WILLS, TESTAMENTS AND ESTATES IN NAMIBIA

Your questions answered

ACKNOWLEDGEMENT

The Namibia Institute for Democracy and the Law Society of Namibia wish to thank the Embassy of Finland for the financial support to the publishing of this booklet.

The NID wishes to thank the following members of the Law Society who contributed to the contents of this booklet:

E.V. Bok	C. Light	N.J. Tjombe
C.J. Daniels	A.J. van der Merwe	
M.P.A. du Preez	M.M. van Zyl	

Illustrations by Nicky Marais.

Published by the Namibia Institute for Democracy in co-operation with the Law Society of Namibia.

NAMIBIA INSTITUTE FOR DEMOCRACY

Namibia Institute for Democracy
4. Bohr Street
P.O.Box 11956
Windhoek
Namibia
Tel. 264-61-229117/8
Fax 264-61-229119
nid@mweb.com.na
http://www.nid.org.na

LSN LAW SOCIETY OF NAMIBIA

Law Society of Namibia
333 Independence Avenue,
Namlex Chambers, 1. Floor
P.O. Box 714
Windhoek
Namibia
Tel.: 264-61-230263
Fax: 264-61-230223
lawsoc@iafrica.com.na

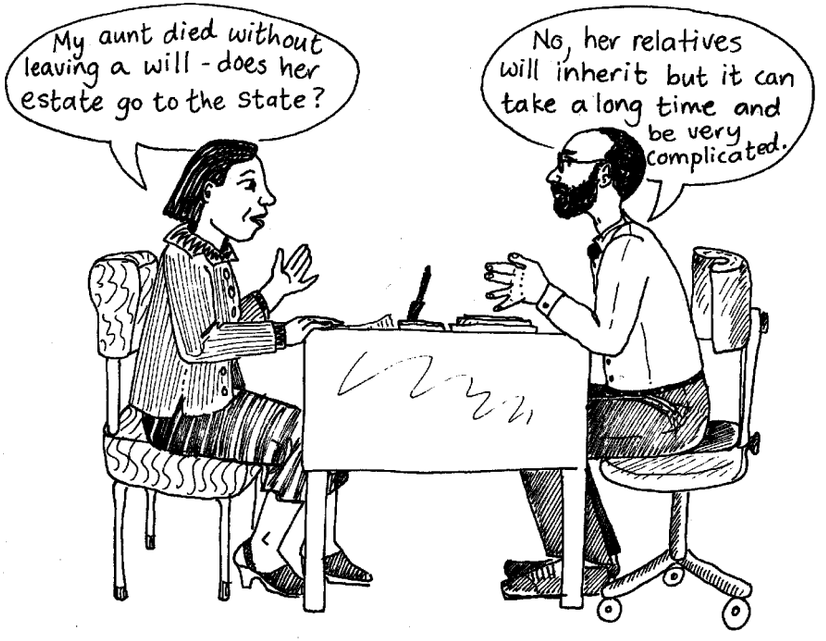
The legislation with respect to wills and estates is in a process of reform. The publishers trust that the changes will soon be enacted. The position at present is stated in the booklet. Kindly note that irrespective of any changes that may be implemented, it will always be important to have a will.

1. Why is it important to have a will?

A will is a legal document that specifies how and to whom your belongings and assets will be distributed when you die. The importance of good estate planning by compiling a will lies in the fact that you are then able to direct how your assets should be distributed at your death. You are, after all, the person best qualified to determine the ideal pattern of distribution. Wills are seen by some as something for the very rich only. This is not true. By stating your wishes clearly and by organising your assets, your family will not have to struggle with your finances during a very difficult time when you die. It is also advisable to inform your relatives where your will is kept.

2. What will happen if I die without a will?

A person who dies without leaving a valid will is said to have died intestate. It is difficult to give a simple answer to the question of who inherits the deceased's estate, because the answer still depends on the racial group of the deceased. For example, if you die without leaving a valid will, one of the following will happen:



- If you are a "white" or "coloured" person your estate will be distributed according to the rules laid down by the laws of intestate succession. This may very often lead to a distribution of your assets in a different way than you would have wanted.
- If you are a "black" person, your nearest relative can go to the local magistrate with a copy of your death certificate and get an appointment as executor. The executor is obliged to distribute the estate in terms of the customary law of the deceased.
- An intestate estate of a member of the Rehoboth "Baster" community will be distributed in accordance with the Second Schedule of the Administration of Estates (Rehoboth Gebiet), Proclamation 36 of 1941.

