30 June 2008 COMPILED BY: DALEEN HARRIS OF GLACIER FIDUCIARY SERVICES VOLUME 08

General mistakes planners make when drawing up a Will

In this issue we look at the drafting of Wills and some of the general mistakes people make – some of which can have serious practical implications. A badly drafted Will may cause delays in the winding up of the estate, in some cases even resulting in rifts among the beneficiaries.

Making use of the current Section 4A abatement of R3.5 million for estate planning purposes

When making use of the R3.5 million abatement, planners should be mindful of the following pitfalls:

1. The planner may bequeath an amount of R3.5 million to either a specific beneficiary or a Trust.

    - First pitfall – Is there enough liquidity to service this bequest? If there is a cash shortfall the Executor will have to sell assets to pay out this bequest and by doing so there may be other implications, such as Capital Gains Tax.

    Ideally, this bequest should read as follows:

    I bequeath cash or assets or a combination of cash and assets equal to the value of (a) such portion of my estate which may be exempt from estate duty at the date of my death in terms of the present Section 4A of the Estate Duty Act No. 45 of 1955 (which section is currently known as the Standard Section 4A abatement of R3,500,000 or, (b) such portion of my estate which may be exempt from any similar form of duty or tax in terms of any new Act or Statute which replaces the present Section 4A of the Estate Duty Act No. 45 of 1955 at the date of my death, whichever of the two ((a) or (b)) is applicable, ……..

    - Second pitfall – Has the planner taken into account all assets going to beneficiaries other than a spouse or a Public Benefit Organisation. If a minor child has been appointed as a nominee on a life policy, this will also form part of the R3.5 million provision for estate duty purposes.

    It is therefore important that a full estate planning analysis be conducted for the client before making use of the abatement.

Beneficiaries mentioned in Wills

Children and grandchildren should be referred to as a group. For example, “I bequeath the residue of my estate to my children”, instead of naming them individually. If children are named individually in the Will, it may happen that subsequent children born after the Will has been drawn up may be excluded from the Will if it is not updated.

When making specific bequests to non-family members it is advisable to make use of full names and surnames, rather than initials and surnames, and where possible to include identity numbers, and last residential address.

Non-family members may not necessarily be known to the immediate family, making it difficult for the Executor to trace the beneficiaries.

Making use of the terminology "Majority" instead of a specific age in the Will

The age of majority was reduced from 21 years to 18 years by the Children's Act 38 of 2005. Any bequest to a testamentary trust with the wording "until majority" will imply that the trust will terminate when the child reaches age 18 and will then inherit the trust capital.

The planner should specify that it is indeed the intention that the children may access the money at age 18. It is advisable to rather use a specific age.

Making use of limited interests in Wills

Planners sometimes make use of a limited interest in their Wills. For example, "I bequeath my property at Umhlanga to my children, with a lifelong usufruct to my spouse."

Or

"I want my mother to have use of the flat at the back of my property for the duration of her lifetime."

Planners don't always fully understand these limited interests, or the long-term effects they may have on the beneficiaries.

The question in most cases and which is rarely addressed in the Wills is, *who will be responsible for the maintenance, rates and taxes, levies, insurance premiums etc.* The person who by law is liable, may not be the person the testator intended to be responsible for these expenses.

Usufruct, *usus* and *habitatio* are in many ways similar, but there are critical differences relating to the rights, duties and implications flowing from them. *Usufruct* allows the holder use and enjoyment of the asset, and to gather and use the gains from the asset, while *usus* only allows use and enjoyment, but not ownership of the gains. *Habitatio* only allows occupation of a building, but the holder is in a position to cede his rights, unlike the holder of a *usufruct* or *usus*. When determining whether to use any of these personal rights when planning one's estate, these differences should be carefully weighed up and considered. The value that is given to the personal right in each of these cases also has a substantial influence on tax and estate planning.

The July issue of *Estate Planning Essentials* will concentrate on the signing of Wills.

Seminar
Glacier Fiduciary Services will be hosting a seminar on Trusts during August. Sessions will be held in the major centres and more information will be communicated closer to the time.

Any queries may be directed to:
Eugene Ward (041) 365 1303