in terms of the Intestate Succession Act and administered in terms of the Administration of Estates Act (Act 66 of 1965, as amended). This means that the beneficiaries in order of reference are: the spouse of the deceased; the descendants of the deceased; the parents of the deceased (only if the deceased died without a surviving spouse or descendants); and the siblings of the deceased (only if one or both parents are predeceased). The Intestate Succession Act should be read in such a way that it could accommodate cases where the deceased was a husband in a polygamous customary union. It is important that all South Africans be made aware of these changes, so that they can plan their estates accordingly.

The Chief Master of the High Court has established a helpline where more information can be obtained. The number of this helpline is 012 315 1880.

Intestate Succession and its effect on Children:

It is evident from previous discussions and exercises that children are often left at the fate of others when a parent or parents pass away. Often those left in charge of the deceased's minor children do not care about the children resulting in children being neglected or denied their inheritance.

Chapter 3 clearly identified the importance of planning for our death, particularly to ensure that our children are provided for after our death. It is always difficult when a child is left with no parent/s and the parent/s have not indicated what their wishes were for the care of the child after their death. This often creates difficult situations especially if no financial provisions have been made for the child/ren.

When parents die without a will and have left behind minor children, the Court will need to appoint a Guardian for the children. If the other biological parent is still alive the Court will consider whether it is in the best interests of the child to reside with the biological parent or a Court appointed Guardian.

It is therefore important that you think of your child/ren's future when you are still alive. This may include:

- making provisions for them in a will
- taking out policies for their education
- Nominating them as beneficiaries on life insurance policies or Pension Funds
- appointing a suitable guardian for them in your will

The formal procedure for appointing a Guardian where no formal provisions have been made for one, will be addressed more fully in Chapter 8 of this manual.

NOTES:

GROUP DISCUSSION 4:

In groups of 2-3, discuss your views on the following scenarios:

1. When a child who is raised in a single parent home loses that parent, the Court should automatically award care and control to the biological parent of that child.
2. Children whose parents don't provide for them in wills, are often ill treated and neglected by the persons left in charge of them.
3. Children whose parent/s have died intestate are often cheated out of their inheritance by family members or even the surviving parent

You will need:

- ✓ Small Groups
- ✓ Paper and Pens



Time:
15min



NOTES:

EVALUATION EXERCISE:

1. Section 2 of the Wills Act set out certain legal requirements which must be fulfilled for a will to be valid. What are these requirements?

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2. Consider the following scenario and answer the questions that follow:

Peter dies without a will. He is survived by his wife Johanna, and his two children. Peter's first born son, Mark died 2 years before him. Mark was survived by his daughter, Anna. After the payment of all Peter's debts, Peter's estate is worth R600 000. Peter and Johanna were married in community of property.

- 2.1 What law will regulate the distribution of Peter's estate? (1)

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- 2.2 Who will be the beneficiaries of Peter's estate? Motivate your answer.(5)

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2.3 *How much will Johanna inherit? Show your calculations. (5)*

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2.4 *How much will each of the remaining beneficiaries inherit? Show your calculations.(5)*

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John is adopted by Joseph and Mary. John's biological parents are Anne and Douglas. Anne and Douglas have a daughter, Sophie, who was raised by both Anne and Douglas. Anne dies intestate.

2.5 *Does John qualify as a beneficiary of Anne's estate? Motivate your answer (2)*

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2.6 *Who are the beneficiaries of Anne's estate? (2)*

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3. Answer True or False

3.1 *An illegitimate child can inherit from his/her parents estate*

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3.2 *An adopted child can inherit from his biological parent's estate*

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3.3 *A 13 year old child can sign as a witness to a will*

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3.4 *The person who drafts your will can also inherit in terms of your will*

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3.5 *If you die without a will, your estate will be administered according to the laws of intestate succession.*

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3.6 *In customary law, intestate succession is based on the principle of Primogeniture*

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4. What effect has the *Bhe* Judgment had on intestate succession and customary law principles?

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CHAPTER 6

THE ADMINISTRATION OF A DECEASED ESTATE

OUTCOMES:

- ✚ To have a general understanding on how an estate should be administered
- ✚ To know the various way in which an Executor/Representative can be appointed
- ✚ To understand the primary role and duties of an Executor /Representative when administering the deceased estate
- ✚ To understand the role and function of the Master of the High Court during the administration process

6.1 INTRODUCTION

We have now discussed the aspects of planning the burial of the deceased, as well as some preliminary legal steps which need to be taken, such as obtaining a death notice and a death certificate. It is also important to discuss what happens after the deceased has been buried and what needs to happen to the belongings of the deceased, as well as who will be in charge of taking control of the estate of the deceased. This aspect is known as *the administration of the deceased estate*, and the person appointed to be in charge of administering the estate is known as the *Executor/trix* or *Representative* of the deceased estate.

