



THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



ESTATE PLANNING TRUSTS WILLS ESTATES BENEFICIARY FUNDS

Most of us understand the importance and the role that a Will plays to transfer wealth from one generation to another.

Many questions, however, arise when it comes to the drafting of the document and the administration process in the event of death.

Online Will drafting

With technology at our fingertips, it is now possible to have a Will drafted online. This is a quick and easy way to draft a Will provided one has a good understanding of the legal and/or tax implications. For example, it may seem very straightforward to bequeath your entire estate to your children when you die, but what happens if one of your children dies in a car accident with you? Should that child's share be distributed amongst your remaining children, go to the children of the child who died with you or rather to a third party?

If one of the beneficiaries is a minor (younger than 18 years) his/her inheritance will have to be held by the Guardian's Fund unless a testamentary trust is set up at death for the benefit of the minor child. There are many rules pertaining to trusts and it is important that all the required clauses are included in the Will.

If you follow the online route, make sure that the drafted Will, will result in your wishes being followed through.

Who can draft a Will?

Your Will should be aligned with your financial plan as it is the last document to give effect to your financial strategy and wishes. Therefore, although a legal practitioner (lawyer or fiduciary expert), an auditor, accountant, your bank, you or anyone else are allowed to draft a Will, a Will should not be drafted in isolation. The Will drafter has to know what your financial situation is as estate duty, capital gains tax consequences and liquidity should be considered.

The contents of related documents such as a Trust Deed, Policy Schedules, Antenuptial Contract etc. should also be known to the Will drafter.

A good example where this did not happen is where a Will stated that the testator's entire estate is bequeathed to a family trust and the Trust Deed determined that the trust should be terminated in the event of the founder's (who was also the testator) death.

Underlying assets

It is just as important to understand the type of assets that form part of your estate that your Will has to give effect to in the event of your death. Referring to the example above where your entire estate is bequeathed to your children and you own a 50% interest in a Close Corporation, there could be dire consequences if the owner of the other 50% member's interest does not consent to transfer of your 50% to your children. This could cause long delays during the administration process and result in litigation which is costly.

Value of estate

If the value of your estate is below R250 000 when you die, the Master of the High Court will issue a Letter of Authority and not a Letter of Executorship. This means that a very simple process can be followed to administer the estate and a professional will not have to attend to the administration process.

Who should be appointed as executor?

Options:

- 1) You can appoint a professional, such as an attorney or auditor who specialises in fiduciary matters, your bank's trust company or another trust company and agree on and note the executor's fees in your Will; or
- 2) You can appoint a family member or other responsible person and request him/her to approach a professional or trust company to administer your estate when you die. The Master will only appoint this individual if he/she is assisted by a professional or trust company with the administration process as there are many laws to comply with and not everyone is familiar with the laws. Although it may not be the ideal time to seek for administration assistance and negotiate executor's fees at death, it is possible to do so.



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Executors and Agents

What to look for when choosing an executor or agent (professional acting on behalf of executor):

- 1) Appropriate qualifications (legal);
- 2) Experience in estate administration;
- 3) Member of a professional body to ensure high standards and ethical behaviour, such as a member of the Fiduciary Institute of Southern Africa (FISA)

Fees

Executors' remuneration, of which the maximum tariff is determined from time to time in the regulations to the Administration of Estates Act, is:

- 3.5% on the gross value of the estate assets excluding assets payable outside of the estate direct to the beneficiaries, or
- 3.5% on the gross value of a community of property estate, excluding assets payable outside of the estate direct to the beneficiaries, and
- 6% on all income collected by the executor on behalf of the estate from the date of death to the date of final execution of the estate.

It is highly recommended that you discuss the executor's fees with your appointed executor and agree to a fair fee prior to the Will being drafted. The agreed fee can be noted in your Will. Factors that professionals will most likely take into account when determining a fee are the value of the estate, liquidity, complexity, risks to administer the estate and type of assets (business interests, offshore assets etc.).

Executor's fees can be saved if policies are made payable to third parties or a family trust. Just take care as beneficiaries who receive the proceeds of a life policy will most likely not pay the funds received into your estate if there is not sufficient cash to pay debts when they are not going to receive a benefit from your estate.

The heirs in your Will may end up not receiving what you wanted them to receive if your executor is forced to realise assets to pay debts. It is also not advisable to make a minor the beneficiary of a life policy. Although executor's fees may be reduced, other tricky situations can be created, which could be worse than paying executor's fees. Personal circumstances should guide you.

Summary

Unfortunately most of the questions do not have a 'yes' or 'no' answer. Everyone's situation is different and the solution for each person may be different. It is important to seek as much information to make informed decisions that will ultimately benefit you and your loved ones.

Visit the **FISA website (www.fisa.net.za)** to find a FISA member who can assist in drafting a Will.