



The court will remove executors for conflict of interest and lack of impartiality.

Get professional advice if a second spouse or partner, as well as children from a previous relationship, are involved.

# Avoiding a will from hell

By Louis van Vuren, CEO, the Fiduciary Institute of Southern Africa (FISA)

## We all need to think carefully before making our wills. A poorly made will could create terrible situations for those you would rather benefit from it.

Before we start, let's glance at two real-life case studies to illustrate the challenges that can arise and why proper professional advice and help are essential.

### Opposing claims over who benefits from an estate

John, wanted to ensure that his spouse would have a place to live after his death. His will bequeathed his whole estate to a trust with his two daughters as the only trustees and beneficiaries, subject to a lifelong right for his spouse to inhabit the house where they (John and her) had lived. Sounds good so far.

Nothing else was bequeathed to the spouse and after John's death the widow was not happy. She instituted a claim against John's deceased estate under the Maintenance of Surviving Spouses Act, 27 of 1990, for more than R6m.

This act aims to protect surviving spouses against disinheritance by the deceased spouse in circumstances where the survivor has insufficient means of support. However, she did not supply any substantiating information about how she had arrived at this amount.

The two daughters were the executors of the deceased estate, although they had the good sense to appoint a knowledgeable agent to do the day-to-day administration of it.

In their capacities as trustees of the trust, the two daughters instituted a claim of R4m against the estate because of an alleged loan extended by the trust to their father to purchase the house over which the widow inherited the lifelong right to inhabit. If both these claims had to be paid, the estate would be insolvent.

The widow, who was not the mother of the two daughters, approached the high court for an order to remove the two daughters as executors. She argued that they have a conflict of interest.

The court was not pleased that such a case, which could have been resolved if all parties acted reasonably, eventually made its way into court. The court ordered the removal of the two daughters as executors as they were fatally conflicted by having to consider two competing claims which would influence how much they would benefit from their father's estate.

### Conflict of interest over income vs accommodation

Pieter owned a property on which a guesthouse was situated. His life partner, Kate, managed the guesthouse and his will provided that in return she could stay on the property after his death without having to pay rent while continuing to manage the guesthouse.

The property was bequeathed in equal portions to Kate and Peter's son, James. The net income (profit) of the guesthouse was to be divided equally between Kate and James. However, if James elected to stay in one of the other buildings on the property, he would forfeit his right to half of the profit of the guesthouse. The rest of the

estate was also bequeathed in equal parts to Kate and James.

This sounds like a neat solution to look after both Kate and James. In his will Peter also nominated Kate and his previous tax consultant, Anne, as executors of his deceased estate. During their administration of the estate after Peter's death, Kate and Anne took a different view from James on several points regarding the interpretation of Peter's will.

But they also refused to supply James with information about their administration of the estate and the income generated by the guesthouse, because they argued that the guesthouse was not an asset in the estate. They said Peter clearly intended Kate to have all say over the guesthouse and that James only inherited half the property and not the guesthouse.

James approached the court to have them removed as executors because of Kate's conflict of interest, Anne's lack of impartiality, and for a proper interpretation of the will. The court agreed with James that he was a co-owner of the property, was entitled to half the profit of the guesthouse and would only lose the latter if he moved into one of the buildings on the property. The court also removed the executors for conflict of interest and lack of impartiality.

### The lessons learned

These two cases, which were both heard before the high court in less than four years of each other, illustrate some very important points about wills:

- The risk of a conflict of interest becomes very real if you make a close relative, spouse or life partner the executor in your estate, except if the surviving spouse inherits everything.
- It's important to get professional advice whenever a second spouse or partner, as well as children from a previous relationship, are involved as beneficiaries or executors.
- Get professional help to draft your will to avoid disputes about interpretation.
- The court views an executor in a deceased estate and a trustee in a trust as being placed in a position of trust and are subject to a duty to act in an impartial way, that means in the best interests of the estate or trust and all who may benefit from it. 🌱