The primary function of the executor or Master's Representative is to take control of the deceased's assets, to pay all creditors and administration costs, and then to transfer the balance of the estate to the heirs of the deceased. Where the deceased left a valid will, the heirs are usually determined in the will, failing which the heirs are determined in accordance with the rules of the Intestate Succession Act.

The whole administration process, from appointment of the executor until the finalization of the estate, takes place under the supervision of the Master of the High Court.

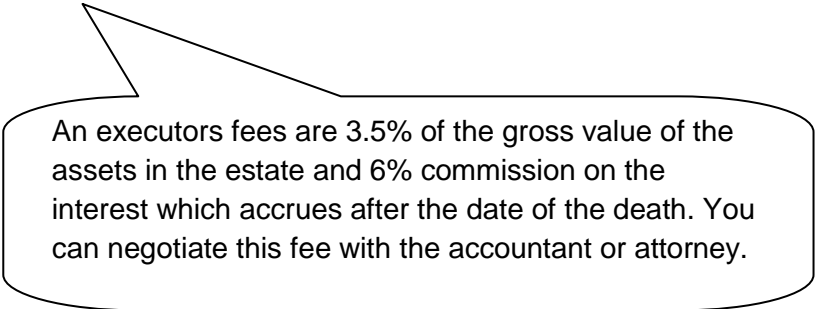
6.2 APPOINTMENT OF AN EXECUTOR/ REPRESENTATIVE OF THE ESTATE

Nominated Executor/Representative:

As discussed previously, we all are entitled to execute a will setting out our final wishes and instructions. If the deceased left a valid, it may be set out in the will who the deceased nominated to administer his estate. It could be that an individual or even a financial institution has been appointed in the will to act as the executor of the deceased estate.

If however no executor has been nominated in terms of the will, or perhaps if the appointed executor cannot perform his/her task or the person dies intestate, then the Master of the High Court will appoint an executor, known as an *Executor Dative*. The following should be noted:

1. Those who wish to be considered as executor, need to advise the Master of the High Court of this, and they will need to convince the Master as to why they should be appointed. An Affidavit in the form of Annexure N must be submitted to the Master when applying for consideration.
2. The Master will generally appoint someone who stands to inherit from the estate, and usually the closest beneficiary will be considered. E.g. a spouse, child, parent
3. Once nominations are submitted, all the beneficiaries must sign a form consenting to the appointment of the executor- if there is a dispute- the Master may appoint joint executors.
4. you have been appointed as an executor and you are uncertain of your duties and responsibilities, you can approach a professional, such as an attorney or an accountant to assist you in the administration of the deceased estate



An executor's fees are 3.5% of the gross value of the assets in the estate and 6% commission on the interest which accrues after the date of the death. You can negotiate this fee with the accountant or attorney.

NOTE: If the estate of the deceased is less than R125 000.00, it is not necessary to appoint an executor, and the Master will appoint a *Representative* or otherwise known as an *administrator* of the estate

Such appointment is made in terms of section 18 (3) of the Intestate Succession Act

LETS REFRESH:

Choose the correct answer:

A person appointed to take control of the administration of a deceased estate is known as a:

- a) A Trustee
- b) An executor
- c) A beneficiary

The process of administering the deceased estate is supervised by:

- a) The High Court
- b) The spouse of the deceased
- c) The Master of the High Court

The administration of a deceased estate involves:

- a) taking control of the deceased's assets, paying all creditors and administration costs, and then transferring the balance of the estate to the heirs of the deceased
- b) Making sure that the eldest male relative inherits everything
- c) None of the above

If you are unable to administer the estate, you can appoint the following person to assist you:

- a) The Magistrate
- b) An Attorney
- c) A community leader

6.3 DUTIES & RESPONSIBILITIES OF THE EXECUTOR/TRIX /ADMINISTRATOR

We will now discuss the basic duties of the Executor, bearing in mind that the following process will usually only apply to straightforward and very basic estates. The administration of certain estates can get complicated or are faced with unique circumstances. Where you are faced with such an estate, it is best to seek legal advice or assistance from a professional. The following is a basic guide as to what the duties of an executor is:

Find a Will if none has been found

- The Executor needs to immediately find out if the deceased left will, and if so, whether it is a valid will.

Establish who the beneficiaries are

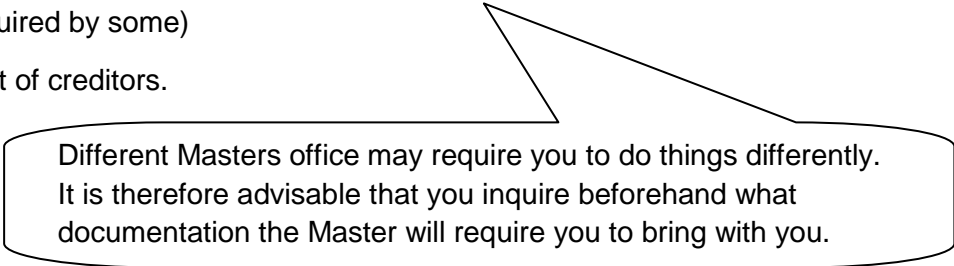
- Executor needs to read will and establish who the beneficiaries are. If there is no valid will, the executor needs to apply the laws of intestate succession to determine who the heirs of the estate are.

