

WHICH ONE WINS, WILLS, TRUSTS OR LETTER OF WISHES?

By Phia van der Spuy

People, generally speaking, do not pay sufficient attention to what they want to happen with their assets upon their deaths. This can be ascribed to estate planning not being given priority at a given time, or to people shying away from dealing with thoughts around death, or even ignorance. As the saying goes, 'nothing is certain, except death and taxes'.

Many people believe that estate planning is having a will, but having a will is just one part of the plan. Where people also have trusts and letters of wishes, those documents will have often been drafted by different service providers, who may not have considered, or even been aware of other relevant documents, and who may not even specialise in providing such services. This may cause a conflict between the various documents, leaving the testator/testatrix having not achieved his/her objectives upon death, which may even be abused.

The Court expressed its concerns around the bad quality of wills in the *Raubenheimer v Raubenheimer* case of 2012, but the same can be said about the drafting of trust deeds and letters of wishes. The Court concluded that estate planning, wills, succession and the administration of deceased estates are inextricably linked to the proper drafting of a will. The following was said in this case:

"It is a never-ending source of amazement that so many people rely on untrained advisors when preparing their wills, one of the most important documents they are ever likely to sign. This is by no means a recent phenomenon. Some 60 years ago, in *Ex Parte Kock NO*, a high court decried the number of instances in which wills had to be rejected as invalid due to a lack of compliance with prescribed formalities and the regularity with which the courts were being approached to construe badly drafted wills, before urging intending testators 'in their own interests as well as in the interests of those whom they intend to benefit when they die . . . to consult only persons who are suitably trained in the drafting and execution of wills and other deeds containing testamentary dispositions'. Despite this, the courts continue all too often to be called on to deal with disputed wills which are the product of shoddy drafting or incompetent advice."

Will

In South Africa there is freedom of testation, where an individual has the right to determine the heir(s) to his/her property upon his/her death as he/she wishes. This is done in a will. Since 1 January 1954 all wills must be in writing. A will is a formal, signed, written (written by hand, typed or printed) document, in which a testator voluntarily sets out his/her instructions in unambiguous terms as to how his/her assets are to devolve following his/her death. Your will is a living document and should always be up to date and reflect your current wishes in terms of how you would like your assets to be distributed upon your death.

Trust

In the context of estate planning, a trust can be described as a legal relationship which has been created by a person (known as the founder, donor, or settlor) through placing assets under the control of another person (known as the trustee) for the benefit of third persons (the beneficiaries). The legal principles applicable to inter vivos trusts are to be found in the Law

of Contracts. This means that the principles that apply to the execution of a valid contract also apply to the execution of a valid trust deed. A trust is either a contract (Crookes v Watson case of 1956) that is brought about by a person (the founder) when he/she is alive (an inter vivos trust) or it is a testamentary disposition (a testamentary trust) that is brought about on the death of a person. A trust can also be created in terms of a court order (court order trust), such as divorce order.

Because a trust is regarded as a contract, the Courts will look at the substance of the arrangement rather than simply looking at the trust deed – the constitutional document of the trust.

Letter of Wishes

A letter of wishes is a way for you to inform others of matters to be taken into account after your death. It may, for example, contain guidance to the guardians of minor children detailing how you might want your children brought up in terms of education, religion or residence. A letter of wishes is a separate document to your will, but it accompanies your will. It is not legally binding but can guide your executors and trustees to ensure that your personal wishes are carried out. You should take care that a letter of wishes does not contain anything that could conflict with your will.

A letter of wishes should be written in plain English, signed and dated, but not witnessed, so as to avoid any claim that it has become a legal will or codicil (an addition or supplement that explains, modifies, or revokes a will or part of one).

Conclusion

There is an ongoing debate as to the role of a letter of wishes and whether a letter of wishes should be seen as part of the trust deed. A letter of wishes is not legally binding on the trustees, but could be taken into account by them. Where trustees have been given wide discretion in a trust deed, it is important for them to have an understanding of what the founder had in mind when he/she created the trust, and exercise their discretion accordingly. The trustees should certainly be influenced, but never dictated to, by a letter of wishes. If the trustees only follow the letter of wishes and do not apply their discretion, they risk being attacked by beneficiaries and creditors.

~ Written by Phia van der Spuy ~