

Estate planning during a pandemic: are your affairs in order?

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The coronavirus (COVID-19) pandemic, which has disrupted lives and continues to wreak havoc on the global economy, has seen a sudden and dramatic shift in the way we live.

Previously uncommon concepts and practices such as social distancing, lockdown, quarantine and self-isolation have now rapidly become part of our daily parlance. Unsurprisingly, in view of the swift rise in death rates associated with the pandemic, many people are being reminded of their own mortality. Intensified by the fact that prominent people such as Prince Charles and Boris Johnson have contracted the virus, it is clear

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that nobody is exempt from the risks posed by the pandemic.

The primary risk, undoubtedly, is a matter of health. Parallel, however, there are financial risks, many of which can be severe and extremely difficult to manage. Consequently, it is understandable that many fiduciary practitioners around the world have observed an increase in the demand for wills, as well as estate planning. In view of this, what follows is a brief explanation of the significance of proper estate planning and the execution of a valid and well-drafted will, and how they can be employed to benefit those that you care for the most. Also included are a few questions and comments that are aimed at assisting readers to gauge their specific needs.

Estate planning involves the arrangement and implementation of legal and administrative processes to ensure that your interests and those you care for are protected during your lifetime and after your death. Various factors are taken into account by a fiduciary practitioner when considering an individual's needs and requirements.

Arguably, the most fundamental component of an estate plan is the preparation and execution of a well-considered will. A good will must be drafted to cater for the specific objectives and requirements of the relevant individual and, accordingly, the use of templates should be avoided or, at a minimum, used with extreme caution. It is also vital that a will accurately records the intention of the relevant individual and that it has legal certainty. An experienced fiduciary practitioner will be able to highlight any areas of concern and guide the individual through the process of preparing a good and legally defensible will.

Fiduciary practitioners are frequently highly qualified lawyers and their field of practice is commonly known as private client law. Many are members of the Fiduciary Institute of Southern Africa (FISA) which sets a high bar for professional fiduciary standards and whose members are bound by a code of ethics. Private client lawyers have specialised knowledge in succession laws and a good working knowledge of the law across other disciplines. They are able to assess the feasibility and limitations of structures and mechanisms that can be used to tailor and implement an estate plan that will work well for the particular individual.

Although an unexpected and truly unpleasant event is the impetus behind this article, it is hoped that the points conveyed may help individuals to avoid the negative consequences of poor estate planning. Below are various questions and considerations that should help readers to structure their thinking on the topic.

- Do you have an up-to-date will? If not, have you considered the repercussions of dying without one? In a few cases, experience has shown that it might have been more efficient, administratively, for the individual to have died without a will, than with one that was badly drafted. Although quite simple and straightforward, the requirements for the valid execution of a will should not be overlooked as it is not uncommon for a will to be declared invalid for failing to adhere to the relevant legal requirements.
- Is your will tailored to your specific asset base? For example, should you have a separate will covering your offshore assets?
- Do the provisions of your will align with the provisions of your residual heir, for example, in the case of a trust that is to inherit your estate? Some trusts provide that the trustees should terminate the trust a few months after the death of the founder which may have an effect contrary to the one that you desire.
- Consider any declarations and revocations with a view to ensuring

that multiple wills do not inadvertently revoke one another.

- Do the executors and trustees whom you have appointed have appropriate experience and knowledge to carry out your directions and act in your best interests?
- Are there any vague, imprecise or ambiguous provisions in your will? Does the document, where applicable, seek to create a *usufruct*, for example (where someone is given a right to use and enjoy the asset and to take its net income but cannot alienate the asset), a *usus* (a right to use the property of another for one's own needs but not for profit), a *habuitio* (a right to live in the property of another but the holder may lease the property), a full *fideicommissum* (the provision for the asset to be passed successively but where the asset may not be alienated), or a *fideicommissum residui* (where up to three-quarters of the asset may be disposed of by the heir but one-fourth thereof must pass to the ultimate heir)? As expressed, the rights of the parties associated with the various mechanisms can differ considerably.
- Where conditions are imposed in a will, consider the legal validity of those conditions and the repercussions of the condition being invalid. If the condition was invalid, the beneficiary could inherit the subject matter of the bequest free of the condition.
- Even conditions that are legally valid, can, at times, be notoriously difficult to execute practically. Consider the practical implications of conditions attached to bequests.
- What will be the costs and timeframe in winding-up your estate? Are sound financial provisioning and other mechanisms in place to alleviate the administrative and potential financial burden on those you care for? Failing to ensure sufficient liquidity in an estate to settle debts, meet tax obligations and address financial obligations can lead to forced sales and auctions of your assets.
- Does your inheritance plan clearly include your chosen beneficiaries, while excluding any undesirable but potential beneficiaries? It should be noted that the financial and emotional costs involved in inheritance-related litigation can be particularly high.

In the same vein that social distancing and heightened hygiene are steps that you can take to avoid COVID-19, there are steps that you can take to mitigate the harsh realities of poor estate planning and an inappropriate will. Depending on your answers to the considerations above, it may be in the best interests of those that you care for to revisit the actions that you have taken so far and, to the extent that you have not yet taken any action, the old adage of "there is no time like the present" surely applies in the light of the current pandemic. ♦

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