Benaters.

Deceased Estates

A LEGAL AND PRACTICAL GUIDE ON WHAT HAPPENS NEXT

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Contents

LOCAL EXPERTISE.
GLOBAL ESSENCE.

About Roxanne Benater

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Roxanne sat for her B.Com Law degree at the Rand Afrikaans University (RAU) in Johannesburg, South Africa. She later went on to complete her post-graduate LL.B degree at the University of Johannesburg (UJ) in 2005.

She began her legal career at Melamed and Hurwitz Attorneys in 2006 where she completed her articles in 2007, going on to be admitted as an Attorney, Notary and Conveyancer in the same year. After falling pregnant with her first child in 2009, she made the decision to leave Melamed and Hurwitz Attorneys and start her own legal practice where she would have the freedom to be a mom as well as a practising attorney – the best of both worlds.

She started Benater Attorneys in 2009 (one week after her first child was born – She is quite a determined woman) and a few years later formed **Benaters**, together with her husband, Shaun Benater, in 2011, later rebranding their practice to Benaters in 2017. Solidifying her belief in family. Both in her practice and at home.

She runs a very successful practice and absolutely thrives in her day-to-day duties.

She is a specialist in conveyancing and the administration of deceased estates. And together with her extensive experience and use of cutting edge technology, she ensures that all her clients receive outstanding professional (yet personalised) service especially when she is entrusted with her client's personal matters.

After all, *your family is her family too.*

Legal Notice

YOU DO NOT HAVE TO GO THROUGH THIS ALONE

This eBook was designed to provide information about the Administration of Deceased Estates in general. The information provided herein should thus only be used as a general guide, and should not be construed as or relied upon as formal legal advice.

You are encouraged to consult a suitably qualified attorney for specific legal advice regarding the facts of your particular situation.

The information you obtain in this eBook is not, nor is it intended to be legal advice. Any information provided herein does not create an attorney-client relationship.

This eBook may summarise legal sources such as Statutes, Regulations and Acts that pare in effect as at the date of publication. However, please keep in mind that these legal sources are subject to change. You should therefore confirm the current status of these legal sources prior to relying on any of them for advice.

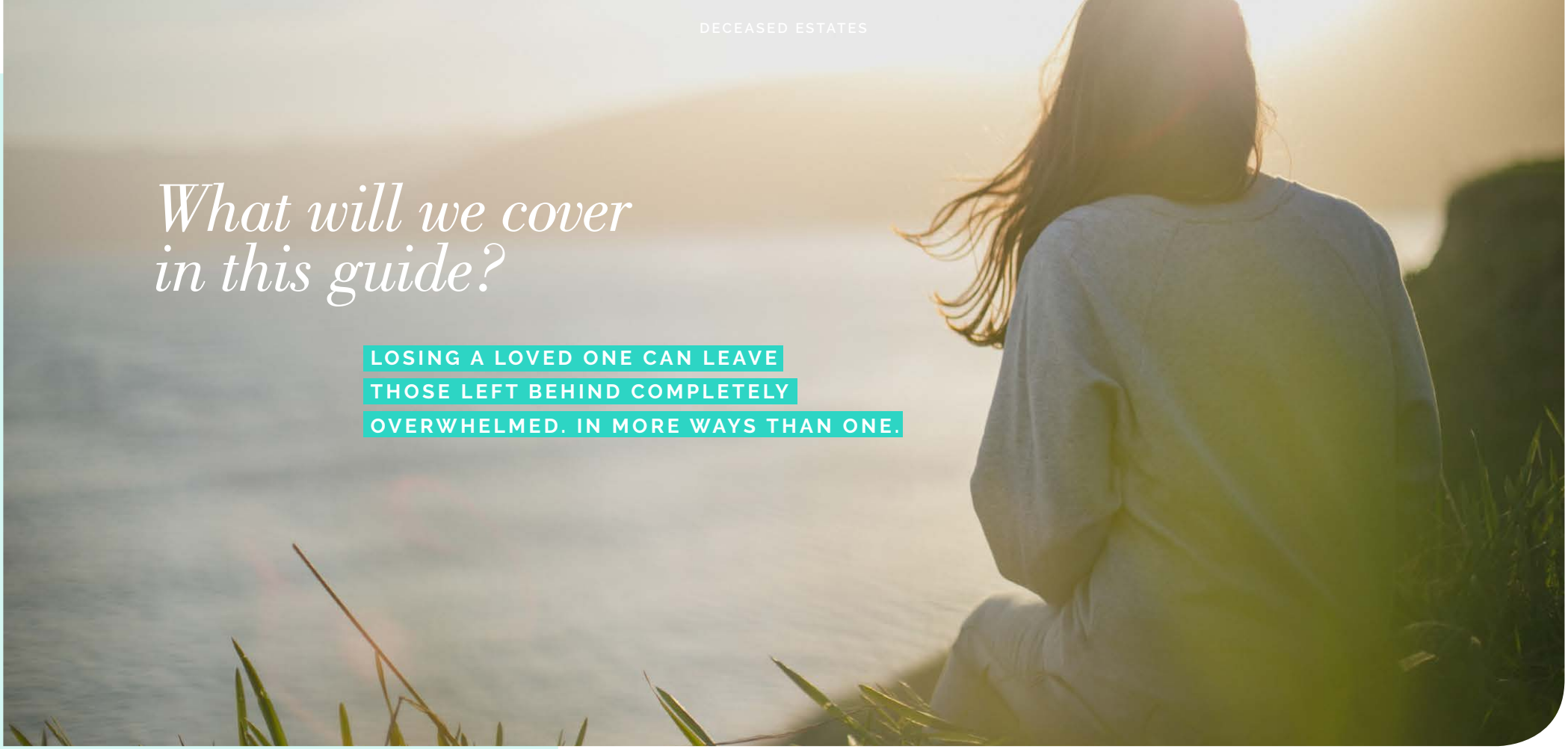
We once again reiterate that it is advisable to consult with an attorney for specific advice (especially where applicable Acts and Regulations are concerned) regarding the facts of your particular situation.

The attorneys at **Benaters** are poised to assist you with your queries regarding Deceased Estates and the administration thereof. They are here to both support and guide you as you go through this difficult time.

Please contact Roxanne Benater on +27 (0)82 325 8585 or email her on roxanne@benaters.com.

Alternatively, please visit Benaters' website, benaters.com/wills-trusts-estates where you will find more information on Deceased Estates in general.

You may not alter, extract or delete any of this eBook's contents.



What will we cover in this guide?

LOSING A LOVED ONE CAN LEAVE THOSE LEFT BEHIND COMPLETELY OVERWHELMED. IN MORE WAYS THAN ONE.

WHERE DO YOU GO FROM HERE?

Of course, first and foremost is giving yourself time to grieve. To go through all the emotions, to reminisce. To miss. To love. *And that is never easy.* Nor is there a time limit on it. Everyone grieves in their own way. And in their own time.

But there is an obligation that will inevitably arise following the passing of a loved one. And that is the administration of their deceased estate. The deceased estate's winding up process can be very overwhelming for the family of the deceased. It is a complex and lengthy process that can take a while to complete. And if you are not an attorney or have no prior working knowledge of what the administration of an estate entails – it can leave you feeling rather helpless.

We understand that.

So, in an effort to assist family members and/or Executors with no prior experience, we believed it would be helpful to draw up *a simple guide* so that you can understand the basics of what needs to happen next and where to start.

