

■ INHERITANCE

Demand for wills spikes during coronavirus

Lockdown reveals Electronic Communications and Transactions Act to be antiquated

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AS THE death toll from the coronavirus climbs, the demand for wills has spiked. If you did not get your affairs in order before the lockdown, the crisis has thrown up some practical challenges in terms of how to get that done legally. The Wills Act requires the following for the execution of a valid will:

- ◆ The testator must sign the will in the presence of two witnesses, or acknowledge his/her signature in the presence of the two witnesses;
- ◆ The witnesses must sign the will in the presence of the testator and of each other; and
- ◆ The witnesses must be 14 years or older and must be able to testify in court.

With physical distancing rules, legally executing a will is practically impossible, says the Fiduciary Institute of Southern Africa (Fisa).

On April 6, Fisa made an urgent submission to the Department of Justice, asking it to declare the drafting and execution of wills an essential service. Fisa says it has had no response.

Since the easing of lockdown restrictions is hopefully imminent, the submission might be moot,

but Louis van Vuren, Fisa's chief executive, says it's a costly issue for those forced to approach the High Court to have a will validated.

"We want the ministry to allow people the freedom to sign a will legally," he says. "With any other contract, if there's a dispute the parties are available. But when you die, you can't defend it. That's why the strict requirement (of two witnesses and a testator) exists the world over. A will is a unilateral legal act and you have to be able to prove the provenance of the document."

An electronic will, such as a PDF file with an electronic signature, does not constitute a valid will in South Africa. "Electronic wills are not regarded as valid, without going to court, because they're not compliant with the Wills Act," Van Vuren says.

The Electronic Communications and Transactions Act (Ecta), which made electronic signatures legal, specifically excludes four types of documents: those pertaining to wills, the sale of fixed property, long-term leases and bills of exchange.

South Africa is not the only country grappling with the issue of validating wills. In Canada and Australia, emergency legislation has allowed parties to sign hard-copy documents during video

conferencing.

Van Vuren says the Disaster Management Act, under which the lockdown measures have been promulgated, does not give the Minister of Cooperative Governance and Traditional Affairs (who issues all regulations under the act) the power to amend legislation. Only Parliament, which is in recess, can do that.

David Thomson, senior legal adviser at Sanlam Trusts, suggests it's time to bring Ecta in line with the 21st century. He says insurance policies can be signed electronically. "The act is antiquated: electronic systems leave a trail. Clients don't understand why they can't sign electronically – they want to know why we don't have a solution."

DECEASED ESTATES

During the lockdown, the Master's Office is dealing with section 18.3 deceased estates only – these are estates with a value of less than R250 000. "We expect a backlog in estate administration; people haven't stopped dying because of the lockdown," Van Vuren says. "Billions of rands are locked up in administration."

With bank accounts frozen after death, dependants are often severely

WHAT TO DO ABOUT YOUR WILL WHILE IN LOCKDOWN

FISA CHIEF executive Louis van Vuren offers the following practical ways to execute a valid will under the current circumstances:

- ◆ If the testator is a terminally ill patient in a hospital, the testator could sign in the presence of two nursing staff members who can sign as witnesses.

- ◆ If your relationship with your neighbours is such that you are comfortable that they sign as witnesses, you can place the will document through or over the fence and confirm to them on the other side of the fence that it is your signature that appears on the document. They can sign while you observe over or through the fence, complying with the requirement that the signing by the witnesses must

be in the presence of the testator.

- ◆ It is not clear whether the local police station would be willing to allow SA Police Service members to sign as witnesses to a will if you walk into the police station and ask them to.

- ◆ Where none of the above is an option, the common-sense approach would be to date and sign the will properly, and also draft and sign a memorandum or letter making it clear why the will was not signed by witnesses, stating that the will is intended to be your last will and testament. The will can also be scanned after signature and emailed to a fiduciary practitioner. "This course of action will increase the chances of a successful application to order the Master of the High Court to accept the will as valid," Van Vuren says.

cash-strapped, and executors of deceased estates cannot access frozen funds until they are appointed by the Master of the High Court and issued with letters of executorship. Deceased estate advertisements, which are legal requirements in the estate administration process, have been stopped in the Government Gazette and newspapers, which means further delays in deceased

estates already under administration.

Irene du Plessis, managing partner at Sentinel International, says after lockdown, the Master's Office backlog will surge. "They need to start working as soon as possible, at least to accept documents. The office is working on revisions to deal with electronic lodgement, but the Deceased Estate Act also needs to be brought in line with Ecta."