List the assets and liabilities of the deceased

- The executor needs to gather all relevant documentation such as bank account details, title deeds, insurance policies, birth certificates, identity documents and any other document relevant to the financial affairs of the deceased.
- If the deceased had beneficiaries named in a life insurance policy, then the proceeds of that policy can be paid directly to the beneficiaries without recording it in the estate/winding up the estate.
- He/she needs to establish what the assets are and what liabilities the deceased had. This will be recorded on an inventory form which can be obtained from the Master of the High Court's office or on the Home Affairs website. See annexure Form J243. This inventory must clearly indicate whether the estate's total assets or less or more than R125 000.00.
 - If it is less than R125 000.00 the executor can proceed straight to winding up the estate in an informal manner, without the need to advertise the estate or prepare an Liquid and Distribution Account
- The executor must also sign an 'acceptance of trust' form, which can be collected from the Masters office. See annexure L. This form must be signed and submitted in duplicate.

Getting formally appointed by the Master

- The executor needs to apply to the Master of the High Court to be formally appointed to administer the estate of the deceased person. This process can take very long, depending on the Province in which you are applying. When you apply to be formally appointed in terms of a will, you need to go to the Masters office with the following:
 - ✓ The original will, (it is advisable to get a receipt when you hand it over).
 - ✓ The death notice
 - ✓ An inventory
 - ✓ A certified copy of the death certificate
 - ✓ An acceptance of trust form, in duplicate.
 - ✓ A next of kin affidavit-
 - ✓ An affidavit that the estate has not been reported to another Master's office. (required by some)
 - ✓ A list of creditors.



Different Masters office may require you to do things differently. It is therefore advisable that you inquire beforehand what documentation the Master will require you to bring with you.

- The Master will issues Letters of Executorship (if the estate is greater than R125 000.00) or Letters of Authority (if the estate is less than R125 000.00) to the person authorised to deal with the administration and winding up of the estate.

NOTE: These Letters of Executorship/Authority are important as they are proof of your authority to collect, pay and/or transfer the assets and liabilities of the deceased. Certified copies are required by most institutions such as Banks and insurance companies to prove that the assets held with them are being paid to an authorised person

Duties of the Executor Once Appointed by the Master of the High Court:

As soon as an executor is appointed, he or she must:

- place an advertisement in the Government Gazette and in a local newspaper circulating in the district where the deceased resided, calling on all creditors of the deceased to lodge their claims against the estate within 30 days as from the date of the advertisement. This advertisement is referred to as *the section 29 advertisement*. See Annexure T- Form J193
- At the same time the executor must take steps to identify all the deceased's assets and to take control of such assets. The executor must have the assets valued.
- The executor must open a banking account in the name of the estate and must deposit all funds received by him or her into such account. Any payments made by the executor must be made out of the estate banking account.
- The executor must notify institutions with which the deceased had any dealings, such as banks, Pension Department, Insurance Companies, SARS (South African Revenue Services) etc. of the death of the deceased. In the case of SARS the executor must provide the estate number and any details required by SARS to determine the deceased's final tax liability to SARS.
- Should there not be sufficient cash in the estate to pay all the creditors and administration costs, then the executor must, after consultation with the heirs, sell sufficient assets to cover the cash shortfall. Should their heirs not want to sell any assets, they can undertake to pay the cash shortfall into the estate themselves.
- Within six months after being appointed as executor, the executor must compile and lodge with the Master of the High Court an account of his or her administration known as a Liquidation and Distribution Account. This account reflects all the deceased's assets and liabilities and how the balance for distribution is to be distributed to the heirs. Any income and expenditure received after date of death up until the account is lodged with the Master is also accounted for in the account. The account must be examined by personnel of the Master to ensure that it is correct in all aspects.
- After the Master has examined and approved the account, it must be advertised to lie for inspection for 21 days at the Master's Office, and if the deceased resided in a place other than where there is a Master's Office, also at the Magistrate's Office in that area. During this time any interested person may inspect the account and if he or she has any objection to anything in the account he or she may lodge the objection with the Master of the High Court during the 21 days.

- If the above process takes place without any complications, it takes approximately nine months to finalise an estate. However, if there are complications, it can sometimes take years to finalise an estate.

This image shows a single page of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

EXERCISE 6: [5 min] (self study)

In the previous Chapter we discussed the situation of the Linda and Tom. Assume that Tom has been selected by the family to be the Executor of Linda's estate. He is unsure of what needs to be done and comes to you for advice. Advise Tom on the following questions. You can write down your answers on the space provided.