In some cases, a "black" person's intestate estate will be distributed according to the law applicable to "whites" and "coloureds". Therefore, the rules applicable to "black" and "white" intestate estates will subsequently be discussed:

2.1 "Black" estates

A deceased "black" person's estate will be distributed as a "white" or "coloured" estate only if the deceased was married by a civil marriage (not a customary marriage) in community of property or by antenuptial contract. An antenuptial contract is an agreement to be married out of community of property entered into by the spouses before the marriage, which is registered in the Deeds Office. In all other cases, the "black" person's estate will be distributed according to customary law.

"Black" people who marry by civil marriage north of the "red line", which is the area north of Oshivelo (including Kavango and the Caprivi), will be married out of community of property. The intending spouses may, however, make a declaration before the marriage to a marriage officer or magistrate that they wish to be married in community of property and their marriage will then be in community of property. Unless "black" persons who marry north of the "red line" make a declaration that their marriage is to be in community of property, they will be married out of community of property, but not by antenuptial contract. Their estates will in that case be distributed according to customary law.

To summarise, the only cases in which a "black" deceased's estate will be distributed according to the system applicable to "whites" and "coloureds" are:

- where the deceased was married south of the "red line";
- where the deceased was married north of the "red line", but only if a declaration was made to be married in community of property or the spouses had married by antenuptial contract.

In all other cases, the deceased's estate will be inherited according to the customary law applicable to the deceased. In the case of a person who is unmarried and dies intestate, such estate will also be distributed according to customary law.

2.2 "White" estates

The system of inheritance applicable to "white" deceased's estates is the following:

a) <u>If there are descendants:</u>

The surviving spouse, if married in community of property, will receive his/her half share in terms of the marriage and he/she will inherit a child's share or an amount which, together with his/her half share by virtue of the marriage in community of property, does not exceed N$ 50 000.

The surviving spouse, if married out of community of property to the deceased, inherits a child's share or N$ 50 000, whichever amount is larger.

For example: A man who has a wife and four children dies intestate leaving a distributable joint estate of N$ 300 000.

If the man and his wife were married in community of property, the estate would be divided as follows:

a) The wife gets half of the estate in terms of the marriage in community of property - this amounts to N$ 150 000.

b) The other half (N$ 150 000) of the estate devolves according to the laws of intestate succession as follows:

(i) A childshare (N$ 150 000 divided by 5) = N$ 30 000;

(ii) The wife should inherit the larger of N$ 50 000 or a childshare. Since the wife's halfshare is already more than N$ 50 000, she inherits a childshare, namely N$ 30 000. Therefore the wife shall get N$ 150 000 and will inherit N$ 30 000.

(iii) Each of the four children will also inherit N$ 30 000.

If the man and his wife were married out of community of property and the man leaves N$ 300 000, the estate would be divided as follows:

a) A childshare (N$ 300 000 divided by 5) = N$ 60 000;

b) The wife inherits the larger of N$ 50 000 or a childshare, which means she gets N$ 60 000;

c) The four children each also inherit N$ 60 000.

Had the distributable amount of the estate been less than N$ 50 000, the wife would inherit the entire estate.

b) <u>If there are no descendants:</u>

(i) If the deceased dies without leaving a parent, brother or sister, the surviving spouse inherits the whole estate.

(ii) If there is a surviving spouse and surviving parents, a half-share (50%) of the estate goes to the spouse and the other half-share (50%) goes to the parents in equal shares.

(iii) If there is no surviving spouse, the whole estate goes to the parents in equal shares.

<u>The parents' proportions:</u>

- If both parents survive the deceased, a half-share each;
- If one parent survives the deceased, the surviving parent receives a half-share. The other half-share is inherited by the children of the deceased parent in equal shares. If any of these children are deceased, then their share is inherited by their children or grandchildren in equal shares.

