

Passing on your wealth to your loved ones



While no one likes talking about death, it's especially important for you as a South African expatriate to have arrangements in place to protect your family.

Taking out life insurance is one part of the financial planning process.

You will also want to ensure that you are able to pass on your assets to your chosen beneficiaries according to your wishes as quickly as possible and without compromising the quality of your life in later years.

As an expatriate you may have acquired assets in different countries with different laws on how they can be passed on in the event of death. Unless you have made the appropriate arrangements, which will be explained in more detail later, this can lead to significant delays in the transfer of your wealth to your family dependents and beneficiaries.

This guide is intended to provide you with information designed to assist with your succession planning on becoming a South African resident. We do not give legal, taxation or investment advice and you should always speak with your financial adviser before making any decisions.

Essential considerations

It's important that you consider the following questions in order to make life as simple as possible for your loved ones when you pass away, at what will already be a difficult time:

- Do you have professionally drafted Wills in place in the countries where your investments are based, and are they up to date?
- Will your executors need to obtain Probate in the countries where your investments are based? Probate is the legal process by which a Will is proved valid or invalid.
- Are there any steps you can take to avoid the need for Probate?

With the help of a local lawyer and a qualified financial adviser you can put measures in place to ensure that these questions are answered in line with your individual circumstances.

This should leave you free to enjoy life, secure in the knowledge that your financial planning has been taken care of.

When considering the principles involved with succession planning in South Africa, the South African legal system gives you freedom to leave your estate to whoever you wish. It also provides protection for your dependents if inadequate provision has been made for them.

Having up to date and professionally drafted Wills in place

A Will can be the most effective way for you to pass on your estate in accordance with your wishes and to avoid potential family disputes. You can also appoint in your Will the people, known as executors, who will administer and distribute your estate.

Laws of intestacy will apply if you do not have a valid Will in place. In South Africa specific estate administration legislation is in place, meaning that a surviving spouse or spouses along with any children will receive prescribed shares of your assets. Only people who have entered into a marriage or civil partnership in terms of the Civil Union Act are legally regarded as 'spouses', including same sex relationships.

If you have returned to live in South Africa, as well as having a Will written in South Africa it may also be advisable for you to have separate Wills for investments, life insurance policies and property which are held in other countries. Considerations that need to be made in executing a valid Will abroad can be complex and may vary from country to country. Where you need two or more Wills to deal with assets held in different countries, care needs to be taken to ensure that they are not at odds with each other and that they do not contain any clauses which may revoke your South African Will. This could potentially cause delays and disputes.

Universal community of property and of profit and loss is the primary matrimonial property system in South Africa. If you are married in community of property you have a joint estate with your spouse. The assets of the joint estate are held by the spouses in co-ownership, in equal undivided shares. Upon your death, your undivided half share of the joint estate will be divided amongst your heirs, either in terms of your will, or in terms of the laws of intestate succession, should you die without a will.

The secondary matrimonial property system is the so called "accrual system" (a form of deferred community of gains regime). Every marriage out of community of property entered into on or after 1 November 1984 in terms of an ante-nuptial contract, by which community of property and of profit and loss is excluded, is subject to the accrual system, unless the parties have expressly excluded this system in their ante-nuptial contract. If you are married out of community of property, your assets are your own and each spouse administers his or her estate at free will. However, where the accrual system applies, the accrual of the estate of the deceased spouse is determined before effect is given to testamentary dispositions or succession out of that estate in terms of the law of intestate succession.

Executors may need to obtain Probate in the countries where your investments are based

Assuming you have a valid Will, on your death your executors will apply to the Probate registry of the relevant court for a Grant of Probate, called letters of executorship in South Africa. This legal documentation is confirmation that your executors have the power to distribute your assets. Before distributing your assets, the executors are responsible for ensuring that funeral and legal expenses along with any tax and other debts are paid. It is important to review your Will periodically because changes in your personal circumstances may make it inadequate or may revoke it. For instance, you may have had another child or purchased a property.