1. Where does Tom need to go to appoint himself as Executor of Linda's estate and what forms will he need to complete?

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2. What documents must he take with him to be formally appointed as the Executor?

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3. Does Tom have to wind up the estate on his own? Give reasons for your answers.

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4. Does the proceeds of the life insurance policy have to be included in the winding up of the estate? If your answer is no, give a reason.

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5. Explain to Tom what will happen if Linda's estate is less than R125 000.00

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EVALUATION EXERCISE:

1. In what circumstances will the Master of the High Court issue: a) Letters of Executorship and, b) Letters of Authority?

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2. Who supervises the entire administration of a deceased estate?

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3. Answer True or False:

- 3.1 *If the deceased's estate is less than R125 000 in value then there is no need for the Master to appoint an Executor, and instead he will appoint a representative of the estate*

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- 3.2 *The proceeds of policies can be paid directly to the beneficiaries and need not be recorded in the liquidation and distribution account*

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- 3.3 *The duties of an Executor include: (a) establishing who the beneficiaries are (b) listing all the assets and liabilities of the deceased (c) ensuring that all the creditors and expenses of the deceased estate are paid.*








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CHAPTER 7

MAINTENANCE CLAIMS AGAINST THE ESTATE

OUTCOMES:

-  Know who can claim maintenance from a deceased's estate
-  Know when a claim for maintenance can be made by a spouse of the deceased
-  To identify the factors which the Master and/or Executor will take into account when approving a claim for maintenance
-  To know the role and functions of the Guardian Fund
-  To know how money is paid into the Guardians Fund
-  To know the process involved in lodging a claim against the Guardian Fund
-  To understand what happens to money held in the Guardians Fund

7.1 CLAIMS BY A SURVIVING SPOUSE

In Chapter 6, we discussed what constitutes a “spouse” for the purpose of claiming spousal benefits upon the death of either of the spouses.

The importance for this identification of the concept “spouse” is that when a person dies, their surviving spouse, is entitled to claim certain benefits such as:

- Maintenance in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (See Annexure U for an extract of the Act), irrespective of your marital regime;
- Half of the deceased Pension/Provident Fund if they were married in community of Property
- Half of the Joint estate if they were married in community of property
- The accrued value of the estate if you were married out of community of property with the inclusion of the accrual system

It is therefore important that you know which marital regime governs your marriage, as it will determine what you are entitled to claim in the event of your spouse's death, especially where a spouse has drawn up a will in which he/she has excluded their surviving spouse from inheriting.

Maintenance Claims by Surviving Spouses

If you are married and your spouse dies, you are entitled to lodge a claim against your deceased spouse's estate for maintenance. This also applies to a customary law wife.

This maintenance is defined as "reasonable maintenance needs until death or remarriage insofar as he is not able to provide for his own means and earnings"

In essence, this means that if you are financially unable to provide for your own basic needs, you can claim maintenance from the estate

Section 2 (1) of the Maintenance of Surviving Spouses Act

of your spouse. However, this maintenance will only be paid to you up until such time as you die or remarry.



How much can a surviving spouse claim?

When determining what the reasonable maintenance needs of a surviving spouse is, the following factors will be taken into account:

- a) What is the **value of the estate which is left over** for distribution to heirs and legatees
- b) The **existing and expected means** of the surviving spouse
- c) **The earning capacity** of the surviving spouse- in other words- whether he/she is capable of earning an income and how much they could earn
- d) **The financial needs and obligations** of the surviving spouse- in other words- what are her necessary expenses and what other obligations does he/she have?
- e) **The duration of the marriage**
- f) **The standard of living during the marriage**- what type of lifestyle did the surviving spouse have whilst their spouse was alive? Expensive lifestyle or perhaps middle-class?
- g) **The age of the surviving spouse** at the death of their spouse

CASE STUDY 8:

Monica and David were married for 30 years and together they lived a life of luxury. Monica was a house wife, who spent her days at beauty salons and social clubs. She had never worked since she married David at the age of 19. David was a big shot Doctor who provided for Monica's every need. Tragically on the night of their 30th wedding anniversary, David died in a car accident. David was 50 years old and Monica was 49 years old. Monica was deeply hurt when she found out that David had left his entire estate to his mother in his will, and because they were married out of community of property without the accrual, Monica was not entitled to a half share in the estate.

Monica approached her attorney as she did not know how she would survive without David's financial support. Her attorney lodged a claim against the estate of late David. The following information was given to the Master of the High Court for consideration:

1. Monica stood to inherit nothing from David's estate and therefore had to start her life over
2. As Monica had never worked she had no working experience or any formal educational qualifications and therefore it would be difficult for her to find a job, especially since she 49 years old and 11 years away from retirement age
3. Monica lived an expensive lifestyle and grew use to grand and luxurious things
4. Monica was married to David for 30 years, during which she maintained his home and duly served her duties as a house wife
5. Monica had opened clothing accounts and credit cards in her own name and which accounts needed to be paid (David had always paid them)
6. After payment of all David's debts and creditors, the residue of his estate amounted to 5million Rand.

