

ESTATE PLANNING

Plan ahead to ease your kids' grief

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IF you die unexpectedly and leave minor children behind, your estate planning should take into account their need for years of financial assistance and the choice of people who will take care of them.

Here are some tips for setting up a proper safety net to limit the extent of any personal tragedy.

"Children's needs include emotional and physical wellbeing, guidance, financial assistance, education and support," said Trinette Burger, estate planning specialist at Glacier by Sanlam.

"Everyone has an inherent instinct to provide for their children's needs and most people fulfil them quite naturally while they're alive. If you die unexpectedly, the first and most important question to ask is, do you have a will?"

According to Burger, if you don't have a will, the Intestate Succession Act will apply the default rules as to who inherits what.

"This act provides that your children inherit your estate in equal shares with your spouse. This may not be what you want, and it may not be tax-efficient," she said.

"If you do not have a will and any of your children are under the age of 18, their benefit has to be paid to the Guardian's Fund, which is administered by the master of the high court and invested with the Public Investment Commission," Burger said.

"Some of the reasons why this may not be in the best interest of your children include being unable to stipulate where that money is invested and possibly a lower interest rate than could be gained elsewhere, difficulty in accessing the money as well as running the risk of fraud and corruption."

It's clearly better to have a will in place, and certain issues — such as the nomination of a guardian and the creation of a trust to hold minor beneficiaries' inheritance — must be dealt with.

"If a minor child is left without a natural guardian, a guardian will be appointed by the high court. Although the court will always consider the child's best interests, it is advisable to expressly nominate a guardian in your will," Burger said.

Dying without a will creates a lot of problems for young children, but you can ensure it doesn't happen

"A nomination is not an enforceable appointment, but it will be considered when the best interests of the child are decided and may avoid unnecessary disputes over the wellbeing of the children. You can also exclude the guardian from furnishing security, which will avoid unnecessary costs for that guardian," said Burger.

"When choosing a guardian, there are various factors to take into account, including geographical, financial, religious, educational and personal considerations.

"Would you want your children to move to a foreign country to stay with your aunt? Would you want them to go

lifetime (inter vivos) or stipulate that a trust be created at your death (testamentary trust). Burger said both options have specific benefits.

"An important benefit to consider is that a testamentary trust will qualify as a special trust, which is defined as a trust that has been created solely for your relatives, where the youngest beneficiary is under the age of 21.

"It is important to note that this definition refers to 'the age of 21' and not to 'minor'. Also, not all beneficiaries have to be under 21 — it will qualify as a special trust for as long as one of the beneficiaries is under the age of 21.

"Unlike a normal trust that is taxed at a flat rate of 40%, a special trust is taxed at the same progressive tax rates that apply to natural persons."

If you choose the testamentary trust route, Burger said, the trust will be created according to your will which must stipulate who the trustees will be and what powers they will have.

"Just like the nomination of a guardian, the nomination of the trustee should be considered carefully. This is the person who will decide, for as long as your children are below the specified age, how your children's inheritance is invested and when and how much should be spent on their care and maintenance.

"The same person can be nominated as trustee and guardian, but this often causes a conflict of interest."

An appointed guardian need not be in South Africa.

"Currently the age of majority in South Africa is 18 and a child under this age cannot inherit assets directly: he or she would need to be in the care of a legal guardian appointed by the court," said Tanya Jacobs, an estate planning specialist at Glacier by Sanlam.

"When a South African parent nominates a guardian living outside South Africa, there are a few additional issues to be considered."

First, every country differs in its

Trusts come with taxation rules

"If you are already making use of an inter vivos trust as part of your estate planning, or if you are considering setting up a trust for that purpose, it is important to understand the main taxation rule applicable to trusts and to correctly apply this rule during your lifetime. Any amount received by, or accrued to, a trust will be taxed in the hands of the trust. However, if the amount is distributed to a beneficiary in the same year that it was received by the trust, it will be taxed in the hands of the beneficiary," said Trinette Burger of Glacier by Sanlam.

"An amount will not be taxed in both the hands of the trust and the beneficiary but will either be taxed in the hands of the trust at a rate of 40% or in the hands of the

beneficiary at the beneficiary's tax rate."

Your children under 18 will not have an applicable tax rate of their own, and the law says your marginal tax rate will apply. "Income distributed or allocated to a minor will be deemed to be the income of his/her parent if such income can be attributed to a donation, settlement or other gratuitous disposition made by his/her parent and will be taxed in the hands of such parent. Therefore, if you make a donation, settlement or other gratuitous disposition (this includes an interest-free loan) to a trust and your minor child then receives an amount, that amount will not be taxed in your child's hands but in your hands," Burger said.

guardianship legislation. "Even if the appointed guardian were willing and able to take on an additional child and a relationship already existed, one should not assume that a South African minor will be allowed into another country merely because the guardian you nominate is legally entitled to reside in that country.

"Also, consider that the financial provisions you've made for your child will be affected by the exchange rate," said Jacobs. "Using a trust is an option to house inheritances for minor children, although exchange control rules

need to be taken into account when transferring assets to a South African trust where the minor beneficiary will most likely be moving abroad permanently.

"In some instances a diversification strategy may be a good reason for keeping assets in a South African trust, but in most cases the trust will only restrict the beneficiaries in receiving their inheritance abroad," Jacobs added.

● *Burger and Jacobs are members of the Fiduciary Institute of South Africa (Fisa).*