



Family Support for Schizophrenia

Strength through sharing

A family support group founded in 1981 by the relatives of people living with schizophrenia

Our goals are

- To give support to the families and carers of people living with schizophrenia
- To enlighten and educate families and the public about schizophrenia and mental illness
- To raise awareness aimed at fostering community support and involvement
- To reduce the stigma associated with schizophrenia and mental illness
- To advocate for the rights of persons with mental illness

Extract from FSS Newsletter November 2022

Wills, Trusts and Curatorship

Attorney Schalk de Wet gave a very clear and practical talk on *Wills, Trusts and Curatorship* to the 33 attendees at our October meeting. It proved to be a talk well worth waiting for! He dealt with the three topics in order, tailoring his information to the needs of our support group.

Wills

A **will** is a document which sets out what will happen to your assets when you die. Schalk emphasised that a will is “one of the most important documents you can ever sign”, because it brings legal certainty to your descendants, orders your affairs as at the date of your death, and makes life simpler and easier for those who are left behind. If you die without a proper will in place, the laws of intestate succession will apply. This can lead to lengthy delays, may not give effect to your wishes, and is highly undesirable.

When **planning your estate**, you will need to look at your assets and liabilities and decide what you want to achieve after your death - who your heirs are going to be and how you wish to provide for them. Schalk emphasised that **professional advice** would be needed to ensure your will is “simple, practical and executable”, and gave us a stern warning: “Do not try to rule from the grave!”

Family Support for Schizophrenia

NPO 040-491 | Tel 083 713 8653 | mail@familysupport.org.za | www.familysupport.org.za

Management Committee

Chairperson Maureen Robinson | Vice-Chairperson Wayne Schonegevel | Treasurer Mark van Wyk
Secretary Sue Custers | Members Marijke Littlefield, Lydia Franciscus, Leigh Haselau

In your will you need to appoint an **executor**, who will administer and wind up your estate after your death. In addition, if you create a trust in your will, you will need to appoint **trustees**; and if minor children are involved, you will need to appoint **guardians**. You may wish to appoint both a family member or friend and a professional as co-executors to take care of personal and legal requirements. **Executor's fees** are limited to a maximum of 3.5% of the value of the estate. The **Master of the High Court** exercises oversight over deceased estates.

Schalk pointed out that “the obvious way” to protect a child or loved one with a condition such as schizophrenia after one’s death is to **establish a trust in your will**.

Trusts

In general, the purpose of a trust is to protect assets, and to determine the flow of benefits to a beneficiary or beneficiaries. Creation of a trust involves 3 parties: the **founder**, the **trustees**, and the **beneficiaries**.

The **founder** funds the trust by divesting themselves of certain **assets** and transferring them to the trust. The **trust deed** specifies the **trustees** and the **powers of the trustees** to run the trust, specifies the **beneficiary** or **beneficiaries**, sets out the basis on which the **benefits** will be distributed to the beneficiaries, and sets out the conditions for the **termination** of the trust.

Schalk noted that in South Africa a trust can be established in one of two ways:

- An **Inter vivos trust, Living trust** or trust “between living persons”. This can be created at any time during the founder’s lifetime, by drawing up a **trust deed** and registering the trust with the Master of the High Court.
- A **Trust mortis causa, or Testamentary trust**. This is created at the testator’s date of death. In this case **the will is effectively the trust deed**, and the executor will see to the registration of the trust with the Master’s office.

Once it has been registered as a trust and has received its letter of authority from the Master, the trust is a **separate legal entity** and the normal laws of the land apply. A separate bank account must be opened, and the trust must be registered for tax. The trustees hold a **fiduciary position** and must administer the trust for the benefit of the beneficiary. Under the Trust Property Control Act the Master will require the trust to have an **independent trustee**, such as an attorney or accountant.

A trust can have a lot of flexibility, and the trust deed should facilitate this. The trust deed should give the trustees the same kind of power as the founder would have had to deal with their assets without any unnecessary hindrance.

The costs to draw a proper will and establish a trust in the will vary and are negotiable. There are no statutory fees. It is normal for Trustees' to be paid an annual fee. This may be specified in the trust deed and can also be negotiable.

