PERSONAL FINANCE (Saturday Weekend Argus)
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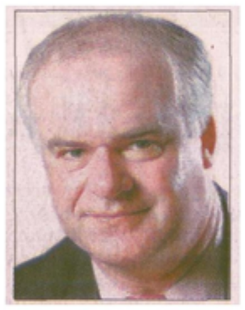
Where there is a valid will there is a clear way forward for your loved ones



Life with Cameron

Bruce Cameron

'It is a never-ending source of amazement that so many people rely on untrained advisers when preparing their wills, one of the most important documents they are ever likely to sign."

So said Judge JA Leach in deciding on the validity and interpretation of a will in a recent Supreme Court of Appeal judgment (see "Raubenheimer vs Raubenheimer" below).

The good judge may also have truthfully added, although this was not under discussion, that a huge number of people simply do not have wills – and this also causes significant problems.

In an effort to halt the situation described by the judge, the Fiduciary Institute of South Africa (Fisa) has been struggling for some years now to get South Africans to prepare wills, and when they do, to ensure that the will is put together by a qualified professional.

Another of its intentions is to have a publically available list of members who are qualified to help you draw up a properly considered and legally structured will.

The problem raised by Judge Leach isn't new. In his judgment the judge said: "This is by no means a recent phenomenon. Some 60 years ago ... the High Court decried the number of instances in 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."

As the court said 60 years ago, it is in your own best interests as well as in the interests of those whom you intend to benefit when you die to consult only with people who are suitably trained in the drafting and execution of wills.

Judge Leech says that 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".

DECLARED INTESTATE

You will be declared to have died "intestate" if you do not have a will or if your will is set aside because it does not meet legal requirements.

This means that your worldly wealth will be distributed according to a formula, with people you may not have seen or particularly liked receiving a slice, often to the detriment of those you wish to benefit.

Don't assume you don't need a will, as someone I know did recently, telling me he didn't need one because it was automatic that his spouse and children would receive everything.

Angélique Visser, chairperson of Fisa, says that you should consider using a Fisa member to draft your will as you will then be assured of a minimum high standard and protection from unscrupulous or unqualified practitioners.

"Fisa has over 700 individual members, drawn from trust companies and banks, as well as the legal, accounting and financial planning professions. Fisa's objectives are to raise the standards of fiduciary practice in South Africa and protect the public. Our members are required to adhere to the Fisa code of ethics and if membership is terminated due to non-compliance, this is published on Fisa's website and in the media," she says.

Visser says that Fisa encourages every South African to have a will.

The institute also advises against do-it-yourself wills, as even the simplest of wills needs to be understood in the context of your particular affairs. Furthermore, wills need to adhere to certain formalities such as signing in the presence of two witnesses. If these formalities are not adhered to, there is no guarantee that the will will stand up in a court of law.

She is absolutely correct, as is the judge, when he says you are protecting your interests and those of your dependants.

To find a Fisa practitioner in your area, email willsquery@fisa.org.za

Raubenheimer vs Raubenheimer: an invalid will reinstated on appeal

In 2009, Pretoria medical doctor SP Raubenheimer died. He had signed a will compiled by his Cape Town-based financial adviser, Jan Hendrik Hagen. The will, at face value, was valid. It was signed by Raubenheimer and his signature was witnessed by two people.

He left his entire estate to his wife, with a single proviso that she only had a right to the family home until death or remarriage.

As so often happens, there was more than one person interested in the estate left behind by Raubenheimer. In this case there was Raubenheimer's wife and his two children by his first marriage, who challenged the will.

In the course of their objections it came out that when Hagen had drawn up the will in 2005, Raubenheimer's signature had not been witnessed when he signed, but two Hagen employees later signed the will back at Hagen's office.

Hagen, who knew that the witnesses had to be present when the will was signed, says Raubenheimer was too busy to leave his practice to get the will signed.

The next problem was that Raubenheimer was supposed to have provided Hagen with a list of specific bequests, which included who would receive the home to which his second wife had been given a usufruct – the right of use for life – until she died or remarried.

By the time he died, the list had still not been provided by Raubenheimer.

The result was that Raubenheimer's children successfully asked the North Gauteng High Court to declare the will null and void because it failed to meet statutory requirements and to declare that their father had died intestate.

The Raubenheimer children would receive a greater proportion of their father's estate if he was declared to have died intestate (without a will).

The second Mrs Raubenheimer appealed to the Supreme Court of Appeal, which set aside the High Court judgment.

Judge JA Leach, with the support of four other appellate court judges, found that the disputed will was, in fact, the way in which Raubenheimer wanted his assets to be distributed. The only reason the will was not properly signed was Raubenheimer's "hard-headedness in refusing to do the necessary..."

The judge pointed out that if a court is satisfied that a disputed will was the intention of the testator (Raubenheimer, in this case) then the court shall order the Master of the High Court "to accept the will even though it does not comply with statutory requirements".

The Raubenheimer children also argued unsuccessfully that, because there was no list of beneficiaries, the will was vague and therefore also invalid.

However, the fact that there was no list of beneficiaries did raise a problem, as the second Mrs Raubenheimer had been given a life right (usufruct) to the family home until she died or remarried. No mention was made of who would inherit the property on her death or remarriage.

Judge Leach says that the term "usufruct" is often loosely used and its legal significance is not necessarily understood.

"The mere use by the testator (the person signing the will) of the terms 'usufruct' or 'usufructuary' is not conclusive: there are many instances where a life interest described in a will as being a usufruct has been held to be, in truth, fiduciary in nature". (See "Life rights take various forms", right.)

The judge says that while a life interest may usually be construed as a usufruct, the intention must be "gathered from the will as a whole" – all the more so where a will is drafted by a person not trained in law.

The judge says Raubenheimer obviously intended that his second wife should not alienate the property. In other words, she could not sell the property.

Although a court must guard against "making a will for a testator", it can apply tests to determine who will inherit, considering the terms of the will as a whole.

The court found that it was clear Raubenheimer intended the ownership of the property to pass on to his two children on the death or remarriage of the second Mrs Raubenheimer.

Life rights take various forms

Graham McPherson, deputy chairman of the Fiduciary Institute of South Africa, says a "life right", as the name suggests, provides for rights over a specific property or other assets, for life. In the Raubenheimer case it is for life or until remarriage over a fixed property.

He says a life right can take several forms, namely:

- A *usus* or habitation, which is a very limited right to the use of property;
- A *usufruct*, which is a less limited right than the above over property, including the right to use of the "fruits" (for example, rental income from the property); or a
- A *fideicommissum* or *fideicommissum residui*, which is a limited right over property that is subject to (the event in the Raubenheimer case being death or remarriage) the property (or in certain cases what remains or needs to be provided) devolving upon another.

"A simplistic difference between a usufruct and a fideicommissum is that the *bare dominium* holders (the people who own the property over which the usufruct is given) will already have the property registered in their names subject to the usufruct, which simply cancels on death or remarriage, whereas the property only transfers to the fideicommissary heir on the happening of the event.

"The key difference between the different types of rights, for life or some other terms, is the ability of the person being given the right to deal with the asset over which the right is given, by themselves or with the approval of others," he says.

The life right in the Raubenheimer case implies a fiduciary right has been provided for, which means that, subject to the event happening (death or remarriage in this case), at that time the property will be transferred to the fiduciary heirs (in this case, his children), McPherson says.