To this end, we will give a general overview of the following principles:

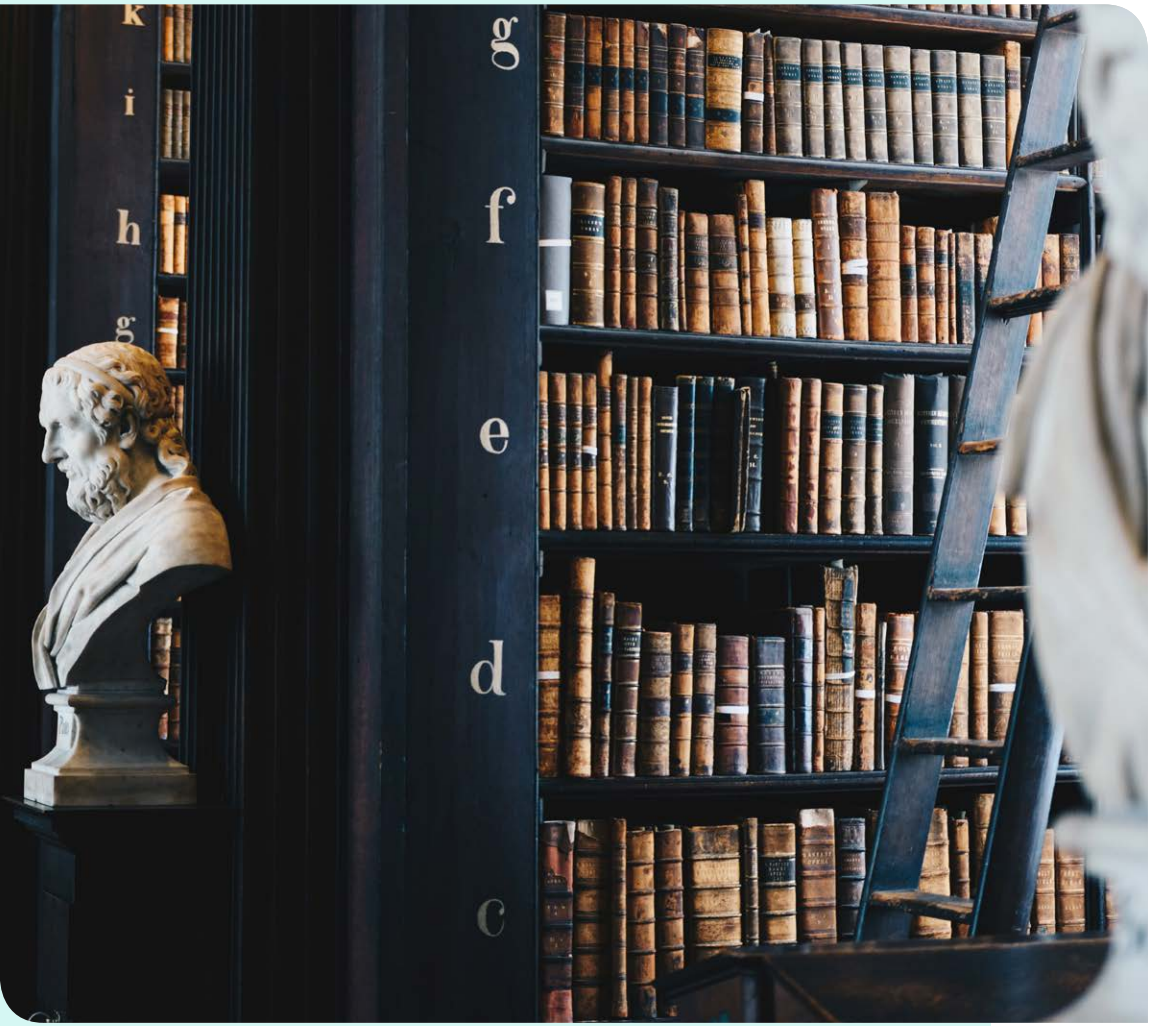
1. **What is a Deceased Estate?**
2. **The difference between testate (what is a will?) and intestate succession;**
3. **What the administration of a deceased estate involves.**

Deep breaths. We have got you!

Let's get started.

What is an Estate?

FIRST THINGS FIRST



LET'S START OFF BY SETTING OUT WHAT THE BASICS OF AN "ESTATE" IS

In the financial and legal world, an Estate refers to *everything of value that someone owns—such as all property owned, in and outside of South Africa* (in cases where someone was ordinarily resident in the country), *art collections, antique items, investments, certain insurance policies, annuities, intangible assets such as a patent or trademark and any other asset or entitlement.*

A person's 'collection" of assets (less any debts on those assets) is also used as the primary way to refer to their net worth.

- **Huh? What is Net worth?** This is the value of everything a person owns. Meaning their financial and non-financial assets minus their total outstanding liabilities (your debts). In other words – what are you left with at the end of the day when all is said and done (i.e. your debts have been paid off)?

An asset is a resource with economic value that someone owns or controls with the expectation that it *may provide a future benefit*. Assets can be sorted into short-term (or current) assets, fixed assets, financial investments, and intangible assets (see page 11 below for further info).

A person's "Estate" and the value thereof becomes particularly important upon death.

- **Why?** Well if set up correctly (and managed properly) a person's Estate will set out the division of their Estate and how their named heirs (known as beneficiaries) will inherit portions of their personal Estate.

Regardless of how modest an Estate may be.

"Legacy. What is a legacy? It's planting seeds in a garden you never get to see."

LIN-MANUEL MIRANDA, PLAYWRIGHT

legacy

A Deceased Estate

Whilst the same as described above, a deceased estate only comes into existence when a person passes away.

A person's deceased estate is made up of the aggregate of assets and liabilities at the time of their passing. And can include immovable property, bank accounts, jewelry, shares, motor vehicles and unit trusts or whatever else the deceased deemed valuable. These assets will need to be distributed to the beneficiaries (or heirs) listed in terms of a Will (which is referred to as testate succession) or if there is no Will, to immediate family members (meaning the deceased passed intestate). Explained more clearly below.

The estate is administered in terms of the **Administration of Estates Act 66 of 1965**.

- A deceased estate must be reported to the Master of the High Court (see page 17 below for further info).

- **Quick question - How do marriages affect Estates?**

  In short *how* you enter into your marriage (whether in or out of community of property and with our without the accrual system) will determine *how* assets in an estate (especially in a joint estate) will be distributed upon death of the first-dying spouse.

  If you refer back to our article **The Lowdown on Ante Nuptial Contracts and the Accrual System**, you will recall that there are different marriage regimes:

  a) **A marriage in community of property** means that there will be only one estate between a husband and wife i.e. everything is shared equally between the spouses, which also includes all of their (as in joint) debts. This also means that upon death, assets of both spouses form part of the joint estate. Meaning – only 50% of the joint estate can be bequeathed by the deceased (or first-dying spouse). The surviving spouse will retain a one-half share of the estate, including any fixed property. A couple married in community of property will not have entered into an ante-nuptial contract;

  b) **A marriage out of community of property** (with or without the accrual) means that the estates of each spouse will remain separate. The couple will have entered into an ante-nuptial contract which will have set out the terms of possession of assets, treatment of financial earnings during the marriage, control and ownership of property as well as how things will be split when one of the spouses passes away. Inclusion of the accrual system means that the net increase in value of a spouse's estate since the date of marriage is taken into account i.e. "what was yours before the marriage remains yours, and what you have earned during the marriage belongs to both of you". The right to share in accrual is exercisable only upon dissolution of the marriage by divorce or death. When the accrual is included, the surviving spouse will be entitled to share in the growth of the two estates at death of the first-dying spouse.

  Therefore h*ow a person is married* will determine how the assets in their deceased estate are distributed upon their death.

Testate vs Intestate Succession

This sounds "hellava" complicated!

It really isn't. Essentially the simple difference between the two boils down to whether the deceased passed away *leaving a Will (testate)* or whether they passed *leaving no Will at all (intestate)*.

See? Not too complicated is it? Let's break this down a little more for you:

TESTATE SUCCESSION

Dying testate

Testate succession means that prior to passing, a person made a valid and enforceable Will which ensures that upon their death, their assets will be distributed in the manner as they specifically set out in their Will i.e. according to their final wishes.

Wait. Stupid question here. But what exactly is a Will?

Firstly, there are no stupid questions. Secondly, in its simplest form, a Will expresses a deceased's final wishes once they have passed. More officially, a Will is a formal, signed, written document, in which the deceased (now referred to as the testator) *voluntarily sets out their instructions in explicit terms as to how their assets are to be "passed down" or inherited.*

It allows the testator to dispose of the whole or any part of their estate (now known as the deceased estate) as they please.