Upon considering the above factors, the Master awarded Monica maintenance in the amount of R20 000.00 (twenty thousand rands) per month, until such time as she died or remarried or became self supporting, whichever occurred first.



What if I am not the only person claiming maintenance? Whose claim will be given preference?

A spouse's claim for maintenance will have the same preference as other claims against the estate. So even if there is a claim by a minor child for maintenance, the child's claim will not take preference over the spouse's claim.

NOTE: If there are not sufficient funds for both a child's claim and spouse's claim to be paid, then the Master may reduce those claims proportionally

7.2 MAINTENANCE CLAIMS FOR MINOR CHILDREN

The same way in which a spouse may exclude the other spouse from his/her will, so it happens that a parent/s may exclude some or all of their children from their wills. And the same way in which a surviving spouse can lodge a claim for maintenance, so the surviving children of the deceased, whether born from a marriage or out of wedlock or even adopted children, can lodge a claim for maintenance against the estate of their deceased parent.

It is important to note that any monetary inheritance for a minor child, will, unless directed otherwise, be paid into the Guardian Fund of the Master of the High Court. Any money needed for the maintenance or day to day needs of the child will be claimed from the Guardian Fund by the guardian or surviving parent of the minor child.

A claim for maintenance for a child is lodged by giving Notice in writing to the Master and the Executor of the estate of the child's need for maintenance. Should the claim be rejected, then the child through his/her Guardian, can approach the High Court for an Order for Maintenance. Further discussion on claims from the Guardians Fund will be dealt with further in this Chapter.

In order to avoid unnecessary financial burdens and stress being placed on children and their caregivers after your death, it is vitally important that parents take steps whilst they are alive to protect their children's future. It is also important that you think carefully about how you want your child's money to be dealt with after your death, as leaving it in the control of the wrong person may result in your child's money being misused.



Duties of an Executor/Representative if deceased is survived by children

It is the Executors duties to find out if the deceased has any surviving children, who may stand to inherit in terms of either the will, or in terms of intestate succession.

If any of the deceased's children or heirs are minors, then the Executor has a duty to place the minor child's monies in the Guardians Fund, until such time as the child attains the age of 18. The person who is appointed as the Guardian of the child or who cares for the child, can then approach the Guardian Fund to claim money in order to cover any necessary expenses of the child. The role and function of the Guardian's Fund as well as how to claim funds from it, will be more fully discussed below.

LETS REFRESH!

Choose the correct answer:

When a person dies, the following persons can claim maintenance from his/her estate:

- a) Friends and cousins
- b) A spouse and children
- c) An employer or employee

The abovenamed persons can claim maintenance if they are:

- a) Employed and looking after themselves
- b) Financially unable to support themselves
- c) None of the above

If a person dies without a will and they are survived by minor children, the minors monetary inheritance will be:

- a) Paid directly to the surviving parent
- b) Paid into the Guardians Fund
- c) Paid directly to the child

7.3 WHAT IS A GUARDIAN'S FUND?

The Guardian's Fund is a fund created by the government to hold and administer the monies paid to the Master of the High Court on behalf of persons such as minors, missing or absent persons and people who are unable of managing their own affairs. The Fund therefore falls under the administration of the Master of the High Court.

In practice, the most common types of monies paid into the Guardians Fund, are as follows:

- Inheritances of minor heirs. This usually happens when a minor child inherits money in terms of the law of intestate succession or when he/she inherits money in a will and the will does not say what is to happen to the minor child's money up until he/she turns 18 years of age.
- Inheritances of major heirs who cannot be traced. It often happens that an heir to a will or even in terms of intestate succession cannot be found or his whereabouts are unknown. Where the Representative or Executor of the deceased estate cannot locate a major heir, then the inheritance will be paid into the Guardians Fund, until such time as the heir is traced.

DID YOU KNOW: On the website of the Master of the High Court there is a list of the names of beneficiaries from all over South Africa, whose money is being held in the Guardians Fund and which has not been claimed. SO if you suspect you may have inherited money from someone's estate, you can go and see if your name appears on the list of unclaimed beneficiaries.

7.4 HOW TO ESTABLISH IF THERE ARE FUNDS IN THE GUARDIAN FUND

How is Money paid into the Guardian Fund?

When the Master receives or accepts any money he/she must:

- ✓ open an account in the Guardian's Fund which must be in the name of the person to whom the money belongs or the estate of which that money forms part. If they do not know who the money must go to, they will open the account in the name of the estate from which it came.