Steps you can take to avoid the need for Probate

01 While you should have a Will in place for the general administration of your various assets and responsibilities towards dependent children, there may be specific investments which can be held subject to other arrangements and therefore not delayed by the requirement for Probate. These include joint tenancy with right of survivorship, beneficiary nominations and inter-vivos (living) trusts.

03 With international life protection, savings and lump sum investment products you have the option to appoint beneficiaries to receive the death benefit without the life insurance company requiring a Grant of Probate to make this payment. Your written nomination is a contractual expression of wishes stating who should receive the benefits on your death.

Succession taxes

It is important for you to think about which taxes may apply when planning to pass assets to the next generation. South Africa has a tax on capital gains and an estate duty tax, both of which can arise on a person's death. If you are resident in South Africa, estate duty applies at a rate of 20% on your net estate (subject to a ZAR 3.5m abatement).

Any estate duty is due within one year of the date of death, albeit that this time may be a difficult one for those you leave behind. Care also needs to be taken if you are thinking about transferring assets during your lifetime: in addition to the potential tax on capital gains when disposing of an asset, South Africa has a donations tax and a transfer duty.

South African residents are subject to donations tax at a rate of 20% on the value of the property donated (subject to an annual exemption of ZAR 100,000). Plan ahead with your professional advisers to maximise your tax allowances and exemptions where it is appropriate in line with your succession planning objectives.

Estate duty mitigation using trusts

Trusts allow you to make a gift while at the same time placing controls over who benefits and when. They are useful structures

If you haven't left a Will, or there are no executors alive or prepared to act, then your beneficiaries will have to apply to the relevant court in the country where the asset is based for letters of administration (or the local equivalent).

02 Where assets are owned on a joint tenancy with right of survivorship basis, the survivor continues to enjoy the full rights of ownership (This form of ownership is not common in South African law).

04 Using trusts is another way to avoid Probate delays and to protect the interests of your beneficiaries while safeguarding your assets. You can create trusts during your lifetime or they can be formed on your death by provisions in your Will. This latter option, however, does not achieve the objective of passing assets to dependents without Probate delays on your death.

if you are not comfortable making outright gifts, perhaps because the recipient is a minor, or lacks the financial maturity to deal with potentially large sums of money or investments themselves. Instead, you appoint trustees to hold the trust assets for the beneficiaries, in some circumstances with the power to make distributions to the beneficiaries at their discretion. Typically you, as the investor, will act as one of the trustees.

South Africans have made extensive use of trusts for tax planning purposes and to reduce estate duty liability on their death. Assets held in trust will not be a part of your estate in South Africa for purposes of the administration process or estate duty and capital gains tax.

Trusts are recognised in South Africa and both local South African and offshore trusts are used. In South African tax law there are essentially two different types of trusts, vesting trusts and discretionary trusts. Discretionary trusts are used most often, as they do not provide the beneficiaries with a right to trust distributions as these are made at the discretion of the trustees.

South African local trusts are legal agreements registered with the High Court through which you set aside assets and money to be held and administered on your behalf, for the benefit of the people or organisations you choose as beneficiaries.

Definitive tax advice should be sought when establishing a trust, since the gratuitous disposal of property to the trust or the sale of assets to the trust on low/no-interest loan account may result in a liability for donations tax, which is currently levied at a rate of 20% on the value of the property donated, in addition to capital gains tax.

Trusts can help you to reduce estate duties upon your death. Trusts have their own tax rates, currently a flat rate of 45% on income and an effective rate of 36% on capital gains. When income or capital gains of a trust vest in a beneficiary (regardless of whether it is in fact paid to the beneficiary) during the tax year they arise, then the beneficiary, and not the trust, is taxed on the income or capital gains. Depending on the circumstances, the beneficiary may have a substantially lower rate of tax than the trust.

