



# TRUSTS AND ESTATES ALERT

## IN THIS ISSUE

### YOUR WILL: A LETTER OF SORTS

Death is a subject mostly avoided in conversation and topical discussions. Yet last week, the moving letter of Leonard Cohen (81), well-known singer and poet, to his former love and muse, Marianne Ihlen, was extensively reported in the print and online media, and shared on social platforms. In a few lines, Cohen addressed the reality of death clearly and beautifully, and has been praised for his honesty and courage in so doing.

# YOUR WILL: A LETTER OF SORTS

*The exercise of drafting a Will and reflecting on a period when we will no longer be around, brings our mortality into sharp focus. So naturally, we prefer to skirt around the issue and put off making that Will for another day.*

*It is important to know that the death of a younger person, particularly when death is sudden, can have as great or even greater impact on estate planning.*



Death is a subject mostly avoided in conversation and topical discussions. Yet last week, the moving letter of Leonard Cohen (81), well-known singer and poet, to his former love and muse, Marianne Ihlen, was extensively reported in the print and online media, and shared on social platforms. In a few lines, Cohen addressed the reality of death clearly and beautifully, and has been praised for his honesty and courage in so doing.

Penning the letter in just two hours, he writes "well, Marianne it's come to this time when we are really so old and our bodies are falling apart and I think I will follow you very soon. Know that I am so close behind you that if you stretch out your hand, I think you can reach mine". Wishing her a very good journey, he says his final farewell, "goodbye old friend. Endless Love, see you down the road". Cohen displayed a fearlessness in addressing openly her imminent death from leukemia as well as his own mortality. For most of us, death is, however, something we do not wish to think about, let alone write and speak about.

Consciously or unconsciously, most people avoid the subject. After all, it is morbid and unwelcome, not something to dwell on. Closely related to this, are discussions regarding our last Will. The exercise of drafting a Will and reflecting on a period when we will no longer be around, brings our mortality into sharp focus. So naturally, we prefer to skirt around the issue and put off making that Will for another day.

Even where we know the importance and advantages of having a well drafted, valid and up to date Will, we procrastinate. Usually the first time a Will is drafted, or updated, is when a risky activity is embarked upon: such as an impending overseas trip or the prospect of major surgery. Of course it is prudent to take

precautions at such times. But statistically, these events pose no greater risk than the things we do every day.

It is more common for people of an 'older generation' to draw up a Will. When we are younger, we like to think there is less risk of us dying soon. Intellectually, though, we know that death can be unexpected, not limited to advanced age or 'risky' activities. It is important to know that the death of a younger person, particularly when death is sudden, can have as great or even greater impact on estate planning.

Another common reason for drafting a Will for the first time is a change in our circumstances which require a sense of responsibility for others; for example: when a relationship is formalised through marriage or moving in together, or when starting a family. These life changing moments are of course important events, but should not be the only times when advice is sought.

An associated reason for avoiding the preparation of a Last Will and Testament may be unresolved family issues. Drafting a Will forces us to consider solutions and deal with family and financial issues that we may not want to face. For instance, a person who has remarried may be conflicted about how best to provide for their new partner and family, without forfeiting the remaining capital for the benefit of the children from their former

# YOUR WILL: A LETTER OF SORTS

CONTINUED

*A lifetime of work and prudent financial planning can be entirely undone if you die without a carefully constructed Will in place.*



marriage; or someone may be struggling to resolve what to do about a potential beneficiary's inability to handle money, but does not want to exclude or discriminate against that person. It is human nature for us to sidestep unpleasant or uncomfortable issues, but there really is no need for us to delay when it comes to drawing up a Will. A seasoned practitioner will have encountered many similar problems and is in a good position to propose constructive solutions.

What also often happens is some people consider their estates too small to bother drawing up a Will. Ironically, in many cases, drafting a Will for smaller estates demands specific skills to ensure that it caters adequately for those to whom they have legal obligations. Some estates are also far greater at the time of the testator's death than was the case when the Will was prepared: The asset base may have grown through, for example, an inheritance, the proceeds of pension funds, life insurance policies and other investments. There are so many demands on our time and energy - our work and family commitments and other obligations; so we neglect to set aside the time to draft a Will. It seems ironic, though, because with a proper estate plan in place, we create the foundation for preserving the fruits of our labour for the benefit of the ones we leave behind.

Many of us view legal costs as a grudge purchase, and there are institutions which provide free wills, and templates are also accessible online. However, the peddling of free wills and making use of such facilities are usually more of a disservice to the potential testator than a service.

In particular in a recent judgment of the Supreme Court of Appeal, *Raubenheimer v Raubenheimer* (2012) 5 SA 290 (SCA) the court expressed its frustration at the high incidence of matters before the court relating to wills which are the product of shoddy drafting or incompetent advice. Judge Leach remarked as follows, "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".

A similar view was also stated in an earlier case *Ex Parte Kock NO 1952 (2) SA 502 (C)*: "These are instances which can and should be avoided, and, in their own interests as well as in the interests of those whom they intend to benefit when they die, I urge intending testators to consult only persons who are suitably trained in the drafting and execution of wills". Thus the value of such expenditure must be seen objectively. Your Last Will is a vital document. A lifetime of work and prudent financial planning can be entirely undone if you die without a carefully constructed Will in place. The legal cost of undoing a flawed Will inevitably is a far more expensive prospect.

The tasks of talking about death and preparing one's Last Will can seem daunting. In the song for which she was the inspiration, So Long Marianne, Cohen sings that "it's time that we began to laugh and cry and cry and laugh about it all again" and as death is inevitably part of life, it is perhaps with this bravado that such tasks should be faced.

.....  
*Johann Jacobs and Karin Muller*

## OUR TEAM

For more information about our Trusts and Estates practice and services, please contact:



**Johann Jacobs**  
National Practice Head  
Director  
T +27 (0)21 481 6380  
E johann.jacobs@cdhlegal.com



**Karin Muller**  
Senior Associate  
T +27 (0)21 481 6372  
E karin.muller@cdhlegal.com



**Gretchen Barkhuizen-Barbosa**  
Director  
T +27 (0)11 562 1250  
E gretchen.barkhuizenbarbosa@cdhlegal.com



**Linda Coffee**  
Associate  
T +27 (0)21 481 6418  
E linda.coffee@cdhlegal.com

### **BBBEE STATUS: LEVEL THREE CONTRIBUTOR**

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### **JOHANNESBURG**

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### **CAPE TOWN**

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2016 1241/AUG

