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Fiduciary Matters

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Will drafting really does require specialist expertise

Wills

Will requirements vary from person to person. Some people's circumstances require only a simple straightforward Will.

However, every Will drafting exercise requires specialist expertise to know whether a simple Will will suffice. The 1 June 2012 judgment of the Supreme Court of Appeal in the Raubenheimer case is another reminder that Will drafting really does require specialist expertise. (Raubenheimer v Raubenheimer (560/2011) [2012] ZASCA 97)

The judgment begins 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. …. Some 60 years ago, in Ex Parte Kock NO, a high court decried the number of instances on which wills had to be rejected as invalid due to a lack of compliance with prescribed formalities and the regularity with which the courts were being approached to construe badly drafted wills …".

Despite this the courts continue all too often to be called on to deal with disputed wills which are the product of shoddy drafting or incompetent advice. This is another such case."

Dr SP Raubenheimer (Dr R), a Pretoria medical practitioner, signed a Will in which he stated, "I bequeath my estate to my spouse…. She shall have a usufruct over our residence in Pretoria until her death or remarriage. See the attached list of specific bequests. In the event of my spouse dying before me …. the bequest to her will lapse and I bequeath my estate to my children [being his children from a previous marriage]."

The Will was prepared for him by a Cape Town insurance broker and investment advisor (Mr X). The three problems with the Will, which led to the costly litigation, were as follows:

- The 'witnesses' who signed the Will did not actually witness Dr R signing it, in his presence and in the presence of each other (as required by section 2 of the Wills Act 7 of 1953). The testator signed at his medical practice in Pretoria, whereas the 'witnesses' (employees of Mr X) signed in Cape Town two days later.
- The Will refers to an attached list of specific bequests. At the date of signature, Dr R had not had time to prepare it. By the time he died, some three years later, it had still not been attached.
- A bequest of a usufruct in favour of a person amounts to a conditional deprivation of the rights of enjoyment as against the intended ultimate (outright) owner, but Dr R's Will does not say who that owner should be.

On the basis of the above problems, Dr R's children applied to court for an order declaring the Will void and as a result that Dr R has died intestate.

Such an order would have resulted in the estate being divided equally between the spouse and the two children[1] (as opposed to the spouse inheriting everything). The children contended that the Will was void because it was not properly witnessed and because it was too vague as to who should inherit what.

On the first point, the court found (on these specific facts) that Dr R did intend the document to be his Will, as required in the determination of a validity challenge in terms of section 2 of the Wills Act. On the second point, the court held that the failure to attach the bequest list simply meant that Dr R did not make the bequests. It did not render vague his bequest of his estate to his spouse.

As for the 'usufruct', Dr R's spouse argued that the result of the defective wording was that she inherited the property outright (not subject to any restrictions). The court held that the Will should be interpreted as creating a fideicommissum over the property with the spouse as the fiduciary until her death or remarriage when the property passes to Dr R's children – there being no other persons mentioned as potential heirs.

The courts continue all too often to be called on to deal with disputed wills which are the product of shoddy drafting

To reach this conclusion, the court was required to imply a term into the Will in light of its express terms and the relevant surrounding circumstances.

The court concluded by reiterating the cardinal rule (quoting Masters v Estate Cooper 1954 (1) SA 140 (C)) that "no matter how clumsily worded a will might be, a will should be so construed as to ascertain from the language used therein the true intention of the testator in order that his wishes can be carried out."

The Raubenheimers are not the only family to have spent a substantial sum on legal fees to try and sort out (through the courts) who was meant to inherit what – because of a poorly drafted and executed will. Testators who want to avoid their legacies being eaten up by legal fees after they die, would be well advised to get their Wills drafted by appropriately trained advisors.

[1] Assuming the estate was worth R375,000 or more.

This article was written by FISA member Tanya Cohen, Fiduciary Specialist at Momentum.

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