A will also enables a testator to appoint heirs and legatees (or their substitutes), postpone the vesting of a bequest (something that is handed down by virtue of a Will) subject to a condition, create trusts, appoint trustees and administrators (and to regulate their powers), appoint Executors and guardians and even make a Will without naming beneficiaries (such as one in which a previous will is revoked, an executor appointed, or an heir disinherited).

An easy rule of thumb is that as long as the Will is not illegal, impractical or against public policy (i.e. is a valid will) *a deceased can leave anything to anyone in their will*. For example, it can be explicitly specified that the deceased is leaving their entire estate to an animal shelter or even to their favourite church. It is their choice. And despite this being a probably obvious statement – their wishes must be honoured according to their Will.

Testate vs Intestate Succession (cont.)

INTESTATE SUCCESSION

If the deceased has passed without leaving a valid Will, they will have *passed intestate* (which literally means without a valid will). The assets in their deceased estate will now have to be distributed according to the **Intestate Succession Act 81 of 1987**. This in essence means that with no valid will to direct the deceased's Executor as to what they want to go to who, their estate will be administered and divided according to Section 1 (1) of the Intestate Succession Act, either wholly or in part as follows:

a) If there are no children, the spouse (if survived by a spouse) will inherit the entire estate;
b) If there is no spouse but only children, that child(ren) will inherit the entire estate;
c) If there is both a spouse and child(ren) then:
   i. The spouse will inherit the child's portion of the intestate estate, or as much of the intestate estate so as not to exceed the value fixed by the Minister of Justice (whichever amount is greater), and
   ii. The child will inherit the remaining portion of the estate (if any).
d) If the deceased is not survived by a spouse or child, but is survived by:
   i. by both parents, the parents shall inherit the intestate estate in equal shares; or
   ii. by only one parent, the surviving parent shall inherit one half of the intestate estate and the children of the deceased parent (i.e. brothers and sisters of the deceased) shall inherit the other half. If there are no other children who have survived the deceased, the surviving parent shall inherit the entire intestate estate.
e) If the deceased is not survived by a spouse, children or parent, but is survived by:
   i. children of the deceased mother who are related to the deceased through her only, as well as by children of the deceased father who are related to the deceased through him only i.e. step brothers and sisters; or
   ii.the deceased's brothers and sisters - either way, they would inherit the deceased's estate in equal shares.
f) If the deceased is not survived by a spouse, child, parent or sibling then the other blood relation or blood relations of the deceased who are related to him nearest in degree (like uncles, aunts or cousins) shall inherit the intestate estate in equal shares.

What assets can form part of a deceased estate?

WHAT EXACTLY ARE "ASSETS"?

When we set out the differences between testate and intestate succession, we mentioned, quite extensively – the term "assets". And these assets when forming part of a deceased estate become particularly important because *they set out the value of the estate.*

But what exactly are "assets"? We understand that it can be a little confusing, so let's discuss what the term "assets" actually means.

- *An asset is a resource with economic value that someone owns or controls with the expectation that it may provide a future benefit.*

Assets can be sorted into short-term (or current) assets, fixed assets, financial investments, and intangible assets.

But what do these terms mean?

a) Current Assets - short-term economic resources that are expected to be converted into cash within a short period of time (such as one year). Current assets include cash and cash equivalents, accounts receivable, inventory, and various prepaid expenses;

b) Fixed Assets - long-term resources, such as equipment, property and buildings. An adjustment for the aging of fixed assets is made based on periodic charges called depreciation;

c) Financial Assets - investments in the assets and securities of other institutions. Financial assets include stocks, sovereign and corporate bonds, preferred equity, and other hybrid securities. Financial assets are valued depending on how the investment is categorised and how well the institution in which you hold stocks is performing, and

d) Intangible Assets - economic resources that have no physical presence. They include patents, trademarks, copyrights, and goodwill. Accounting for intangible assets differs depending on the type of asset, and they can be either amortised or tested for impairment every year.

Assets in multiple jurisdictions

If the deceased had multiple assets in multiple jurisdictions, for example they purchased assets whilst living abroad, or they used their various **South African Reserve Bank allowances** to make property purchases or perhaps they themselves inherited assets from non-resident family members. There are many reasons as to why the deceased may have assets in multiple jurisdictions – certain actions need to be taken.

WHAT DO YOU DO ABOUT IT?

Technically speaking, their South African Will (as discussed above) could govern their worldwide assets. But with the complexities of international laws and conflicting jurisdictions (all having their own requirements), having only one Will could become a recipe for disaster – considering the differing laws in different jurisdictions.

Ok. Now what?

Well, let's consider the following issues which may arise:

1. Firstly, if there is a South African appointed Executor, he/she will not have jurisdiction to deal with the assets in the countries in which the deceased's foreign assets are located.

   This means that an agent will need to be appointed in that country by the South African Executor. The appointment of this agent can be time-consuming given that an application needs to be made to the Master of The High Court for court certified copies of the Will (which is lodged with the Master of The High Court) and various other affidavits. The original documents will then need to be forwarded to the agent who in turn applies for appointment to act in that country.

   This process is often referred to as "*probate*".

What if there is no valid Will?

Well, that leaves the assets open to forced heirship rules (which are present in many civil law jurisdictions). Forced heirship rules provide inheritance rights to family members and *prescribe exactly how the assets must be treated upon death (see point 2 below for further details).*

Generally speaking, a South African will cannot override the rights of family members to inherit in terms of a foreign jurisdiction's mandatory succession rights. *A foreign or secondary Will is therefore important where assets in foreign jurisdictions are concerned.* It is advisable to ensure that there is no secondary Will in existence.

Assets in multiple jurisdictions (cont.)

2. Secondly, we in South Africa have what is known as "freedom of testation" which essentially boils down to "the right of an individual to dispose of his or her property on death as he or she pleases" (enshrined in **Section 25 of the Constitution**). Certain countries, instead, have what is called "**forced heirship**" rules. Essentially, forced heirship rules legally prescribe how the assets must be treated on death - the estate of a deceased is separated into an indivisible portion (the forced estate passing to the deceased's next-of-kin) and a discretionary portion (or free estate, to be freely disposed of by will). Forced heirship is generally a feature of civil-law legal systems which *do not recognize total freedom of testation.* Mostly prevalent among civil law jurisdictions, including *Mauritius, Switzerland, Spain, France, Japan and Portugal, as well as countries operating under Shariah law (to name but a few).*

   Each country's forced heirship rules are unique, and it is always advisable to consult with a local expert in that country. As is no doubt evident – forced heirship poses an important conflict between that and a South African's rights to freely dispose of their assets as they deem fit. It may also be advisable to **seek the counsel of local experts** that are able to assist and guide you in this situation.

3. Lastly – jurisdiction. If there are multi-jurisdiction Wills, their jurisdiction clauses must work in conjunction with one another.

   In other words, *if there are conflicting clauses in the Will, it could result in a massive delay and absolute logistical nightmare*. Wills must also be clearly identifiable for the jurisdiction in which they are intended and not revoke one another.

If you are an heir to a foreign Will or seek to benefit from an asset in a foreign country, you must take note that there are **other considerations which also need to be kept in mind**, like:

a) Tax residency;
b) Discretionary allowances, and
c) Double taxation.

There is a lot to take in. But, the point is – *don't panic!*

Yes, having multiple assets in multiple jurisdictions can prove to be difficult. And confusing. But if you have the right support and **seek professional advice** to guide you on the intricacies of multiple jurisdictions and foreign assets, these complexities are easily handled. And will not keep you up at night.

So fret not.

How do I administer a Deceased Estate?

A very good question.

Ok, now that we have got some of the "basics" out of the way, we can get down to the nitty gritty of what needs to happen when "winding up" a deceased estate.

