

How can a will be changed?

CAN THE BANK APPOINTED AS THE administrator and executor of my late husband's will (he died in 1985) approach the Master of the High Court to review the terms of the will to my benefit? My daughter and my late son received their one-third shares when they turned 25, leaving a third to be paid out to me as a monthly income (currently R14 000) from a portfolio of between R3.5 and R4 million. The income is not keeping pace with my living expenses, but the trustees say they cannot increase my income, because the will does not allow it. They also declined my requests for a lump sum to buy a second-hand car and to pay for a hip operation, which cost R160 000. Their reason was

the power to use capital for the benefit of the reader. The Master of the High Court has no authority to review and change the terms of a will. The only way to amend the will would be to approach the High Court for an order in terms of section 13 of the Trust Property Control Act. Such an application is costly and time-consuming and granted on very limited grounds.

In terms of section 13, the court may, on application by a person who, in the opinion of the court, has sufficient interest in the trust property, delete or vary any provision in a trust instrument that the court deems just, if such trust instrument contains any provision that brings about consequences that, in the opinion of the court, the founder of the trust did not contemplate or foresee and which:

- Hampers the achievement of the objects of the founder;
- Prejudices the interests of beneficiaries; or
- Is in conflict with the public interest.

A "trust instrument" includes a will in terms of which a trust is created. A trustee or beneficiary would be regarded as a person with sufficient interest.

As the reader has indicated that she does not have the financial means to bring such an application, she could ask the trustees whether they can do it. They

the same: the will does not allow it. If I approached the Master, it would cost a large amount in legal fees, which I do not have.

Can the trustees approach the Master to reduce the fees, so that I can receive a higher income? The will states that the trustees shall receive executor's fees as fixed by government regulations and administrators' fees at the bank's tariff.

Jo Maxwell

Ronel Williams, the national chairperson of the Fiduciary Institute of Southern Africa,

responds: Based on the facts provided, it seems that the will does not give the trustees

will, however, have to consider the financial viability of such a request, because the trust's funds will be used for the application, which will reduce the income-generating capacity of the trust. It is part of a trustee's duty to weigh up the competing interests of the different classes of beneficiaries (that is, income and capital beneficiaries) impartially, as they are often different people. When making a decision relating to the spending of trust capital, the trustees must consider how it will impact on the ultimate capital beneficiaries, and this is especially important when they consider spending capital to benefit the income beneficiary.

In this case, if the trustees are asked to use trust assets to fund an application to court, the outcome might be in favour of the reader (the income beneficiary), but the capital available for the capital beneficiaries will be reduced. There is no general rule to indicate how the trustees should weigh the interests of the competing classes of beneficiary; each case must be considered on its own merits and the trustees will be led by the intention of the testator as expressed in the words used in the will.

As the will stipulates that the trustee/administrator's fee is set according to the bank's tariff, the reader should try to negotiate a reduced fee with the trustees so that more income is available for her benefit.