



FISA CONSUMER EDUCATION – WILLS

Introduction

FISA believes that every South African should have a Will as this is the only way to ensure that all your wishes, as far as your assets are concerned, are carried out in the event of your death. If you die without a will (intestate), the law of intestate succession is applied to the distributable portion of your estate, meaning that your assets may be inherited by individuals you never intended to inherit.

Even if you have a simple estate there are certain issues which need to be taken into account when drafting a will. Most people are unaware of the complexities and technicalities involved and for this reason, FISA strongly recommends against do-it-yourself wills.

We recommend that you use a FISA registered professional, well versed in the disciplines of the legal requirements of a will, the implications of how you are married (or not married) various taxation laws (such as CGT, donations tax and normal income tax) on your estate created under the will as well as the impact on your assets, liabilities and cash flow of the implications of the proposed will.

Comment 1

The implications of your prior will

Good practice suggests you should review your will regularly and at least when significant changes occur in life such as marriage, divorce, birth of children, retirement etc.

It also happens that you may approach someone other than the person who drafted your first will to update your will. This is quite common but it often results in many people having several wills, at different places.

It is important to note that just because you have forgotten that you have a prior will, this does not make it invalid. It is only revoked if a later will is found which specifically revokes the earlier will.

It is not uncommon for a fiduciary practitioner to be asked to administer an estate under a will, which the

family understood to be the last will only to find that after the estate was finalised, a later will was found appointing different heirs, with different amounts bequeathed to them.

So do you know where your current will is, and are there other wills that you had with other providers whom you should contact to cancel your prior will with them?

It is also important to consider where your current will is held. If it's at home, what happens if there is a fire, or accidentally gets overlooked or destroyed after you pass away? We suggest that you cover this aspect with your will provider.

Comment 2

Are you entitled to bequeath certain assets?

FISA members frequently encounter estate matters flowing from a will where ownership of assets and liabilities has been overlooked.

Significant assets often form part of a business or trust and while the person using the asset such as a car or house refers to these assets as their own, in fact they belong to the business or trust. A FISA member was recently involved with two such matters, which it administered on behalf of the appointed executor. In the first instance, the house had been registered in a trust, but the family lived in it as if it was as their own. In the second example a motor vehicle was used by the deceased which was registered in the name of a business.

Without getting into the technical detail around how the wills need to be worded, the wills in the above examples simply bequeathed "my house and my car to X and Y". In these particular sets of circumstances, the fiduciary practitioner could not give effect to the bequests in the wills.

So when you have your will drafted or reviewed, remember to discuss the wider issues with the will drafter to ensure straightforward issues like the above don't arise.

Comment 3

Do you have enough liquidity in your estate?

Is there enough liquidity (cash/cash assets) in your estate to settle any claims or liabilities you may have on your death? The funds can be part of your investments or if necessary can be raised through insurance policies payable on your life.

Not planning for sufficient liquidity can lead to delays in heirs sourcing financing or even the need to sell an asset to meet the debt.

Comment 4

Business ownership

If you are the sole owner or involved with others, for example shareholders or partners in a private company or partnership, the implications can cause complexity in will drafting/estate planning and need careful attention.

For example, your executor may need to sell a share in a business to a business partner under an existing shareholder agreement on the death of a partner. In this instance there may be a need for buy/sell insurance or

key man cover to be taken out. These often essential contracts provide liquidity to allow the deceased's share in the business to be bought out.

These are complex documents and should ideally be put in place by specialist assurance practitioners to prevent issues like additional estate duty being levied, simply because the policies are not structured correctly.

Comment 5

Appointing an executor in your will

Choosing the executor to be named in your will is an important step. The executor is charged with taking control of all assets and liabilities and distributing the remainder of your estate in terms of your will, or intestacy if there is no will. Whilst executors have a fiduciary responsibility of care, they are also bound by various laws and taxation requirements, not normally familiar to a person not trained in this field.

You may want to consider the following:

Have you discussed the appointment of executor with the person/ institution you intend appointing?

Can they act as executor without the need for an agent to be appointed? If you appoint your spouse or family member as executor the appointment will often not be confirmed by the Master of the High Court without an agent being appointed as well. Such an agent is a professional executor. Whilst your spouse or family member may be able to find an appropriate agent to deal with your estate once you have passed away, you may prefer to know who this will be and what their ability is to attend to your estate.

Have you discussed the fees that the appointed executor/agent will earn? This is an area that should form part of a transparent discussion with your executor, and the amount can be included in the will. It is only if you do not specify the fee to be recovered that the tariff of fees is applied as set by government regulation (3.5% of the gross estate value plus VAT (3.99%) and 6% plus VAT (6.84%) on income collected post death.

If a person who is not familiar with the steps to be taken in administering an estate is appointed by the Master of the High Court to act as executor, the Master may require that person to obtain an insurance policy that will cover the loss of assets should the executor act inappropriately or simply err. This is called "providing security". Due to the risks involved to the lay person, the provision of security can be difficult to obtain and can delay the administration process. It may however be a good idea to require security to be provided, depending on the executor you appoint.