DID YOU KNOW: The money in the Guardian's Fund is invested with the Public Investment Commission and audited annually.

What is the position with the payment of interest?

Interest is payable on amounts paid into the Guardian's Fund on behalf of:

- ✓ any minor,
- ✓ persons incapable of managing their own affairs,
- ✓ unborn heirs and persons having an interest in the moneys of a usufructuary, fiduciary or fideicommissary nature.

The interest is calculated on a monthly basis at a rate per annum determined from time to time by the Minister of Finance. The interest is compounded annually at 31 March. Interest is paid for a period from a month after receipt up to five years after it has become claimable, unless it is legally claimed before such expiration.

How to Claim maintenance from the Guardians Fund:

An account holder can claim maintenance from the Guardian's Fund. The Master is entitled to pay all accrued interest, as well as up to R100 000 from the invested capital for maintenance, such as:

- ✓ school and university fees,
- ✓ clothes, medical fees,
- ✓ boarding and lodging and any other needs that can be motivated.

Maintenance can be claimed by the guardian/executor/curator/person looking after the person of the account holder by way of an application on [form J341](#), (See Annexure V1) supported by quotations and accounts. Payments can be made directly to the service provider, like schools, universities and bookshops.

When can an account holder claim the invested money, and how?

A minor can claim the invested money, as well as the accrued interest on reaching the age of majority. However, a testator can stipulate another age when a beneficiary is entitled to the invested capital. Money can be claimed by the account holder when entitled by way of an application on [form J251](#), (See Annexure V2) supported by a certified copy of the account holder's identity document/passport/ marriage certificate/order of court.

In the case of usufructuaries/fideicommissaries, those entitled to the interest can claim the accrued interest on an annual basis after 31 March of each year by way of a written application giving full particulars of the instrument, which created the usufructuary/fideicommissary interest. The owner can claim the invested capital when entitled thereto (usually after the death of the usufructuary/fideicommissary) by way of an application on [form J251](#), supported by a certified copy of the account holder's identity document/passport.

What if the beneficiaries cannot be determined or traced?

In the case of untraced or undetermined beneficiaries, money can be claimed by the account holder when the account comes to his/her attention. In other words, the money will stay in the account at the Master's Office and when the beneficiary becomes aware that he has money in the Guardians Fund, he/she can go and apply for it. The application must be made on form J251, supported by a certified copy of the account holder's identity document/passport.

How do payments take place?

Money/interest/maintenance is paid by means of a crossed cheque to the payee personally, or by a deposit in the payee's banking account.

What happens with the money if not claimed in time?

After the lapse of a period of five years after the money has become claimable, the Master pays the unclaimed money to the Receiver of Revenue Payment Register. This does not mean that the owner of the money cannot claim the money from the Guardian's Fund. However, after the lapse of a period of 30 years after the money has become claimable, the money is forfeited to the state. Every year during September the Master advertises accounts that have been unclaimed in the Government Gazette. You can also log onto the website of the Master of the High Court to view any unclaimed accounts.

CAUTION: Often children are unaware that money has been paid into the Guardian Fund for them, Be aware of people who want to charge you for telling you that you have funds held in the Guardian Fund. You are not obligated to pay anyone for what is lawfully yours. Should you know of people doing this, they must be reported to the relevant authorities immediately, as this practise is unlawful

Guardian's Fund Contact Details In your Area:

Office of the Chief Master

Tel: 012 3151220

Fax: 012 3151901

Private Bag X81

Pretoria

0017

Bhisho

Cell: 083 491 2255

Tel: 040 639 2079/87

Fax: 040 639 2100

Private Bag X 0002

Mthatha

Tel: 047 532 3716

Fax: 047 532 2040

Private Bag X 5023

Mthatha, 5100

Port Elizabeth

Tel: 041 502 7407

Fax: 041 582 1497

No 29 Western Road

Private Bag X2

Centrahill

Port Elizabeth

6006

Durban

Cell: 082 337 3254

Tel: 031 306 0123

Fax: 031 306 0126

Tel: 031 306 5330

Private Bag X54325

Durban

4000

EVALUATION EXERCISE:

1.1 When will a surviving spouse be able to claim maintenance from a deceased spouse's estate?

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1.2 What factors will be taken into account when determining what will be reasonable maintenance for the surviving spouse?

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2. Who can claim money from the Guardians Fund and what do they need to do in order to claim such money? Explain the process.

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3. Answer True or False (If you answer False, give reasons for such answer):

3.1 *No interest is accrued on any money held in the Guardians Fund*

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3.2 *When claiming money from the Guardians Fund on behalf of a minor, you must submit quotations and accounts to prove why you need the money.*

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4. At what age can a beneficiary claim the invested money as well as interest from the Guardian Fund, on their own, and what do they need to do to claim such money.

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5. What happens to unclaimed money after (1) 5 years and (2) 30 years after the period for claiming it has lapsed?

