



The Down Syndrome Association Gauteng

PLANNING YOUR WILL

Acknowledgement:

Henk Van Rensburg - Stabilitas

It is essential, that we do make informed decisions in planning for the future care and financial provisions of our children, in the event of our untimely death.

Most people spend the greatest part of their time in order to live and let others live, to smile and to make others smile; to fulfil their duty and to cherish the dreams to be realised in this life, especially the dreams for the special child given in their care, giving them so much joy but remains so totally dependent on them as parents.

Because children grow up, we think a child's purpose is to grow up. But a child's purpose is to be a child. Nature doesn't disdain what lives only for a day. It pours the whole of itself into each moment. We don't value the lily less for not being made of flint and built to last. Was the child happy while we lived? That is a proper question, the only question. **If we can't arrange our own happiness, it's a conceit beyond vulgarity to arrange the happiness of those who come after us – Tom Stoppard.**

It is therefore, of paramount importance to, through comprehensive planning, ensure that enough means will be available to utilise towards the property maintenance and well-being of the child in order to prevent undue hardship befalling him.

The Will, as part of the planning process, is not only a legal necessity but also a moral obligation towards the child.

Professor Meyerowitz, in the chapter dealing with Wills, states that a testator with a philosophical frame of mind began his own Last Will and Testament by saying: 'Nothing is more uncertain than life, and nothing more certain than death. Death, indeed, comes to all and many who leave this vale of tears behind them not only the mere memory of their existence but also the more tangible fruits of a lifetime of toil, an estate. The importance of a Will as part of the circle of life should, therefore, never be underestimated'.

A Will, in a nutshell, represents the wishes of a person in terms of which his estate is to be finalised and the assets distributed amongst his dependents and loved ones. It can, subject to the conditions and the manner in which it was drafted, be a blessing or still be the cause of the dependant's misery for years after his death.

Although a Will may adequately provide for the devolution desired by the testator, the way in which a bequest is made may involve consequences flowing from the Wills Act as well as other laws that might have neither been desired nor contemplated by him. It is, therefore, important the the Will be finalised by a professional draftsman and not a layman.

Due to the fact, that the child will always be dependant and never able to handle his own affairs no assets should be bequeathed to the child, but bequeathed to the trustee to be utilised for the sole benefit of the child for life, whereafter the corpus can be distributed amongst other beneficiaries. A trust utilised in terms of the conditions of a Will is generally known as a trust moris causa or a wills trust.

An Inter Vivos Trust, or family trust, can also be utilised and be one of the beneficiaries in terms of the Will. The Inter Vivos Trust is based on the law of contract and has to be registered during a person's lifetime.

Notwithstanding the type of trust utilised it is essential that, in terms of the conditions thereof, the trust qualifies as a discretionary trust. The disabled child should also, in the discretion of the trustees, and during his lifetime, qualify as the sole beneficiary of the trust. This condition will qualify the trust as a "special trust" referred to in the Income Tax Act resulting in a more favourable tax scenario.

In terms of Section 9 of the Trust Property Control Act a trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. The best interests of the child must, at all times be served.

Provided that the child has not attained the age of 18 a guardian should also be appointed to care for the person of the child until he has reached the age of majority. Although only the High Court or judge can appoint a curator to care for the person of a child that has already reached the age of majority, persons whom preference should be given to should also be named in terms of the conditions of the Will.

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