The use of offshore trusts has increased in line with the relaxation of South African exchange control regulations and many South Africans' desire to hold substantial investments and property outside South Africa. Holding foreign assets, such as an insurance bond issued by an international life company, in an offshore trust can help protect you from creditors and high estate duty in the event of your death. This can also avoid a potentially difficult and time-consuming administration process if a South African Will alone deals with your worldwide estate.

Offshore trusts are not taxable in South Africa on their worldwide income. However, any amount that accrues to the non-resident trust, as a consequence of a donation, settlement or other gratuitous disposition made by a resident will be deemed to be the income of the resident, if such amount would have been included in the income of that trust had the trust been a resident. Further, any income of the non-resident trust that vests in a resident beneficiary during the tax year that it arises is taxed in the hands of the beneficiary. Furthermore, any amount distributed to a South African resident beneficiary out of the capital of a non-resident trust (ie out of income received by the trust and not vested in a beneficiary in a previous tax year), is taxed in the hands of the beneficiary if:

- that capital arose from any receipts or accruals of the trust, which would have constituted income if such trust had the trust been a resident, in any previous year in which the resident had a contingent right to that amount; and
- that amount has not already been subject to tax in South Africa.

Similar rules apply in respect of capital gains derived by non-resident trusts and vested in resident beneficiaries.

Your pension plans

One of your primary investments may be your pension fund, provident fund or Retirement Annuity fund in South Africa. The payment of death benefits from these retirement funds is governed by The Pension Funds Act.

The trustees of your retirement fund must follow the Act's requirements and cannot simply follow any beneficiary nomination made by you. The trustees are allowed, 12 months from the date of death, to search for any dependents and this must be done despite the existence of a beneficiary nomination. The distribution of the death benefit is decided by the trustees, ensuring that there is equitable distribution based on consideration of a wide range of factors. You can help to speed up this process, as the fund member, by making sure that your beneficiary nomination form is kept up to date at all times, and lists all your financial dependents.

When the lump-sum death benefit is payable to a minor then the trustees may only pay this to the guardian of the minor, or to a beneficiary fund if the child's caregiver is unable to administer the benefit on behalf of the child. The lump sum in a beneficiary fund must be managed actively and provides guardians and caregivers with a monthly income and ad hoc payments for other expenses, such as education and health care.

During your time as a South African expatriate you may have contributed to an authorised domestic pension plan in one or more countries of residence. Your pension benefits left in these countries remain subject to specific local laws, including benefit restrictions and requirements following your death.

You may have transferred pension funds to an international pension plan held by pension trustees in an offshore jurisdiction. On your death, the full value of your international pension plan can generally be paid to your beneficiaries without inheritance tax or estate duty in the offshore location.

Should you be ordinarily resident in South Africa at the time of your death, benefits payable in consequence of your past membership of a foreign pension (or retirement) fund will generally be included in your dutiable estate. Where applicable, relief from double estate duty may be available in terms of domestic South African legislation or a relevant double death duty agreement concluded between South Africa and the country of source.

Benefits payable in consequence of the past membership of the deceased of an approved South African pension (or retirement) fund are generally not included in the dutiable estate of the deceased. However, any contributions made to such fund is expressly included as property in the deceased's estate to the extent that the contribution was not deductible in determining the taxable income of the deceased for South African income tax purposes.

You should be able to nominate anyone you choose as a beneficiary and the pension fund assets will pass straight to your family or other named beneficiaries. This process should take days rather than months and the assets can be kept offshore.

Achieving your objectives

In this guide we have summarised some important points for you to consider when thinking about passing on your wealth to your family or other chosen beneficiaries.

For example, we have covered the benefits of having up to date Wills in place and of using beneficiary nominations and trusts in conjunction with financial products such as pension plans and international life insurance policies.

Estate planning is a complex matter and to enable you to achieve your objectives we recommend that you obtain independent advice on how best to proceed.

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