A forewarning – this is not easy! It is a really complicated issue with so many intricacies and pitfalls. We therefore (once again) suggest that you get in touch with attorneys who have intricate knowledge of what the administration of an estate entails. Don't be shy. **Get in touch**. Ask your questions – it is always better to be safe than sorry. And save yourself time and money in the process.

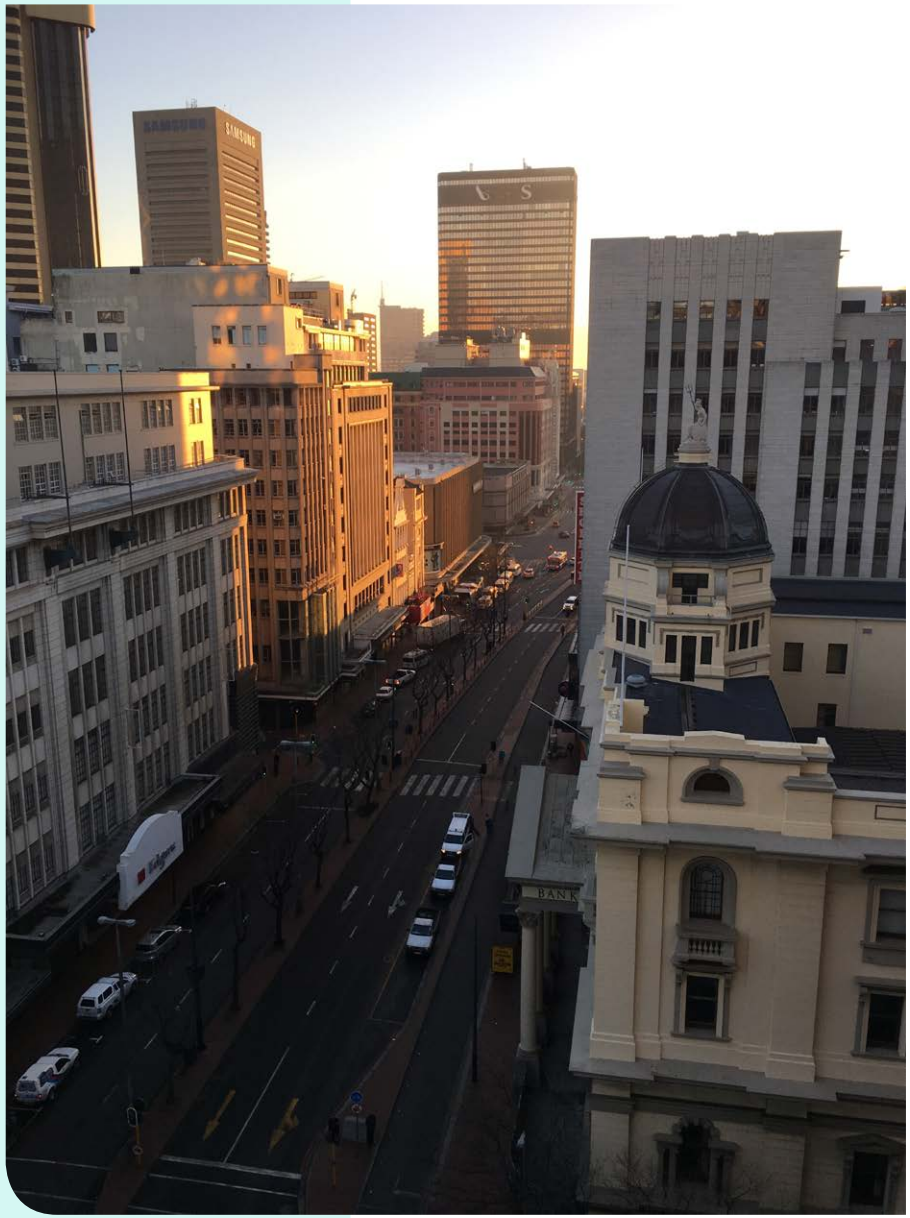
What does the administration of an Estate entail?

The "main steps" of administering a deceased estate -

After the appointment of the Executor – the Executor must meet up with the family of the deceased and obtain all necessary documents (such as the death certificate and the Will – if any), then:

a) Report the deceased estate to the Master of the High Court;
b) Provide notice of the deceased's death;
c) Take control of the assets (which may include a valuation of the assets by a sworn appraiser) and paying all of the debts of the estate;
d) Open an estate bank account;
e) Prepare the estate's Liquidation and Distribution Account;
f) Submit the final tax returns to SARS, paying all Inheritance Tax (like Capital Gains Tax and other taxes - if applicable);
g) Advertise the Liquidation and Distribution Account;
h) Distribute the assets;
i) Transfer property to heirs, and
j) Sign off and close – which includes the closing the estate bank account and obtaining the final discharge from the Master of the High Court.

This all sounds like a lot. And sounds rather complicated. Let's go through it...



Appointment of an Executor

An Executor is appointed to represent a deceased estate and is normally nominated by the deceased in the Will and appointed by the Master of the High Court to undertake his/her duties.

- Amongst other things, it is the Executor's responsibility to report the death to SARS, protect the assets of the deceased estate, make distributions of property to beneficiaries according to the Will (or via intestate succession – discussed below) and pay the debts and various taxes of the estate (income tax, Capital Gains Tax, and calculate any Estate Duty owing).

It is advisable to have an experienced Executor who is familiar with the mechanisms and procedures of winding up deceased estates. Especially someone who will act to the benefit of the family left behind and beneficiaries nominated in the Will. Having someone who is emotionally invested in the passing of the deceased is not advisable – it is already an emotional and difficult event, having someone who is personally affected by the passing of the deceased is not the best appointment.
It is therefore always best practice for an *Executor to be impartial*.

The appointment of an Executor is *formalised after registering the deceased estate* (discussed below). The Master of the High Court will, once registered, issue a Letter of Executorship which effectively authorises the Executor to represent the deceased estate.
The Executor's powers, duties and responsibilities only commence once the Master of the High Court has issued this Letter of Executorship.

Once authorised, the Executor will have the authority to open an estate late bank account, notify third parties of the death, collect all assets, advertise for creditors and settle liabilities (all discussed below).

The Executor's term of office is terminated automatically if he/she dies, or when the Master (or a court), relieves him/her of the office (for whatever reason). *But the duties and responsibilities of an Executor only end when the estate has been finalised and the Master has issued a filing note*. The Executor must then apply in writing to be discharged from his/her duties, and his/her office ends once the Master has discharged him/her in writing.

Just wondering - is the Master of the High Court entitled to a fee?

Yes, he/she is.

The Master's fees are as follows:

a) For Estates with a value between R250 000 - R400 000 = R600
b) Fees escalate as value of the Estate increases, to a maximum of R7000.

Is the Executor entitled to a fee?

Yes.

The Executor's fee or remuneration, is determined by the regulations to the **Administration of Estates Act 66 of 1965**.

The current maximum tariff (excluding VAT) is 3.5% on the gross value of the deceased estate's assets, including the gross value of a community of property estate (excluding life insurance policies and retirement fund benefits payable directly to beneficiaries).

As well as 6% of all incomes (e.g. rentals, interest and dividends) which the Executor collects on behalf of the deceased estate from the date of the deceased's death to the date of final distribution of the assets of the deceased estate.

Should **Benaters** be appointed as the Executor of the deceased estate, Roxanne is always amenable to **negotiating the Executor fee** – after all, *that's what family is for*.

WHAT ARE THE DUTIES OF AN EXECUTOR?

The Executor needs to meet up with the family

"Unable are the loved to die, for death is immortality."

EMILY DICKINSON, POET

The **Administration of Estates Act 66 of 1965**, sets out the duties of an Executor.

The Executor must meet up with the family of the deceased in order to obtain all the relevant information and documentation needed.

The information and documents referred to include:

a) ID of the deceased;
b) ID of the surviving spouse, all children and all beneficiaries;
c) Will (if applicable);
d) Death Certificate;
e) Ante-Nuptial Contract (if applicable);
f) Marriage Certificate (if applicable);
g) Divorce Order and Settlement Agreement (if applicable);
h) List of the deceased's assets and liabilities, and
i) Contact information of family and beneficiaries.