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OVERNIGHT ASSIGNMENT- DYING AND SUCCESSION SHORT COURSE, 2012

Consider the scenario below and answer the questions put forward by Mrs Lilian Joba:

Mr Jock Joba and his wife Lilian have been married for 15 years and share 2 minor children. Their civil union was in community of property, and throughout the marriage they acquired many beautiful assets including a beautiful house in the village. Mr Joba is a very spiritual person and was admired by many in the community. He was always travelling with work and was often away from home for lengthy periods. One Sunday evening Mr Joba was involved in a serious motor vehicle accident on his way from church and was killed. He did however not have a Will.

Mrs Joba comes to see you the following morning and asks you the following questions:

1. I know that my Husband had a funeral policy, as I often saw post coming in from Avbob. What documents and/or information will I need to be able to claim the funeral benefits? (3 marks)
2. What other important documents should I get together which may be important to claim benefits or administer the estate? And please tell me why they could be important? (4 marks)
3. Doctor Shumba handed me a death Notice and said I must take this to Home Affairs. What is this Death Notice? (2 marks)
4. There is no Home Affairs in the village and the nearest town is 50km away. By when do I need to take the death notice to home affairs? (2 marks)
5. People are saying I must report the estate. Do I need to report the estate and where must I go to do this? (2 marks)
6. By when must I report the estate? (2 marks)
7. Who is responsible for arranging and paying for the funeral? (2 marks)
8. What is cremation? (1 mark)
9. What two important tips can you give me on planning this funeral and saving costs while doing it? (2 marks)

TOTAL MARKS: 20

RHODES UNIVERSITY LAW CLINIC- SOCIAL RESEARCH ASSIGNMENT NOVEMBER 2012

This questionnaire is being conducted by students enrolled for the accredited short course in Dying and Succession at Rhodes University. The purpose of this questionnaire is to learn more about people's attitude towards death as well as investigate the perception which various demographic groups have in respect of planning for death as well as dying itself.

The questionnaire will take about 3-5min to complete, and candidates are requested to answer all questions as truthfully as possible.

Please note that this questionnaire is confidential and no names will be used in the final research paper.

Your cooperation is greatly appreciated.

Please tick the appropriate box

**RACE: GENDER: AGE: FINANCIAL BRACKET HIGHEST
QUALIFICATION:**

Black		Male		<i>Please specify</i>	R0-R3000pm		Some Primary School	
							Some High School	
White		Female		<i>Your age in</i>	R4000-R5000pm		Matric / Grade 12	
Coloured				<i>the row</i>	R6000- R15000pm		Higher Certificate	
				<i>below:</i>			Diploma	
Indian					R15000 and up		Degree	
Foreigner							Postgraduate Degree	
Other							None of the above	

Please answer the questions that follow:

1. Do you have a Will?

1.1 Why do/don't you have a Will?

2. Do you have funeral policy?

2.1 What is your reason for having one/not having one?

3. If you die, who is going to take control of your financial affairs, and why?

4. Do you believe that only the eldest male relative/child should inherit from the father?
Give reasons for your answer

5. Are you comfortable talking about death? Give reason/s for your answer.

Thank you for your time!

TAKE HOME ASSIGNMENT

DUE DATE: 31 JANUARY 2013

PLEASE NOTE: This assignment counts towards 60% of the final mark and therefore it is compulsory that the assignment is completed and handed in on or before the said due date. The assignment consists of two (2) sections and both sections must be completed and submitted.

This assignment is to be completed and submitted to the RULC, for the attention of the project manager, on or before the abovementioned due date. This assignment, with the test written during the course, will form part of the competency assessment.

PART 1

You are to read the facts below then answer the question that follows:

FACTS:

Mr John Bana is a 32 year old male, who is married to Mrs Patty Bana by customary rights. They never had the marriage registered with Home Affairs. They share 3 children, born of the marriage and all three children are minors. Mr Bana never attended school and has never learnt to write. He has always signed document by making an "X".

Mr Bana owns a 2009, white Nissan Sentra 1.8 and a various other household furniture and personal belongings.

Mr Bana attends on your office and advises you that he is sick and wants you to assist him in drafting his last Will and Testament. He tells you that he wants to leave his car to his wife, Patty and an amount of R5000.00 in cash to his sister, Portia Bana, who is an adult. He also wants his wife to inherit the house that they live in. He wants the remainder of his estate to devolve upon his surviving children in equal shares. In other words, only those that are alive at the date of his death must inherit.

He also says that he doesn't want any inheritance forming part of any beneficiaries marital regime.

He further advises you that he wants his sister Portia to be the executrix of his estate and she must be exempted from furnishing security to the Master of the High Court. He advises that she can appoint someone else if she doesn't want to execute such duties or is unable to execute them.

1. Draft clients simple Will, adding in any other information or details you think is necessary. You can make up your own facts if necessary.

