

# What are the current issues facing **FIDUCIARIES?**



Before we dig into the issues faced by fiduciaries, it is important to first clarify what is meant by fiduciary.

## Definition of a fiduciary

**A** fiduciary is a person or organisation that is legally and ethically bound to act in the interests, and on behalf of, another person or persons. They have a duty to preserve good faith, to cultivate trust and to avoid conflict of interests. The term 'fiduciary', therefore, includes but is not limited to, financial advisers, executors, trustees, corporate board members, shareholders, guardians, curators, lawyers, insurers and investment companies.

The issues facing fiduciaries could, therefore, be considered a point of perception. Each person in a fiduciary role will experience a different set of challenges that are specific to their circumstances. The question should, therefore, be, what is your perception of the issues and challenges faced by fiduciaries?



## Setting the trend

While there's nothing we can do about some of these issues, there's definitely something we can do to eliminate the number of issues pertaining to the validity and proper drafting of wills.

In essence, you, as an intermediary, have the ability and also the responsibility to influence another fiduciary's perception on these matters. This can be done by setting the trend in making sure that your clients' wills are up to date, professionally drafted and valid.

## Fiduciary issues

Below, I discuss a few of the current issues facing fiduciaries in the role of executors, according to my perception on the matter.

**1 Poorly drafted, outdated and invalid wills** - a poorly drafted will has the potential to cause complications to any estate. Examples of this could be where someone without the necessary skill and knowledge drafts their own or someone else's will. In such cases, a person would make use of a template that would not necessarily be applicable to the specific situation or forget to remove some of the information that is specific to another person's will. People also often forget to update their wills in cases where a family member passes away, or when they get divorced. The executor will then have to explain to the family why certain people will be inheriting. Moreover, it often happens that a will is not accepted as the deceased's last wishes, because it did not adhere to the formalities in terms of section 2(1) of the Wills Act, 1953 (Act No. 7 of 1953). This could potentially cause an estate to dissolve, in terms of intestate succession, leaving the executor to explain this predicament to the family.

**2 Recent developments** - in the intestate succession sphere, there have been a few developments. These include the judgements of the *Bwanya versus Master of the High Court, Cape Town and Others* (20357/18) [2020] ZAWCHC 111; 2020 (12) BCLR 1446 (WCC); 2021 (1) SA 138 (WCC) and *Wilsnach N.O. versus TM and others* [2020] JOL 49017 (GP) cases - each of which causes their own set of potential challenges. For example, families who demand that their estates be dealt with in a similar fashion. There were also some changes to the customary law of succession. Fiduciaries, here, face the challenge of explaining why the rule of male primogeniture is no longer applicable to the intestate succession.

**3 Impatience and ignorance** - the family is often impatient when it comes to dealing with a deceased estate - the main reason being that they don't understand the timelines and processes involved. The pandemic has brought about delays in the already prolonged deceased estate process, due to the closure of offices and/or staff limitations on key role players, such as the Master of the High Court, the South African Revenue Services (SARS) and the Deeds Office. As a consequence, executors often have to face a frustrated family and deal with a lot of heightened emotions in this regard.



**Brunhilde Gerber CFP® FPSA®**  
Head of Department: Financial Planning  
Milpark Education