Finally, Schalk explained that if you have an existing **Inter vivos** trust, you will be able to bequeath certain assets from your estate when you die to the existing trust. You do not have to create a new Testamentary trust.

Curatorship

A **curator** is someone who is authorised by a court of law to conduct the affairs of a person who does not have the mental capacity to make decisions for themselves.

Schalk explained that a **Power of Attorney** only remains valid while the person who has granted it is *compos mentis*, or "of sound mind", and still has the capacity to withdraw it. Once this is no longer the case, the Power of Attorney becomes **invalid**, and it is time to apply for a **curatorship**.

Schalk told us that an application for curatorship is a **formal process**, which must be dealt with by the High Court. There are certain strict requirements for a curator to be appointed. The application is brought by a family member assisted by an attorney and must include a report from an independent psychiatrist who has examined the patient. On receipt of the application, the court appoints a **curator ad litem**, usually an advocate, to investigate the circumstances and report back to the court.

Two kinds of curator can be appointed by the court:

- A **curator personae**. Deals with matters affecting the body. Takes decisions regarding welfare, custody and care and consents to medical treatment of the person. This is a relatively rare form of curatorship.
- A **curator bonis**. Deals with financial and legal matters. Manages the person's finances, property and estate, for the benefit of the person. This is the more common form of curatorship.

Schalk emphasised that the appointment of a curator is a "drastic" event as it takes away rights previously held by the person. The court "will not do this lightly", and "must be convinced that this is in the best interests of the person". Although "the curator is there to protect the person", the arrangement can be vulnerable to abuse "as family members may try to get their hands on the money". This is one of the reasons that the Master imposes strict reporting requirements on the curator bonis.

The application process is expensive and may cost in the region of R50 000. Statutory fees for a curator bonis are 6% of the annual income earned during the curatorship, and 2% of the capital at the termination of the curatorship.

Schalk concluded by noting that a curatorship can be complicated and there are many issues to consider. Often **a trust can work as well as a curatorship** in order to protect a patient's interests. But the law around curatorships is well established, and if circumstances justify a curatorship, one can have the confidence to "go for it".

Administration

As an alternative to curatorship, **administration** in terms of the Mental Health Care Act can be applied for when there is an asset base of R200 000 or less. The requirements are less stringent.

Feedback from participants

One member wrote in to say she had benefited from the talk and was busy drawing up her will. Another reflected after the meeting: "This is the kind of technical information that people often don't like to think about. But it has significant lifelong implications. One needs to understand the value of talking to a professional to get information that is accurate and up to date." Our sincere thanks to Schalk for getting us informed and motivated to "get our affairs in order".

There were requests for a summary or FAQs covering the material presented. We have done some hunting on the internet. Please see below for a few links.

Further reading

Miltons Matsemela Attorneys. *Guide to Estates / Wills / Trusts*.

https://miltons.law.za/assets/uploaded_attachments/Estates_Wills_Trusts_1.pdf

Abrahams & Gross Attorneys. *Curatorship – what does it entail?*

<https://www.abgross.co.za/curatorship-what-does-it-entail/>

AED Attorneys. *What is the Difference Between a Curator and an Administrator?*

<https://adattorneys.co.za/what-is-the-difference-between-a-curator-and-an-administrator/>

Zabow, Tuviah, *Wills and curators - decision-making in adults with impaired capacity*.

Continuing Medical Education, April 2012. (Includes a section on Administration of property in Mental Health Care Act)

<http://www.cmej.org.za/index.php/cmej/article/view/2404/2276>

Our speaker

Schalk de Wet, Consultant at Basson Blackburn Inc, was admitted as an attorney in 1979 and has been practising in Durbanville since 2007. With a long history in insolvent estates and company liquidations, as trustee or liquidator, Schalk currently concentrates on deceased estates, curatorships and commercial litigation related to those two fields. At present he is appointed as curator bonis in numerous estates, and as executor in various deceased estates.



NPO Registration Number NPO 040-491
www.familysupport.org.za