

# Electronic wills discussed at FISA conference

The Fiduciary Institute of Southern Africa (FISA) held its 4th Annual conference in Illovo, Johannesburg on 18 September.

The theme of this year's conference was: 'Are you fit for the challenges?' Ten speakers gave speeches including University of the Free State's private law lecturer, James Faber; fiduciary specialist, Ronel Williams; Professor of the Ethics Institute of South Africa, Leon van

Vuuren; and Chief Master of the High Court, advocate Lester Basson.

Mr Faber spoke on the tension between the requirement that a will must be in writing and in hard copy on the one hand, and the technological advances in communication and document management on the other. His paper was titled: 'Electronic wills and jurisdictional issues surrounding a "digital estate"'.  
Mr Faber looked at the legal position pertaining to electronic 'wills' and docu-

ments in the context of South African law and foreign jurisdictions.

Highlighting the challenges posed in the abovementioned regard, Mr Faber said that there was no statutory definition of what a will is, adding that provisions of the Wills Act 7 of 1953 include all the requirements necessary for a will to be valid or for a document to become a will.

Mr Faber said that in modern law there was a general trend to move away

from formalities. It has been said that there is still a need to retain a legal requirement for formalities when executing a will, he said.

Looking at South African legislation, Mr Faber said that the Electronic Communications and Transactions Act 25 of 2002 (ECT Act) excludes wills from the Act's compass: Section 4(3) read with sched 1 and s 4(4) read with sched 2 conclude that a will cannot be executed electronically.

Mr Faber said that s 2(3) of the Wills Act 7 of 1953, which states that: 'If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act No. 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1)'. He said that the electronic document will be deemed as a will if the following three requirements are met -

- a document is presented to the court;
- this document was drafted or executed by the deceased; and
- the deceased intended the document to be a will.

Mr Faber referred to developments in countries such as Australia, New Zealand, the United States and Canada. He said that in Australia wills created on smartphones and of which only an electronic copy exists, have been accepted by the courts in some of the federal states. He also referred to the need to au-

thorise someone to be able to access one's electronic accounts, records, and social media profiles after death.

Mr Faber said that legislation has been enacted in Nevada in the United States to enable electronic wills.

Mr Faber said that some of the challenges posed by the electronic medium is that of security and access. He also said that electronic signatures can be removed.

In conclusion, Mr Faber said that we are living in a technological era and thus must start exploring the new possibilities that come part and parcel with it. He said that s 2(3) of the Wills Act provides a good platform to start exploring how to deal with technological changes and challenges. 'With the importance of formalities in mind, the new challenge is to reformulate current formalities in the interest of finding a new regime that facilitates the fullest possible formal carrying out of the testator's intention,' he said.

Speaking on professional ethics in a high integrity environment, Professor van Vuuren quoted David Steward who said: 'An ethical dilemma occurs when we face two choices, both of which lead to less than desirable consequences.' He added that a conflict of interest can arise where professional duty and personal financial interests demand diverging actions.

Professor van Vuuren said that the law reflects the ethics of society but that the law did not equal ethics. He added that if something is legal, it being ethical was not guaranteed, adding that there was a time lag between ethics and the law.

Professor van Vuuren also said that a new rule could not be made for everything that can go wrong.

According to Professor van Vuuren, the purpose of professional ethics is to prevent the abuse of power and to promote the responsible use of power. He said that these two aspects would increase the public's trust in the profession.

Professor van Vuuren said that some of the ways attorneys can make practical ethical decisions was by -

- talking about ethics;
- consulting colleagues; and
- exploring and discussing the profession's grey areas.

He added that a way of recognising ethical issues was when attorneys heard phrases such as:

- We have to be careful here.
- Should we not get legal advice on this one?
- You can make this decision, but I do not want my name attached.
- Everyone else is doing it.
- We have always done it like this.

Professor van Vuuren suggested a quick ethics decision-making test consisting of five questions, namely:

- Is it legal/procedural?
- How will it look in a newspaper?
- Is it consistent with my professional values?
- Is it fair to all?
- If I do it, will I feel bad?

He said that if one is uncomfortable with the answer to any of these questions, it is a good indication that it is a slippery slope.

Other topics discussed were the huge compliance burden; 'sham' trusts; the challenges of dealing with lay persons as co-executors and co-trustees; *modus*, conditions in wills and trusts and the trends in the number of deceased estates reported and trusts registered per annum.