WHAT ARE THE DUTIES OF AN EXECUTOR?

Reporting the deceased estate to the master of the High Court

A rule of thumb – a deceased estate must be reported within 14 days from the date of death.

What deaths must be reported?

The death of any person living in South Africa and the death of a person who was living and passed away in a foreign country but owned property or assets in South Africa.

To which Master of the High court must the deceased estate be reported?

The deceased estate must be reported to the Master of the High Court within the area where the deceased was living 12 (twelve) months prior to his/her death. If the deceased was living outside South Africa the estate can be reported to any Master of the High Court.

Who must report the deceased estate?

The estate must be reported by the person nominated in terms of the Will as the Executor.

What if there is no Will?

The estate must be reported by a family member of the deceased.

- For an estate where the value of the total assets of the deceased is over R250 000.00 (two hundred and fifty thousand rand), an attorney or accountant must assist the Executor or family member in this regard.

What documents are required when reporting the deceased estate?

The documents and procedure for reporting an estate and the administration thereof differ depending on the value of the total assets of the deceased -

a) If the value of the total assets estate is under R250 000.00 application is made to the Master for the issue of Letters of Authority, and
b) If the value of the total assets of the estate is over R250 000.00 application is made to the Master for the issue of Letters of Executorship.

What specific documents must be submitted?

If the value of the estate is above R250 000:

1. Death Notice;
2. Death Certificate (certified copy);
3. Original Will (if applicable);
4. Inventory;
5. Acceptance of Trust as Executor in duplicate;
6. Next of Kin Affidavit;
7. Nomination by heirs to act as Executor (no will);
8. Affidavit confirming that the estate has not yet been reported;
9. Declaration regarding the marital status of the deceased;
10. Certified copy of the ID of the deceased;
11. Certified copy of the ID of the surviving spouse (if applicable);
12. Certified copy of the ID of the executor;
13. Certified copy of the ID's of the children of the deceased (if applicable);
14. Certified copy of the marriage certificate (if applicable);
15. Certified copy of the ANC (if applicable);
16. Certified copy of the Divorce Order and Settlement Agreement (if applicable); and
17. Fidelity Fund Certificate from the attorney assisting the executor.

WHAT ARE THE DUTIES OF AN EXECUTOR?

Provide notice of the deceased's death

Once the Executor has received the formal appointment from the Master of the High Court, he/she must place a Section 29 advertisement (a type of notice) in the local newspaper and the Government Gazette regarding the deceased estate, giving notice to creditors (persons or entities the deceased owed money to) informing them of the death of the deceased.

The purpose of this advertisement/notice is to request the creditors to institute their claims against the deceased estate within a period of not less than 30 (thirty) days or more than 3 (three) months after publication of the notice to submit any claims against the Estate.

This advertisement must appear in one or more local newspapers published in the area where the deceased ordinarily lived, as well as in the Government Gazette. If the deceased lived in another district within 12 (twelve) months prior to his or her death, the advertisement must also appear in one or more newspapers in that district.

4. TAKING CONTROL OF ALL ASSETS AND LIABILITIES AND PAYMENT OF DEBTS

The Executor will need to ascertain the full details of all assets and liabilities in a deceased estate. This will involve getting valuations, certificates of balances and vouchers to prove the value of assets in order to draft the Liquidation and Distribution account (discussed below).

- It is specifically important that the Executor obtains valuations for those assets which are not to be sold such as immovable property, motor vehicle and shares.

The Master of the High Court may insist that the assets of the deceased estate be valued by a sworn appraiser (who must have a good knowledge of the assets for which he/she is appointed) and for this, the sworn appraiser is entitled to a fee (calculated according to a sliding scale). The sworn appraiser is also entitled to levy travel charges, which are also calculated on a scale determined from time to time.

WHAT ARE THE DUTIES OF AN EXECUTOR?

An estate late bank account must be opened

The Executor must request that all existing bank accounts of the deceased be closed and upon receipt of a minimum of R1 000,00 open a separate bank account (estate late bank account) according to Section 28 of the Administration of Estates Act - where all money that forms part of the deceased estate must be kept.

On the opening of the estate banking account, the Executor will need to ensure that all surplus cash is invested in an interest bearing account.

It's at this stage that following the lapsing of the 30 (thirty) day period for the advertisement, with all claims being lodged (i.e. all the debts of the estate have been paid by the Executor), that the Executor will now need to prepare a Liquidation and Distribution Account (L&D Account).

THE LIQUIDATION AND DISTRIBUTION ACCOUNT

Now it is the duty of the Executor to determine if the deceased estate has enough assets to pay for the liabilities that form part of the deceased estate.

- If there is not enough money to pay some or all of the liabilities, the Executor must consider selling some of the assets that form part of the deceased estate.

Ok. We bet you have some questions about this

What exactly is the Liquidation and Distribution account?

A Liquidation and Distribution (L&D) Account is the document that must be prepared by the Executors as soon as possible after the last day specified in the Section 29 advertisement but in any event, within 6 (six) months of the date of issue of the Letters of Executorship (or such further period as the Master may allow).

The Executor will need to submit to the Master an account in the prescribed form listing all of the assets and liabilities of the deceased as at date of death, the income and expenditure after the date of death and the distribution of assets to the heirs.

What exactly is the L&D Account compiled of?

Simply put - *the L&D account reflects all of the assets and liabilities of the Estate and determines its solvency.*

During the winding up process, it is crucial to ensure that the deceased estate has sufficient liquidity (i.e. there is enough cash available to cover the administration costs, such as the fees for the Executor and Master of the High Court, as well as any outstanding liabilities from debts raised by the deceased).

If there is a Will, the Executor will use the L&D account to determine how the assets of the estate must be distributed (discussed in more detail below).

In the absence of a Will, the assets will be distributed in accordance with the **Intestate Succession Act 81 of 1987**.

The L&D Account must be approved by the Master of the High Court. Once the Estate Account has been approved by the Master of the High Court, a further notice is published in the Government Gazette and local newspaper advertising the L&D Account to lie open for inspection for a period of 21 (twenty one) days.

- To summarise, the L&D Account sets out the following:
  a) assets and liabilities as at date of death;
  b) income and expenditure incurred after death;
  c) distribution to heirs;
  d) deemed assets such as life policies paid directly to beneficiaries, and
  e) estate duty calculations if necessary.

Importantly, it must be noted that a L&D Account should not be completed by a lay person. There are far too many pitfalls.

We therefore urge you to consult with attorneys (such as **Benaters**) as well as our preferred accounting and financial planning partners such as:

Accountants:
PKF Octagon

Financial Advisors:
Octagon Financial Services (Pty) Ltd

WHAT ARE THE DUTIES OF AN EXECUTOR?

Payment of inheritance tax

At the time the L&D Account has been submitted to the Master of the High Court (and approved), the Executor will pay all relevant taxes.

BUT WHICH TAXES BECOME PAYABLE?

Estate Duty

Estate Duty (the most widely associated tax with an individual's passing) is levied on the worldwide property and deemed property of a natural person who is ordinarily resident in South Africa and on South African property of non-residents, which is payable within 12 months from date of death.

However, this tax is only payable if (under section 4 of the Estate Duty Act, dealing with allowable deductions) the net value of the estate exceeds R3.5 million. The estate duty is then levied on the dutiable value (or taxable amount) of an estate at a rate of 20% on the first R30 million and at a rate of 25% on the dutiable value of the estate above R30 million.

- When the final figure of estate duty is determined, it is normally the responsibility of the Executor of the deceased estate to pay the tax over to SARS before the remaining funds are paid over to the beneficiaries.

In terms of Section 4A of the Act, a deduction of R3.5 million is allowed when determining the amount of estate duty to be paid. Deductions are also allowed for liabilities, bequests made to qualifying public benefit organisations, and property accruing to surviving spouses – either in terms of a Will or by intestate succession. In respect of the estate of a person dying on or after 1 January 2009, all benefits (including lump-sum benefits), payable from South African pension, provident and/or retirement annuity funds are not deemed as 'property', and are therefore not subject to estate duty.

