

DRAWING UP YOUR WILL – the snags

By Philip Bateman

Don't consider using a standard form to draw up your Will. It's a complicated issue and these forms do not take every aspect into consideration. Mistakes could cost your heirs dearly. Use a registered attorney – it will bring you peace of mind.

Jan Dankwards (name changed) of Parktown, Johannesburg, thought he was smart when he found a form at a stationer's shop that set out a will template. He filled it in, had a friend and their maid witness it, and thought all was in order.

Big mistake. The fact that his friend was named as a guardian in the Will (technically a 'beneficiary') made the Will invalid (because a guardian cannot be a witness), and the estate had to go through a lengthy and costly legal process in order to have it rectified.

The bottom line is this: don't draw up your own Will. Even though it is perfectly possible to create a valid Will with a standard template it is not necessarily the wisest thing to do. Seek out the best, most experienced attorney or trust company to draw it up and you will be able to rest in peace knowing that your final wishes will be attended to properly.

Here are just some reasons why you should avoid drawing up your own Will or have a "I equal-minded" friend do so.

- **UNLESS LEGALLY TRAINED TO A HIGH DEGREE, AN AMATEUR WILL NOT KNOW ALL THE RULES**

Creating a Will requires serious knowledge of the pitfalls that are common. A lawyer is trained to know precisely what constitutes a valid Will. He or she will also know the common law aspects that cause hitches and could negate your wishes.

For instance even a simple thing like leaving a farm to three children might have legal implications in that there may be prohibitions against dividing a farm up without the state's permission. The lawyer will be aware of statutory law and more erudite aspects such as what cash will need to be released to pay death duties and legal costs, for instance.

- **IS THERE ENOUGH MONEY IN YOUR ESTATE TO PAY DEBTS?**

An estate calculation is done in a disciplined, standardized, manner. Right at the top is the gross value of your estate. Underneath are the claims against the estate, such as income tax, administration expenses and executor's fees. Then there's a calculation, known as the net estate. In other words, the 'clean' portion after all compulsory fees have been deducted. That's your real estate and there's no point in arguing otherwise.

It will pay you to go through an estate planning exercise to see what liquidity there is in the estate to pay duties and, as a consequence, to work out the residue. A professional will do this as a matter of course. It's not something you can do on your own.

- **WILL YOU REVIEW YOUR WILL REGULARLY AS A PROFESSIONAL WOULD?**

A great snag with writing your own Will is that you may put it in a drawer and forget about it for years. A professional would advise you to review your Will regularly, as your life situation changes. Life events could include the birth of a child, a death, illness, legislative changes or any of the other multiple situations that can arise. Changing laws can pose particular problems. For instance if your Will was drawn up to take advantage of the former R5 million exemption then the wording may not be appropriate for the current R3,5 million exemption. Another reason to discard an old Will!

- **DON'T YOU WANT AN IMPARTIAL EXECUTOR?**

Your Will makes provision for an executor who will administer your estate. He or she literally takes over your financial matters when you die. They will also pay off debts, pay estate duty and distribute your assets according to your wishes. The executor can be a relative who can also inherit from your estate. It is customary where a family member is appointed as an executor that a further executor is appointed in a professional capacity – that is, an attorney or chartered accountant for instance. By granting executorship to an attorney or a chartered accountant you achieve this right away – which you won't necessarily do with a DIY Will

- **WATCH OUT FOR DEBTS.**

An attorney will provide the correct advice on a Will regarding property. For instance you may have a house with a mortgage. If you don't state that it is to be bequeathed with or without the mortgage, your estate could be depleted as the house needs to be handed over debt-free in terms of common law, and assets you wished to bequeath may have to be sold to pay the debts. It's probably something that a 'lay' person drafting a Will would not know. Generally an estate needs to be what is called 'clean' without the residue paid out to beneficiaries.

- **DID YOU KNOW IT'S INEXPENSIVE TO USE A PROFESSIONAL?**

You may think you are saving a great deal by drafting your own Will but, of course, it could cost you dearly in the long run. In fact the average charge for drafting a Will from an attorney or the like is between about R300 and R1 000 – very cheap considering the high level of legal expertise and consultation involved. Sometimes it can even be done free of charge, providing the drafter is appointed as an executor. So don't be shy about approaching an attorney to do this for you. It's worth it in the long run.