There are further rules if none of these persons survive the deceased, but it is not feasible to discuss these rules in this booklet.

3. Who may make a will?

Any person 16 years or older who is able to understand the nature and effect of his/her actions may make a will. The will may be drafted in the testator's own handwriting. There are, however, certain formal requirements to be met for a will to be valid.

4. Formalities for the making of a valid will

- The will must be in writing;

- It must be signed by the testator in the presence of at least two competent witnesses or the testator must confirm his signature in the presence of at least two competent witnesses;
- The testator and witnesses must sign each page of the will in full and directly at the bottom of each page, i.e. there may not be a large space on the last page between the end of the wording of the page and the testator and witnesses' signatures;
- A will that is only initialled by the testator and/or any of the witnesses will not be valid;
- A person may also sign his will by way of a mark which must then be certified according to the Wills Act by a notary, peace officer, magistrate or commissioner of oaths;
- Witnesses may not, however, witness a will by only making a mark – a full signature is needed;

5. Who may sign as a witness to my will?

- A competent witness is a person of at least 14 years of age who would be competent to give evidence in a court of law.
- The witness may not also be an heir in the will or be an executor, guardian, curator or administrator nominated in the will. If a witness is also a beneficiary or heir in terms of the will, the will remains valid, but he/she may not inherit in terms of that will.

6. Whom should I choose to be my executor?

An executor should be appointed in the will. The executor is responsible for seeing to it that the estate is properly administered and that the heirs receive their correct share of the assets in accordance with the will, after payment of the deceased's debts.

This is a decision that is entirely at the discretion of the testator who will choose a person whom he/she trusts, which decision is usually taken based on previous business associations.

It is necessary to ensure that a suitably qualified person is appointed as the executor to see to the administration of the estate. It is therefore advisable to appoint alternative executors to safeguard against the possibility of the designated executor not being able or willing to accept the appointment. Discussing the matter beforehand with the designated executor will ensure that he/she is aware of your wish to have him/her appointed as executor, thereby minimising the risk of the executor not wanting to accept the appointment.

7. The role of a Legal Practitioner in the drafting of a will

The question may then arise as to what exactly the Legal Practitioner's role is in the drafting of a will. Only Legal Practitioners are allowed by law to ask a fee for the drafting of a will, although a person need not be a Legal Practitioner to draft a will as long as no fee is charged for the drafting. The Legal Practitioner drafting your will has a professional responsibility to ensure that the formalities and other legal requirements regulating the content of the will are adhered to. Legal Practitioners are also in a position to give personal attention to heirs and beneficiaries.

8. What should my will contain?

The will should be practical and care must be taken that legal and practical restrictions are amply provided for, e.g. it is not practical to award agricultural land to multiple heirs.

A person has the freedom to give his/her property to the heirs of his/her choice. A person making a will should, however, see that adequate provision would be made for his/her dependants in the will.

It is advisable to establish a trust and appoint a trustee if there are heirs who are younger than 21 years of age. The trustee will administer the trust and make payments to these heirs for their maintenance or education.

The heir will only receive his/her inheritance when the heir reaches the age of 21 or a later or earlier age as specified in the will.

A guardian should be nominated for a child younger than 21 in the case where there is no remaining parent of the child. It is the duty of a guardian to see to the financial affairs of the child.

It is advisible to keep the provisions of the will as simple as possible.
The testator/testatrix has the freedom to make his/her will in any language he/she prefers, but must remember that for administrative purposes a translation in English is required by the Master of the High Court. Such a translation may be costly and a burden on especially small estates.

9. Illegitimate children

Children born out of wedlock ("illegitimate children") can only inherit intestate from their mother's estate and not from their father's. They can inherit from both in terms of a valid will. Illegitimate minor children have the right to claim maintenance from their deceased father's estate.

10. May I change my will?

It is important to take note that a will can be changed or revoked by the testator at any time before his/her death as our law embraces the principle that a person is free to dispose of his/her estate as he/she pleases within the boundaries set by the law.

It is advisible that wills be reviewed frequently, to ensure the will still adequately provides for your changing circumstances. For example, after every major event (the birth of a child or grandchild, a divorce, a death in the family, purchase of valuable property, etc.) you have to review your will to see whether all your provisions are still adequate.

