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The "freedom of testation"

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Wills

In many countries one cannot merely bequeath assets freely as one may choose as there exists in those jurisdictions forced heirship rules. In other words a certain percentage of the distributable estate must devolve upon the closer defined family. For many years South Africans have proudly defended their "freedom of testation" but when one looks closer, this freedom is certainly not absolute. A will is the only document one will ever sign without being there when the will becomes operative to see how it is implemented or if in fact your wishes can be carried out as you may have desired. Whilst it is true that there is no formula to determine what should accrue to the immediate family, various other bits of legislation can come into play, on occasion thwarting the best intentions of the unwary testator.

Many a married person has executed a will dealing with his entire estate, bequeathing property and assets to various people. It is only after his death that it is ascertained that he was in fact married in community of property, and as his spouse co-owns each and every asset, he is therefore only competent to bequeath his half share of that asset. Ownership of the remaining half share remains with the spouse. This obviously has disastrous consequences if the beneficiary and the surviving spouse are not on very good terms. The parties may also have been married in terms of the Matrimonial Property Act 88 of 1984 and once again find that the spouse has an accrual claim for a chunk of the estate.

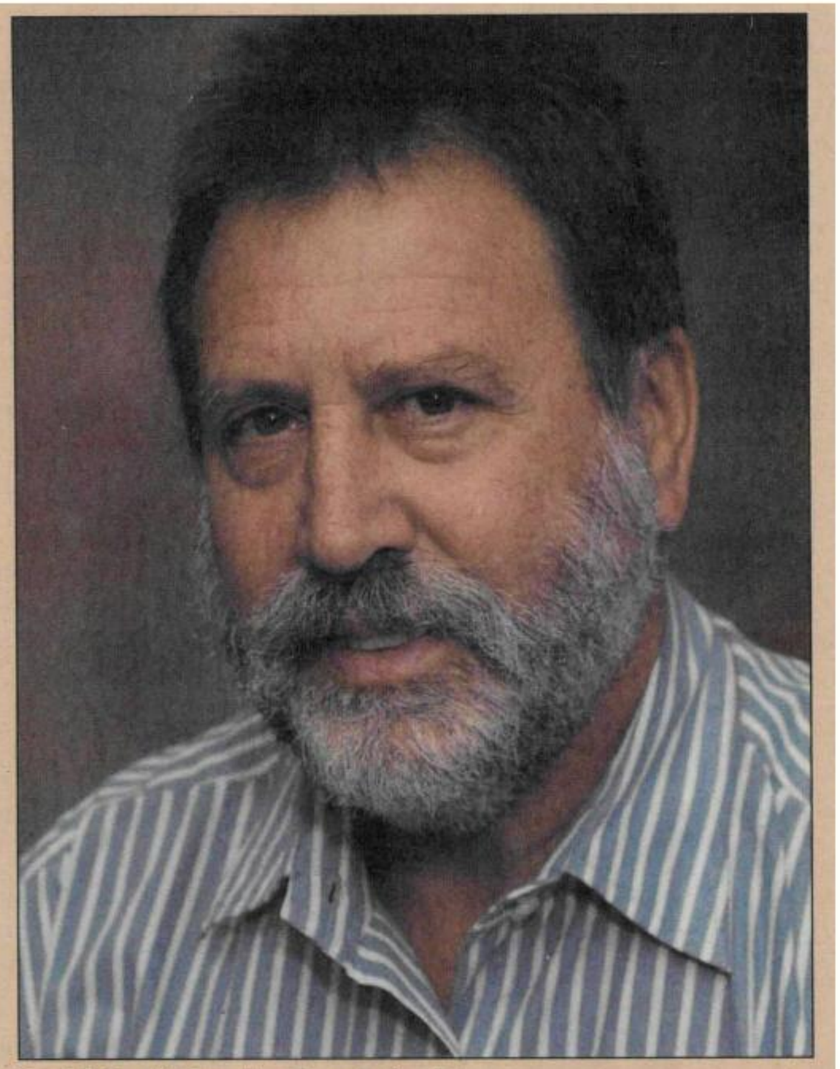
Both parents are obliged to provide for the well-being of minor children according to their means, even after death. If the deceased parent has disregarded the minors in terms of his will, their guardian will be successful in claiming a capital sum from the estate for their maintenance, education and general welfare. Once claimed from the estate, hopefully the guardian will use the monies wisely looking after the minor children until they are able to fend for themselves. Obviously the surviving parent is not released from her portion of the maintenance obligation.

Likewise, if the deceased had been obliged in terms of a divorce settlement to maintain a previous spouse or children of that marriage, those maintenance obligations continue after death. Once again, unless a testamentary trust has been established to fund such commitments, the former spouse will claim a capital sum from the estate. A large capital sum claimed from the estate can leave little for the intended beneficiaries.

The Maintenance of Surviving Spouses Act 27 of 1990 is yet another intrusion eroding the freedom of testation. The Act provides that the spouse shall have a claim against the estate of the deceased spouse for the provision of his reasonable needs until his death or remarriage in so far as he is unable to provide from his own means and earnings. Surviving spouses are often unaware of the Act and so do not avail themselves as fully as they might. As the Act is still relatively new, the decided reported cases are few and executors are often placed in a difficult position deciding the relative merits of claims submitted. In addition, the claims are dependant upon so many factors, for example the size of the estate, the length the marriage endured, the age and re-marriage prospects of the spouse, the wealth and earnings potential of the spouse and suchlike. Unless a spouse has been well looked after in terms of a will, the potential exists for litigation.

The Constitution of the Republic provides that neither the State nor any individual may unfairly discriminate directly or indirectly against anyone on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth. Thus the Constitution must also limit the freedom of testation to a degree as was evident in a Court decision handed down by the Cape Provincial Division. Here, the testator established a testamentary trust which was to provide financial assistance to deserving students but limited to those students of European descent, male and gentile. The Court found that these conditions which discriminated unfairly on the grounds of race, gender and religion, were unconstitutional and therefore invalid. The Court accordingly ordered that the offending words be struck out and the assistance is now available to all deserving students of the selected university. No doubt the Court will be approached in other similar matters in the future where aggrieved parties feel that they have been unfairly discriminated against. There are any numbers of existing trusts which have been established for a limited class of beneficiary which will need to be addressed by the Court in the future. Again, as the level of discrimination may vary vastly from trust to trust and it must be found to be unfair, each instance would need to be decided on its individual merits.

It is clear that we do not enjoy absolute powers of testation. It is therefore important that one seeks proper advice and attends to proper estate planning before one executes a will. One can still achieve the desired results and benefit the intended heirs with appropriate, skilled guidance.



David Knott: Freedom is not absolute