Where the deceased has a surviving spouse, there is an exclusion of all assets bequeathed to the surviving spouse in that there would be no duty applicable. There is also a portable spousal abatement that applies on the death of the last dying in which case the estate duty rebate would be R7 million (R3.5 million x 2), less the amount deducted from the net value of the estate of any one of the previously deceased persons as dictated by the section.

Where the deceased is a surviving spouse of one or more marriages, the amount subtracted is limited to one predeceased spouse.

Personal Income tax

When a person passes away, the Executor steps into the shoes of the deceased and is thereafter liable for the submission of the deceased's relevant tax returns. This means that the Executor has to ensure that all relevant tax returns of the deceased are completed, submitted and assessed by SARS for payment by the deceased estate (if applicable). Once these tax returns have been formally assessed and paid, the Executor's responsibility to declare income for the deceased would end in that no further tax returns would have to be lodged by them.

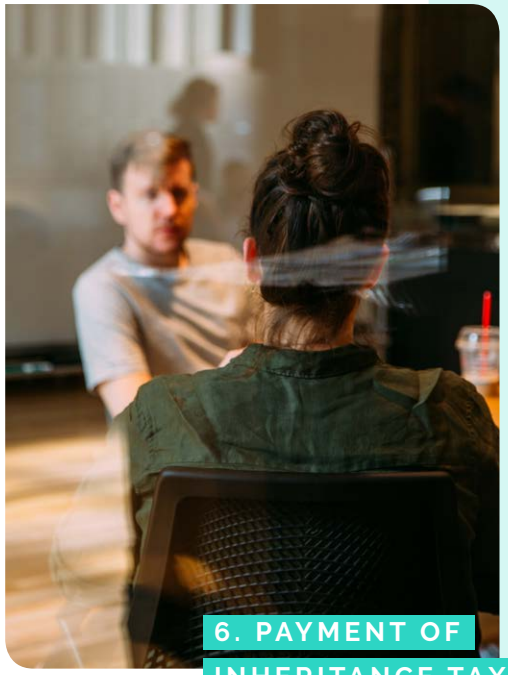
Obviously.

Capital Gains Tax (CGT)

When a person passes away, they (according to the Income Tax Act) are *deemed to have disposed of their assets*. This is because there has been a "change of ownership" as the assets will now be inherited by the heir/s in the estate.

This disposal of assets would therefore, due to the fact that there is a deemed

Payment of inheritance tax (cont.)



6. PAYMENT OF INHERITANCE TAX (CONT.)

gain representing the value increase from the base cost (i.e. the acquisition value plus some allowed additions, for example, capital improvements to a house) to the market value on the date of death, is *potentially subject to capital gains tax*.

There are certain exclusionary rebates applicable to assets that are to be *transferred to a resident surviving spouse.*

Any tax payable would amount to a liability in the deceased estate and would therefore be deductible for estate duty purposes. In addition, a gain of up to R2 million on an individual's primary residence and a R300 000 death exemption is excluded, as are personal assets such as private vehicles. Cash is also exempt from CGT.

- *Good to know* - while individuals have an annual capital gain exclusion of R40 000 during their lives, the exclusion in the year of their death is R300 000.

Considerations that should be kept in mind when dealing with inheritance tax

1. Estate Duty is levied at a rate of 20% on the net value of Estates that exceed R3.5 million but which fall below R30 million. Thereafter, all amounts above R30 million, will have an Estate Duty of 25% levied. If duty is paid late, interest is charged at a rate of 6% per annum;

BUT...

There are exclusions that could potentially apply resulting in a reduction of Estate Duty:

a) Allowable deductions include debts, funeral and death-bed expenses, administration costs and fees on transfer of property to the heir(s). Deductions are also allowed for bequests made to qualifying public benefit organisations, and assets that are inherited by the surviving spouse (Section 4q deductions);
b) All persons are entitled to a Section 4A abatement (rebate) to the value of R3.5 million which may or may not be required to be utilised. In the event that the abatement is not utilised at the instance of the first death, a surviving spouse is entitled to an Estate Duty abatement of R7 million. Where the deceased had more than one spouse or a predeceased spouse, special rebate rules apply;
c) Retirement annuities and pension or provident fund benefits (including lump-sums) are not considered to be "property" and will not be subject to estate duty nor form part of the deceased estate where there is a nominated beneficiary;
d) When a life insurance policy is paid out, the value of the pay-out is included in the value of the deceased's estate and it could, therefore, impact the amount on which the Estate Duty is levied. There are certain exceptions to this rule. It is important to note that endowment investments/policies (local and offshore) that are co-owned by the deceased are included in their deceased estate to the value of their share of such policy/investment and will, therefore, be subject to Estate Duty, although exempt from Executor's fees.

Correctly calculating all associated inheritance tax (as outlined above) is a complex process with many additional factors which require specialist advice and professional assistance by both legal advisors (like **Benaters**), accountants and financial planners.

We therefore suggest that you consult with or at the very least encourage the Executor to approach the following accountants and financial advisors (our preferred partners) for assistance around these complicated calculations:

Accountants:
PKF Octagon

Financial Advisors:
Octagon Financial Services (Pty) Ltd

WHAT ARE THE DUTIES OF AN EXECUTOR?

Advertisement of the L&D account

To recap - the Executor is responsible for drafting accounts that must be advertised for the public to inspect. These accounts must then be lodged at the offices of the Master of the High Court. These accounts will set out the assets and liabilities, as well as how the deceased estate will be divided and distributed between the heirs of the estate.

Once the L&D Account has been signed off by the Master of the High Court, the Executor is required to place a Section 35 advertisement in the local newspaper and the Government Gazette.

The L&D account will then lie open for inspection at the Magistrate's Court and the Master's office where it will run for a period of 21 (twenty one) days. This process provides the opportunity for any objections, together with reasons, to be lodged with the Master of the High Court.

This advertisement must appear in one or more local newspapers published in the area where the deceased ordinarily lived, as well as in the Government Gazette. If the deceased lived in another district within 12 (twelve) months prior to his or her death, the advertisement must also appear in one or more newspapers in that district.

If no objections are lodged, the court will issue a certificate of no objection. This certificate must then be lodged at the Master's Office in order to grant the Executor the authority to distribute the assets.

"Money cannot postpone the death."

PAULO COELHO, NOVELIST

WHAT ARE THE DUTIES OF AN EXECUTOR?

Distribution of assets

After the accounts have been approved by the Master of the High Court, the Executor must pay the creditors and distribute the deceased estate accordingly.

Once the Executor has the authority to distribute the assets (according to the Will or according to the Intestate Succession Act), he/she can begin to distribute the assets as per the L&D Account.

During this process, assets are either awarded to the heirs (for example, property is transferred into the heir's name – see page 24 below) or property is sold and the amount received from the sale of the property is paid out in accordance with the Will.

Note: with marriages in community of property, the surviving spouse would be entitled to 50% of the joint estate. Therefore the first-dying spouse can only bequeath 50% of their share of the joint estate to heirs. Obviously, this also means that the first-dying spouse cannot be vindictive (for whatever reason) and use their Will to remove assets from the joint estate in the event of their death (that's a no-no).

Furthermore, where the first-dying spouse does not make adequate financial provision for the surviving spouse in terms of their will, the surviving spouse may bring a claim against the first-dying spouse's estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990, for the provision of reasonable maintenance needs.

Once the heirs have received their inheritance, they are required to sign an acquittance as verification of receipt.

Are there any assets that would not form part of the deceased estate?

Come to think of it – yes.

