



THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



## Choosing an Executor

**By Chris Murphy, Director, Legacy Fiduciary Services; FISA Councillor and Fiduciary Practitioner SA (FPSA®) and Brenton Ellis, Director, Servo Fiduciary Services and FISA member**

Your executor is an extremely important person, stepping as he or she does literally “into your shoes” when you die to see that your estate is administered correctly with all your debts and liabilities settled, and the balance of your estate (the residue) paid or transferred to your heirs in terms of your wishes.

The executor is nominated in your will and appointed officially thereafter by the Master of the High Court by way of Letters of Executorship.

Among other things, the executor needs to deal with SARS, municipalities and financial institutions. It is an onerous and difficult task being an executor, and thus it is important that your choice of executor is made wisely.

### **Whom should I appoint?**

Historically banks, trust companies, accountants and attorneys have primarily administered estates and taken up nominations and appointments as executors, but over the past few decades, it has been increasingly popular to appoint family members and friends as executors, to “keep it in the family” and make sure costs are kept low. Siblings, best friends, and the like have been appointed in wills as executors or as co-executors. In most instances, they would still have to appoint an administrator to assist them and this would usually be by way of appointing an attorney, accountant, or fiduciary specialist as their agent to attend to the administration.

You may have heard “Beware Regulation 910” in the past. This regulation was brought about in terms of the Attorneys Act to record that only practising attorneys, practising accountants and registered trust companies could administer estates for remuneration. To avoid handing over total control to one of these, the testator (the person making and signing the will) would often record that a few family members would be nominated as well as a professional independent executor (accountant or attorney). You could have circumstances where there were upwards of four lay executors.

This is not ideal, as will become clear below.

The main problem today is that compliance has become a big factor in deceased estate administration, and the risk of delays due to noncompliance is a serious risk. In many instances the co-executor lives overseas which complicates matters.

By way of example, when dealing with SARS in an estate, it is required that the executors contact SARS to register the death and have the deceased's SARS profile "coded as deceased". Only the executors can do this. Once the estate administration process is in play, the executors must then attend at SARS again to record the correct "estate late" bank account with SARS for any refunds. Only the executors can do this, not an agent or someone else in terms of a power of attorney. Having one person queuing to attend the meeting at SARS is bad enough, but getting say four people to spend a minimum of one or two hours at SARS may not be possible.

Yes, three of the four can nominate one of the executors as the "SARS representative" in terms of a resolution, BUT they will still need to supply full FICA details for all the executors and it would be best if they were also a tax practitioner.

FICA in itself, as many know, can be a logistical nightmare. Copies of identity documents need to be clear and certified correctly, utility bills as proof of address need to record the executor's correct name and physical address and not be older than three months and certified properly etc. Having to obtain all of this within the given three-month period window can become onerous in the extreme, especially as many people do not receive original utility bills via the post to their physical address anymore, but rather by e-mail or to a P.O. Box. In the case of SARS, only certain utility bills are accepted and the same goes for banks.

Here is another example of a specific instance where there is a refund due in an estate. There are three executors, one of whom lives on a farm and has no way of providing any FICA as he has effectively gone "off the grid". Vast expense has been incurred in trying to get him "on the grid" purely so that he can provide FICA and then the estate can receive the tax refund from SARS. There is no incentive for this executor to go to all this effort as there is no benefit to him, only to the heirs of the estate, of which he is not one.

Estates can further be delayed if an elderly surviving spouse is a co-executor, as he/she may not be physically able to attend a meeting at SARS as an executor, and then affidavits and doctors' letters may be required to get clearances from SARS.

This is by no means a criticism of SARS, as SARS must follow its policies and procedures to ensure that no fraud is committed, and that the correct person/estate receives the correct refund. Other institutions such as the municipalities, banking and financial institutions are also insisting on FICA for all, and once again the family will run into the difficulty of providing FICA details for multiple or lay executors, causing additional cost and delays.

In extreme circumstances, should your nominated executor not be a closely connected person or family member, the Master of the High Court can also refuse to appoint them as executors, or appoint them only if they are assisted by a fiduciary professional or if they provide security by way of an insurance policy. This can prove costly and difficult, as many of the insurance companies that issue the "bonds of security" will not do so for a lay person.

### **Complex responsibilities**

As an executor, your duty of care is high and so is the risk particularly around tax and SARS. For example, should you be remiss in your duty to establish the deceased's final tax obligations which may be either final income tax, capital gains tax, VAT or even estate duty, you will be held personally responsible.

Apart from the compliance issues described above, there will be a responsibility on the nominated executor in a very difficult and emotional time to search for the correct agent to assist. In many cases this decision is made solely on the fees that the agent will levy, but rarely does it take into consideration whether the agent is competent, has the capacity and has the testator's wishes at heart. Although fees are important in appointing the correct agent, it should never be the driving factor.

So, in a nutshell, be careful who and how many people you appoint in your will as an executor, and if you are aware that you have been appointed as executor in someone else's will, establish as much as you can about the deceased, before you readily accept the appointment.

In all instances, make sure that you consult with a fiduciary expert specialising in the field of deceased estates and estate planning before you make any decision regarding executorship.

The idea of consulting with a specialist is not only to get the correct advice regarding the drafting of your will, nomination of executor and ensuring that your wishes are practical, it is also to build a relationship with the person or institution. This will ensure that they understand the background and your specific family and other dynamics when the time comes.

---

**March 2017**