(30 marks)

PART 2:

You must further host a workshop in your community and during which you will educate participants on a specific topic relating to Dying and Succession. For some idea's you can consult the training manual and select a specific chapter, such as "The Drafting of Wills", or "Planning for Death" or perhaps even "Maintenance issues after Death".

As part of this assignment, you are to submit a written workshop plan which must cover the following relating to the workshop which you will be facilitating:

Part A- Impact Assessment

1. Who you are doing the workshop for and why?
2. How will the workshop benefit the area you live in?
3. Which part of the community will attend the workshop? In other words, who is your target market
4. How many people do you think will come?

Part B- Workshop Content

1. What will your topic be? In other words what is your focus area
2. Why have you chosen this topic?
3. What types of exercises will you be using. For example- role plays, group discussions etc
4. What materials will you be using during the workshop? E.g flipcharts, paper, pens, blackboards etc

Draft and attach the Outline of your Workshop to section 2 of assignment

Part C- Workshop Structure

1. How long will the workshop be? In other words, how many hours, days?
2. Where will you conduct the workshop and who will facilitate it (and co-facilitate if applicable)?
3. How are you going to prepare for this workshop?
4. How are you going to present the workshop?
5. What will the programme for the workshop look like? In other words, what will you be doing when?

Draft and attach the workshop programme to Section 2 of your assignment.

Part D- Reflection/Outcomes

1. Were the goals of your workshop met? Explain
2. How many people attended the workshop? **Please attach an attendance register to your assignment**
3. What was your general view of the workshop?
4. What aspects of your workshop do you feel need to be improved?

5. As a facilitator, how do you think you conducted the workshop and in what ways, if any, can you improve your facilitation skills? (Here you can look at whether you understood the topic and had sufficient knowledge to educate your community)

(70 marks)

MARKING GUIDELINE:

IMPACT ASSESSMENT (10)	Being able to link the target market to the topic selected and being able to identify the needs of the particular community in which the workshop is to be held.
CONTENT & STRUCTURE (40)	Student has shown an understanding of the relevant aspects of the topic selected and sets out what content will be focused on and why. The student must be able to indicate with sufficient particularity why they have chosen the specific topic, particularly its relevance to the target group. A well executed lesson plan which shows sufficient knowledge and understanding of the topic concerned. The student's workshop plans is set out in a logical and organised manner which flows and is able to meet the needs of the target audience. Students must also display an ability to select materials and exercises which are suitable for the selected topic and target group. Thought and careful consideration has been given to who will facilitate and in what manner.
REFLECTION (10)	Student is able to identify the strengths and weaknesses of his facilitation methods and styles and also is able to critically analyse their own knowledge of the topic chosen. Student must also be able to identify the relevance of the workshop and whether it was successful or not.
EFFORT & OVERALL PRESENTATION (10)	Student displays creativity and evidence of research and planning is evident from the assignment. The workshop plan is neat, colourful and is set out well, addressing all areas of the assignment.

**DEPARTMENT OF HOME AFFAIRS
REGISTRAR OF BIRTHS, MARRIAGES AND DEATHS
PRIVATE BAG X114
PRETORIA, 0001**

Dear Sir/Madam

RE: APPLICATION FOR NEW BIRTH CERTIFICATE

I refer to the above matter and kindly request that you furnish me with a new birth certificate for my minor daughter, STACEY-LEE SOAP, as the original was destroyed in a fire.

The particulars of my daughter are as follows:

NAME: Stacey-Lee Soap

DATE OF BIRTH: 30 June 2005

ID NUMBER: 300605 008 0086

MOTHERS NAME: Brenda Margie Soap (born Peters), Identity Number: XXX

FATHERS NAME & ID NO: Jimmy Ben Soap, Identity Number: XXX

In light of the above request, please find attached hereto certified copies of both parents Identity Document.

I look forward to receiving the new birth certificate.

Yours faithfully

Mrs Brenda Soap

Cell: 073 5 842126311233

55 Market Road

Grahamstown

6139

REGISTRAR OF DEEDS

CAPE TOWN/KING WILLIAMS TOWN ETC (WHICHEVER IS APPLICABLE)

PER FAX: XXXXXX

Dear Sir/Madam

RE: APPLICATION FOR COPY OF TITLE DEED

I/we refer to the above matter and kindly request that you furnish me/us with a copy of the title Deed in respect of the following immovable property, which is registered in my name/ my clients name:

ERF 556, RINI, DISTRICT OF ALBANY, EASTERN CAPE, also known as 55 Brink Street, Grahamstown.

Please furnish me/us with an invoice for the said copy and the banking details into which the payment for the copy can be paid. Once payment has been made we/I will send you proof of such payment.

I /we trust that you find the above in order and look forward to receiving your invoice.

Yours faithfully

Mrs Brenda Soap

55 Brink Road

Grahamstown

6139