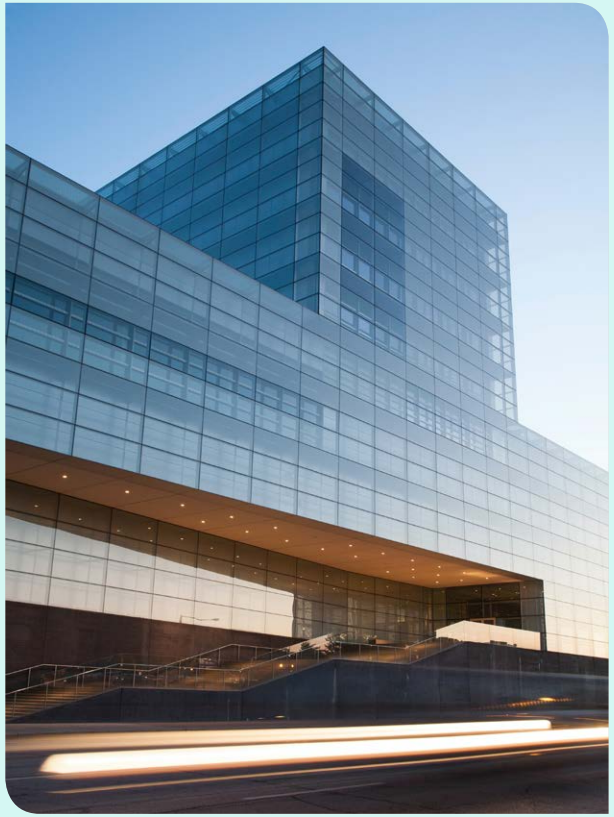
There are certain assets that are not included in the deceased estate and can therefore be distributed independently to the beneficiaries i.e. they do not form part of the formal distribution of assets process. This could prove very useful if beneficiaries require money to support themselves and therefore do not have to wait for the entire winding up of the deceased estate to be finalised (which can be lengthily).

They include:

a) **Life assurance benefits** - if beneficiaries have been nominated in a life assurance policy, the proceeds of that policy are not included in the deceased estate (although it is important to note that such proceeds may still incur Estate Duty Tax) but are paid out directly to the beneficiaries. *Such policies are the ideal vehicles for providing cash for dependents while the Estate is being wound up.* Where the assets under life policies are included in the deceased estate (in other words, no beneficiaries are named), they count in the calculation of the Executor's fee;
b) **Retirement assets** - compulsory retirement assets are excluded from the deceased estate. When it comes to pension funds, it is important to note that the assets are not necessarily distributed according to the wishes of the deceased fund member as expressed in a Will or on the pension fund beneficiary nomination form. The trustees of a pension fund are obliged under the **Pension Fund Act 24 of 1956** to distribute the assets to a member's dependents (such as Spouses (including customary and religious unions, civil marriages and civil partnerships), Children (biological, stepchildren and legally adopted) as well as anyone else proven to be dependent on the deceased for maintenance/financial support, or legally liable for maintenance/financial support (e.g. in terms of divorce agreements and maintenance orders), and
c) **Assets held in trust** - assets held in a living intervivos trust are not included in the Estate.

WHAT ARE THE DUTIES OF AN EXECUTOR?

Property transfers



A consideration that does come up quite often is – how is immovable property transferred from a deceased estate to an heir?

Whilst this is handled by a suitably qualified **conveyancing attorney** (like Roxanne Benater), we can set out the following -

- *Important!* Before proceeding with this section, we need to point out that the appointed Executor will not be permitted to transfer any fixed property before the L&D Account has lain open for inspection by the general public and approved by the Master of the High Court. The appointed conveyancing attorney (like **Roxanne Benater**) will need to lodge special documents with the Deeds Office which prove that the person to whom the property is being transferred is the rightful heir and that the transfer complies with **Section 42 (1) of the Administration of Estates Act**.

Upon the death of the deceased and following the winding up of the deceased's estate, certain registered immovable property will need to be transferred to another person. This will happen either in terms of who has been nominated in the deceased's Will (see page 9) or in terms of the laws of intestate succession (see page 10).

Where the deceased has nominated an heir to inherit their fixed property (i.e. contained in their Will), it is the role of the appointed Executor to ensure that the property is transferred into that specified person's name.

The Administration of Estates Act provides that only the person who is appointed as the Executor to the deceased's estate is authorised to handle the assets of the deceased's estate. The Executor will therefore need to ensure that they have been *provided with an official Letter of Executorship by the Master of the High Court, before they are able to handle any assets in the deceased estate.*

Are there any considerations which could affect the transfer of property?

Yes. Marriage.

The marital contract of the deceased may limit the deceased's freedom to bequeath their fixed property. It is therefore crucial to understand what the impact of their matrimonial property regime on their immovable property rights will have.

As an example – if the deceased was *married in community of property*, only 50% of their joint estate can be bequeathed. Their surviving spouse will therefore remain a one-half share owner of the fixed property. If however the deceased was married out of community of property but with the accrual system and should the deceased have intended on bequeathing their property to a third party, it is important to keep in mind that the *deceased's surviving spouse has a claim for their share of the accrual.* This could necessitate the sale of the fixed property.

The transferring of fixed property from a deceased estate is a complicated process that needs to be managed carefully by the Executor who will outsource the transfer process to a conveyancing attorney. Importantly, the property owned in the deceased's *personal capacity* is an asset in their estate and must therefore be reflected in the L&D Account.

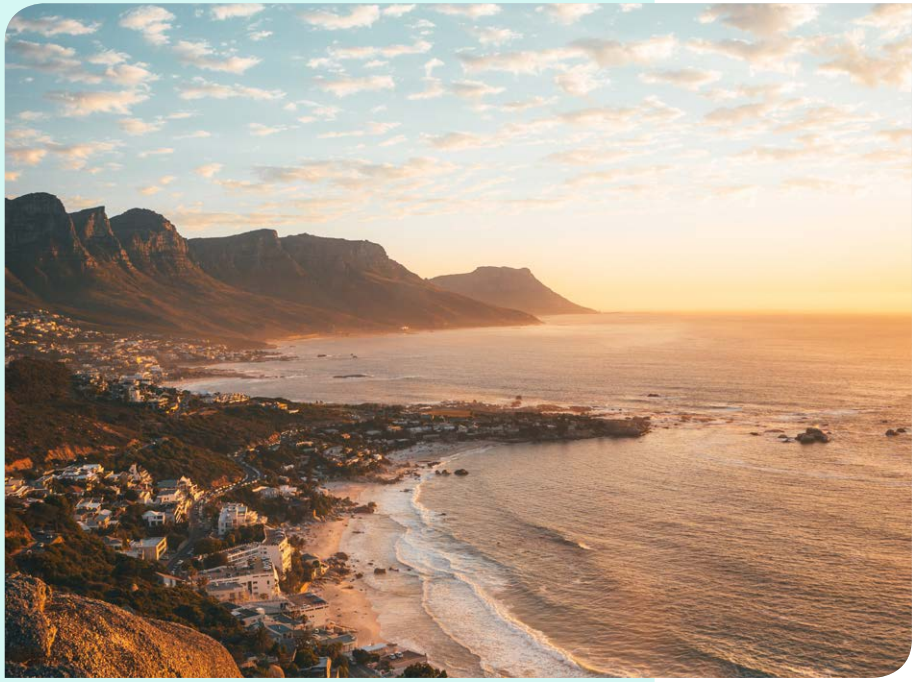
It is therefore important to seek the advice and support of suitably qualified professionals and legal advisors such as **Roxanne Benater** of **Benaters**, who can provide the **guidance** that is required, not only on estates but also on all conveyancing matters.

Are there any costs involved with the transfer of immovable property?

Yes there are.

WHAT ARE THE DUTIES OF AN EXECUTOR?

Property transfers (cont.)



It is here that we reflect on how important it is for the deceased to have made provision for debt in their estate as an essential part of their estate planning process (read our article on the Estate planning process **here**).

Failure to do so can leave their surviving spouse and/or heirs financially compromised. You see, assets that they may have intended to bequeath to loved ones may need to be sold to pay off the debt in their estate which, besides leaving heirs in a financially precarious position, could have repercussions in the form of inheritance tax and Capital Gains Tax (see page 20). Consequences that their estate is perhaps not equipped to deal with. Financially speaking.

