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Choosing an Executor

However carefully you consider the terms of your will, you will put the execution of your wishes at risk if you make the wrong choice of executor. Chris Murphy and Brenton Ellis explain.

Your executor will step into your shoes when you die to make sure that your estate is administered correctly, with all your debts and liabilities settled and the balance of your estate (the residue) 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, who issues confirming Letters of Executorship. This document authorises the executor to deal with SARS, municipalities and financial institutions, among other things.

Executorship is an onerous and difficult task, so it is vital that you make your choice wisely, rather than add a name as an afterthought.

Where do I start?

Historically, banks, trust companies, accountants and attorneys have taken on the administration of estates and accepted appointments as executors, but that has changed over recent decades. It is more common now to appoint family members and friends as executors, to "keep it in the family" and contain costs. It is not uncommon to appoint siblings and close friends as executors or co-executors, but if they have no administrative expertise, it may also be necessary to appoint an administrator – for example, an attorney, accountant, or fiduciary specialist – to help with the administration of the estate.

You may have heard someone say "Beware Regulation 910". This regulation was brought about in terms of the Attorneys Act to record that only practising attorneys, practising accountants and registered trust companies may administer estates for remuneration. To avoid handing over total control to one of these, the testator (the person making and signing the will) can nominate one or more family members to work with a professional, independent executor. In some circumstances, there are as many as four lay executors. This is not ideal, as will become clear below.

Too many cooks?

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

As an example: the executors of an estate are required, within three months, to contact the South African Revenue Service (SARS) to register the death and have the deceased's SARS profile "coded as deceased". Only the executors (all of them) can do this. Once the estate administration process is in play, the executors must return to the SARS office to record the correct "estate late" bank account with SARS to receive any refunds. Again, only the executors can do this, not an agent or someone else in terms of a power of attorney. One person queuing at SARS is difficult enough, but getting, say, four people to meet at one time and spend a minimum of one or two hours at SARS may be impossible.

In theory, three of the four can nominate one of the executors as the "SARS representative" in terms of a resolution, but that person will need to supply full Financial Intelligence Centre Act (FICA) details for all the executors and it would be best if he or she were also a tax practitioner.

FICA in itself, as most of us know all too well, 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 be no older than three months and certified properly, and so on. Having to obtain all of this within the given three-month window can be extremely difficult, especially as many people no longer receive utility bills by post at their physical addresses – they have PO boxes, or receive accounts by email. To complicate matters, both SARS and the banks accept only certain utility bills.

Another example would be a case of an estate with three executors. One executor lives on a farm and has no way of satisfying the FICA requirements as he has effectively gone "off the grid". Vast expense would be necessary to get him "on the grid" and FICA-compliant, just so that the estate could receive its tax refund from SARS. There is no incentive for this executor to go to all this effort and expense, since he is not an heir of the estate and will receive no benefit.

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, in which case, 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, banks and financial institutions are also insisting on FICA for all, and once again the family of the deceased could run into the difficulty of providing FICA details for multiple and/or lay executors, causing additional costs 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 refuse the appointment, or make it only if the executor is assisted by a fiduciary professional, or provides security by way of an insurance policy. This can prove costly and difficult, as many insurance companies that issue the "bonds of security" will not do so for a lay person.

Complex responsibilities

The executor's duty of care is high and so is the risk, particularly around tax and SARS. For example, should the executor be remiss in his or her duty to establish the deceased's final tax obligations – which may be final income tax, capital gains tax, VAT or even estate duty – he or she will be held personally responsible.

Apart from the compliance issues described above, there is a responsibility on the nominated executor, at 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 the agent will levy, without consideration of whether or not the agent is competent, has the capacity, and has the testator's wishes at heart. Although fees are important, they should never be the deciding factor when it comes to appointing the correct agent.

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

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

Consulting with a specialist is not only about getting the correct advice regarding the drafting of your will, the nomination of executor(s) and the practicality of your intentions; it is also about building a relationship with the person or institution. This will ensure that they understand the issues that matter to you, the background to your wishes, the make-up of your family and other dynamics when the time comes.

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