A will can be updated by means of a new will, a supplement or a codicil.

The supplement or codicil is only legal if all of the conditions of a normal legal will have been fulfilled (it has to be in writing, preferably dated, with two independent witnesses and full signatures, etc.). If you wish to draw up a new will to include the changes that you wish to make, it is essential that all previous wills be clearly revoked.

11. Basic process of administration of estates

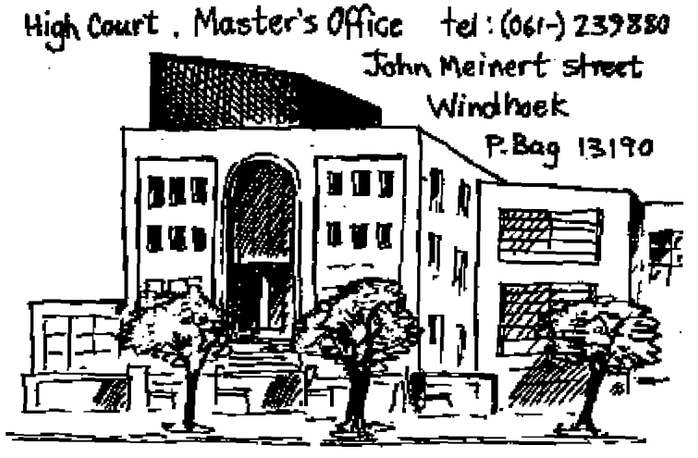
The administration of estates is a complicated and technical field of expertise and requires a sound knowledge of the underlying legal principles from the estate administrator. Again without going into the finer details, the basic process of administration of an estate looks as follows:

- First consultation with the next-of-kin of the deceased to get necessary information and to sign the necessary documents;
- Reporting of the estate by filing a death notice, inventory, original will and acceptance of trust as executor with the Master of the High Court;
- The opening of a main file and sub files for the estate;
- Writing of letters to debtors and creditors of the estate;
- Obtaining valuations for estate assets;
- Completion and lodging of income tax assessments;
- Receipt of letters of executorship;
- Placing of advertisement to debtors and creditors in the Government Gazette and a local newspaper;
- Opening of an estate cheque account;
- Deciding on a suitable administration process together with beneficiaries;
- The collection of sufficient cash and the payment of debts;
- Drafting and lodging of the Liquidation and Distribution account;
- Placing of advertisement in the Government Gazette and local newspaper that the Liquidation and Distribution account is lying for inspection;
- Payment of any outstanding debts as well as the payment/transfer of legacies and inheritances to heirs;
- Paying of Master's fees;
- Complying with Master's final requirements;
- Receipt of the Master's filing slip.

12. The role of the Master of the High Court of Namibia

The function of the Master of the High Court is foremost to ensure that the wishes of the testator are carried out. He also ensures and protects the interest of minors, mentally ill persons and creditors in the case of death, insolvency or mental disability.

In the majority of cases the Master of the High Court has jurisdiction over the estates of persons who die testate, that is, with a valid will, and the Master also ensures that the executor or estate administrator keeps to the stipulations of the will and completes the administration of the estate in an orderly, professional and timely manner. Also note that the original will(s) must be submitted directly to the Master's Office in Windhoek, which will(s) is/are then registered with his office.



The Office of the Master is open to the public and family or interested parties may seek advice or report irregularities to the Master.

13. What to do if your spouse has died

What happens if the **testator** dies, a valid will exists and the executor and the heirs are named? There is no immediate rush, take the time necessary to finalise the funeral arrangements. If the will is in your possession, read it and find out who the appointed executor is and immediately contact him/her. If no executor is appointed, see your attorney or the Master of the High Court.

14. What you can do

Help your loved ones by leaving enough money behind for them to cope after your death. By law, they can't access your assets while your estate is being finalised and that can take months or even years. Meanwhile, they need to settle funeral costs, medical bills and living expenses. One of the best ways to ensure that your family will have enough in this time, is by taking out life assurance policies made payable directly to a beneficiary. These policies will provide money shortly after a death.

You will also assist your family by storing and organising all your documentation. This will help tremendously when sorting out your estate.

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