Where the fixed property is transferred to another person by way of inheritance – whether testate or intestate – no transfer duty is payable. SARS will issue a **transfer duty exemption certificate** upon application by the transferring attorneys (conveyancers). However, the deceased estate will remain responsible for the conveyancing costs, Deeds Office fees, and rates and levy clearance certificates.

If the fixed property is bonded and there is sufficient liquidity or cash in the estate to settle the bond (i.e. a debt), the Executor will settle the bond and bond cancellation instructions will be issued thereby allowing the heir to take ownership of an *unencumbered asset.*

But, if the deceased estate does not have sufficient liquidity, the Executor may need to liquidate other assets in the deceased estate in order to settle the bond, keeping in mind that one of the Executor's first functions is to settle any debts in the estate (see page 18).

However, if the heir is intent on taking ownership of the property (and has been made aware of what that means), he/she can apply to take over the existing home loan, although he/she will need to meet the bank's qualifying criteria in order to do so. If the beneficiary is not in a position to take over the home loan or chooses not to, the Executor may sell the property out of the estate.

Before doing so however, the Executor will need to obtain consent from the nominated heir and ensure that the property is sold at market value. When selling the property out of the deceased estate, the Executor will be responsible for signing the Offer to Purchase and all relevant transfer documents. The transferring attorney will then need to obtain a certificate from the Master verifying that he/she has no objections to the transfer.

- *Note: Delays can arise where an heir is a minor and no provision has been made for a testamentary trust in terms of the deceased's will.*

WHAT ARE THE DUTIES OF AN EXECUTOR?

Property transfers (cont.)

What about conveyancing costs?

Let's not forget that during the transfer of the immovable property process, a suitably qualified conveyancing attorney needs to be involved in the process. As such they are obviously entitled to a fee for their services (which are distinct and separate fees from transfer duty and bond registration costs, which are related to the overall transfer costs of a property).

However, it is not as simple as stating that a conveyancer is entitled to x amount of money (like an Executor as an example). Conveyancing fees are variable based on guidelines that are issued by the Law Society of South Africa (LSSA) and are not set minimums.

Generally, a conveyancer's fees are calculated on the purchase price or value of the property. For deceased estates a conveyancer's fees are calculated on the value of the property.

If the property is sold by the Executor, the purchaser is liable to pay for the transfer costs.

To determine the cost of Transfer Fees refer to the Transfer Cost calculator on **Benaters** website, click **here** to go straight to the calculator.

A conveyancer is also able to charge fees for every service they complete, from requesting cancellation figures, preparing relevant documentation, applying for rates clearance certificates, transfer duty and conducting deeds office searches. So, it is advisable to negotiate these fees upfront. If possible.

Also, keep in mind that attorney's fees are always subject to VAT being added.

WHAT ARE THE DUTIES OF AN EXECUTOR?

Sign off and close

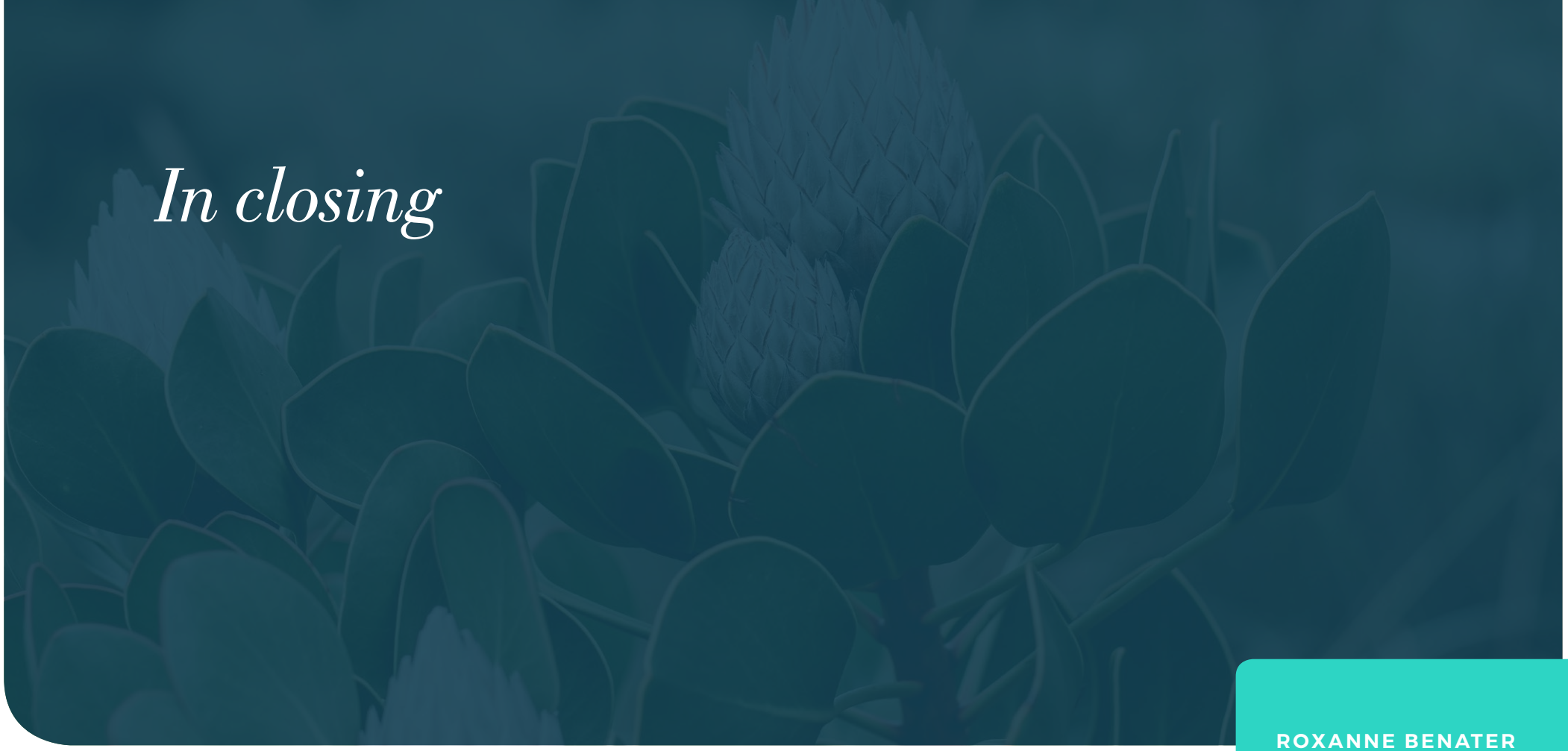
The final step in the process is for the Executor to provide the Master of the High Court with proof that the Estate has been liquidated in accordance with the Will (or according to the Intestate Succession Act).

To do this, the Master of the High Court must be provided with copies of the acquaintances, proof that creditors were paid, affidavits by the Executor setting out that all requirements have been complied with, that all creditors have been paid, that all heirs have received their shares and that all property has been duly transferred.

Once he/she is satisfied that all requirements have been complied with, the Master of the High Court will issue a filing notice and formally close the Estate.

Whew. What a process!

We know. But we are here to help you. Every step of the way!



In closing

At the outset of this eBook we said that losing a loved one can leave you completely overwhelmed. Dealing with grief as well as worrying about how to wind up a deceased estate can often prove too much to bear. Again, *we completely understand that.*

The truth is – you do not have to go through this alone. Not all of this should be left to weigh on your shoulders.

The point of this eBook is to show you what needs to happen but to also reiterate that this is not a task that should be approached lightly or by someone who does not have working knowledge of what to do. Unfortunately, despite all intents and purposes that can only cause more delays and more harm than is necessary.

At **Benaters** we truly do work under the assumption that your family is ours too.

And we look after you as if that was a fact.

We are here to help you. We are here to support you and we are here to guide you.

Please get in touch with our team today to see how we can support you as we help you wind down your loved ones estate.

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Website: **benaters.com**

We wish you a long life, extend our deepest condolences and hope that you will find the strength to move on. When you are ready.