You may also wish to provide for an alternative executor should the first nominated either have died, be not willing to take up the appointment, or simply no longer exist (say if it is a company).

Comment 6

Watch your language!

Be careful what you say in your will. There is a world of difference between:

- I leave my Ferrari to my son, and
- I leave a Ferrari to my son

In the first instance what happens if you have sold the car by the time you die and in the second instance what Ferrari do you mean, and at what cost?

While you may want to leave a specific item (such as a car, house, boat or piece of furniture) to an heir in your will, it should not be your intention to specially bequeath each and every item in your estate to heirs. The work involved in identifying each item, having it

valued and packed and disbursed can significantly delay the estate and be costly. There are other ways to achieve this in which your will drafter can guide you.

Similarly, if you bequeath your house or car to an heir, do you mean with the attaching bond or finance costs? Currently, a bequest of a house or car for example is just that. The debt, if any owing on the assets, falls to be paid from the residue of your estate.

So remember that there are many technical rulings around what is said in a will, the pitfalls of which a skilled will drafter can steer you around.

Comment 7

Marital status

The regime under which you may be married can have huge significance when it comes to drafting your will. It is important to note that if you are married in community of property you can only bequeath your half share of the estate. Your spouse receives the other half share by virtue of the marriage. Similarly, if you are married in community of property, the joint estate is reported to and accounted for in the estate process. This includes the surviving spouse's assets, due to the 50% ownership of each asset and liability. In

other words, the deceased and living spouses' estate are accounted for in the administration process.

It is also important to note that on divorce, there is a three-month window from the date of divorce, during which, should you die and you had left your estate to your previous spouse, this bequest becomes null and void. After three months from date of divorce however, if you have not drawn up a new will, such will contents bequeathed to him/her stand.

Comment 8

Heirs in general

Inheritances form part of the heirs' estate, and depending on how they are married or what you have said/not said in your will, the inheritance may be included in the assets of that heir's spouse. If you wish only the specified heir to receive the inheritance and for it not to form part of that heir's wider marital estate, you need to state this in your will. Whilst some marital regimes do take this into account in the pre-marital contract, you should discuss this matter with the will drafter.

It is important to provide the will drafter with substitute heirs in case the person nominated to receive an

inheritance has died. While there are provisions in law for other heirs to inherit even in intestacy, it is better that you discuss this aspect with the drafter so you can be made aware of the implications.

If an inheritance is payable to a minor child, this payment, no matter how much, will be paid to the Master of the High Court's Guardian's Fund. It may be prudent depending on the amount involved, to deal with this in the will either via a will trust (testamentary trust) or some other mechanism on which the drafter can guide you.

Comment 9

What should I pay for a will?

Taking into account the knowledge required to draft a will properly, paying for the good advice when drafting your will is a small price to pay. The amounts charged in the industry vary between professional drafters and take into account various marketing strategies that different firms follow. The actual will cost can be free or charged on a professional/client basis. The amount charged may also vary depending on whom is appointed the executor.

The key issue is that you should separate the will drafting function from the estate administration function in your mind. Whilst they may involve the same firm, they also may not, and the time between drafting your will and it being given effect to can be several years apart. Each is as important as each other and each should be attended to by a professional. In practice the will drafter may often be appointed executor but this is not, and need not, always be the case. In other

Comment 9 - Continued

What should I pay for a will?

words, it is not unreasonable to expect to pay for the will drafting service and separately, at a later date, for the estate administration process.

Various professionals or organisations may offer will drafting services for free. Remember that this is generally on the understanding that they will be appointed executor of your estate and be paid executors' fees when your estate is wound up.

Free or not, the most important factor is that you ensure you actually get a will executed and that it covers your particular circumstances and gives effect to your wishes.

We suggest that you engage the services of a professional will drafter, and include in the discussion many of the items covered above as well as the question of fees incurred both for the drafting of the will, the executors fees to be charged, and the appointed executor's ability to attend to your estate.

About FISA

The Fiduciary Institute of Southern Africa (FISA) is a non-profit organisation that represents fiduciary practitioners and sets high minimum standards for the industry to protect the public's interests. FISA is the only professional body focusing solely on fiduciary practitioners in Southern Africa. Membership is drawn from trust companies and banks, as well as the legal, accounting and financial planning professions.

FISA has over 700 individual members, who collectively manage in excess of R250 billion. They draft several thousand wills each year and administer around 50 percent of deceased estates reported to the Master's Office.

Activities of FISA members include but are not restricted to the drafting of wills, administration of trusts and estates, beneficiary funds, tax and financial advice and the management of client funds.

FISA helps to make processes smoother for members and the public, particularly through its good working relationship with the Master's Office and SARS.

FISA also has a Code of Ethics and Disciplinary Code that emphasise the conduct, competency, knowledge, professionalism, integrity, objectivity and responsibility of each person accepted as a member. The public can be assured that the Disciplinary Committee is not afraid of acting against members who do not adhere to FISA's Code of Ethics. Memberships have been terminated, details of which can be found on FISA's website.

Whilst enhancing the professional image, reputation and credibility of the trust industry, FISA also plays an important role in educating the public through educational articles and discussions in the media.