Sometimes executors charge a monthly fee for the safekeeping of a Will. This is perfectly legal and it is something you will need to know. On the other hand there are others who don't charge such fees and this is a good sign as the fees could clock up considerably over the years.

When drawing up DIY Wills, people do not often consider fees. Did you know that you can negotiate with a professional to charge less than the uppermost fee of 3.5% of the gross assets and 6% of income accrued and collected by them after your death? In fact it's a bit more than

that as VAT is added. If your prospective executors will not negotiate, then take your business elsewhere. SAARP, incidentally, has a system, using professional attorneys, whereby you can enjoy just such a saving.

- **DOES IT COMPLY WITH THE WILLS ACT?**

An amateur will-drafter will give up at this stage because they certainly won't know all the implications. This is a fundamental rule and may not be covered in sufficient detail on the template. For instance, if an heir signed as a witness or helped draw up the Will (Wrote it out on behalf of the testator), this will be a contravention of the Wills Act. This could end up in an expensive High Court battle (paid for by the estate of course). Even if found invalid though, the heir could inherit what he or she would have in an intestate estate but that's not the way you want to go.

- **WILL YOU REMEMBER TO REVOKE OLDER WILLS?**

Big snag here. Most of us have old Wills tucked away, sometimes in executors' offices.

You need to include wording to revoke former Wills and go even beyond this. It's advisable to retrieve and destroy all copies of old Wills to ensure that they don't add to the administrative burden. If your DIY Will does not include the precisely correct wording about revocation of older Wills, then the former Will could stand. In any case the holder of a Will is obliged to present it to the Master of the High Court on your death. That's not what you want! Use a professional to ensure the wording is correct.

- **HAVE YOU THOUGHT ABOUT A TRUST?**

Laymen know little about Will trusts so it's highly advisable to consult with an expert. A Will trust makes provision for a minor, for instance, or an adult whom you wish to protect from their own folly – an alcoholic for example. Or you may simply wish to exercise some control over your hard-earned assets after your death. The trustees take control of the assets bequeathed to the Will trust and administer them according to your wishes, providing your wishes are possible and not unconstitutional or against the good morals of society. You can't for instance introduce discriminators that contravene the Constitution such as race or religion – for instance leave money for a scholarship providing that the beneficiary is of a specific skin colour. You may set an age at which the trust can devolve and when the beneficiaries can take the money – or they could elect to simply keep the trust going. It's a way of protecting assets and influencing behavior where necessary.

- **BEAR IN MIND THE NEED FOR SECURITY BY A NOMINATED EXECUTOR.**

In most Wills the testators request the Master to exempt the nominated executor from putting up security for properly fulfilling his other duties as such. Unless there is a good reason for refusing to exempt the nominated executor from finding security, for example. Where he/she has been convicted of fraud or theft, the Master will normally accede to the wishes of the testators and not require the nominated executor to put up security.

If no security has been furnished by the executor, and the executor or any of his or her employees fraudulently or dishonestly misappropriate assets or funds belonging to the estate, or if any losses of any assets or funds of the estate occur as a result of such negligence, there is no fund or security against which the heirs can claim.

However, if the executor is an attorney or if an attorney administers an estate on behalf of and as the agent of an executor, the Attorney's Fidelity Fund protects members of the public against losses suffered as a result of theft of money entrusted to an attorney in the course of his/her practice.

The attorney's Fidelity Fund has also taken out Professional Indemnity Insurance on behalf of all attorneys. The indemnity granted in this policy is in respect of an attorney's legal liability to pay compensation to any third party, if there is misconduct.

In summary, if an estate is administered by an attorney, and the heirs of such an estate suffer losses as a result of theft of money from an estate by an attorney or his/her employees, or as a result of any of their negligence, such loss will be covered by either the Attorney's Fidelity Fund or the Professional Insurance Indemnity Policy.

If the nominated executor is not an attorney, chartered accountant, one of the big banks or a registered financial institution with a trust license, it is important that the nominated executor(s) should not lightly be exempted from finding security. It is however very difficult and costly for someone who is not an attorney or a chartered accountant to put up security and it must be remembered that the costs involved in doing so will have to be paid by the estate, in other words out of money which would otherwise have been distributed to the heirs.

In short, creating a Will is a hazardous business best left to a professional.

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