

# PRACTICAL POINTS REGARDING DISQUALIFIED HEIRS

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## **General principle**

All persons are *testamenti factio passiva*, i.e. they have capacity to benefit in terms of a will.

Same principle applies on intestacy, but subject to rules as to order of inheritance.

## **Exceptions**

Common law

Statutory

# Common law exceptions: Intestacy

## 1. Person who caused the death of the testator

Taylor v Pim 1903 NLR 484

Caldwell v Erasmus N.O. and Another 1952 (4) SA 43 (T)

Casey v The Master 1992 (4) SA 505 (N)

*No impact on spouse's ½ share of marriage in community of property or spouse's right to accrual in marriage out of community of property subject to accrual regime.*

*Ex parte Vonzell 1953 (1) SA 122 (K)*

*Nell v Nell en 'n Ander 1976 (2) SA 700 (T)*

## 2. Person who stands to benefit as a result of his own crime

*Ex parte Steenkamp and Steenkamp 1952 (1) SA 722 (T)*

## 3. Illegitimate child and father (or his blood relations)

*Green v Fitzgerald and Others 1914 AD 88*

## 4. Mother (and her blood relations) of an incestuous child

# Common law exceptions: Testate succession

Same as intestacy, as well as:

## **1. Persons excluded by section 12 Perpetual Edict of 1540**

Minor cannot leave immovable property in his will to his curators, guardians, godparents or their children.

Spies N.O. v Smith en Andere 1957 (1) SA 539 (A)

## **2. Witness to will and his spouse**

## **3. Person who signed will on instruction of testator and his spouse**

## **4. Person who wrote out the will**

## **5. Incestuous child and parents**

## 5. Unworthy person

- a. Beneficiary who encouraged testatrix to lead immoral life  
Taylor v Pim (1903) 24 NLR 484
  
- b. Beneficiary who concealed a testator's will  
Yassen v Yassen 1965 (1) SA 438 (N)
  
- c. Person marrying minor without consent of parent/guardian/court  
Ex parte Dineen & Another [1955] 4 All SA 1933 (O)
  
- f. Person who sought to defraud persons of their rightful inheritance by forging a will.  
Pillay v Nagan 2001 (1) SA 410 (D)

# Statutory exceptions

## 1. Before 1 January 1954

Several statutes and ordinances.

## 2. Since 1 January 1954: Wills Act 7/1953

Section 5: any person who attests the execution of a will, signs a will in the presence of and by direction of the testator and the spouse of such person is incapable of taking any benefit from the will.

Section 6: same limitation applies to nomination as executor, trustee or guardian.

### ***Burton-Moore v The Master [1983] 2 All SA 257 (N)***

*B-M appointed as co-executor, but signed as witness.*

*He realised error and had will re-signed  $\implies$  testator signed twice and four witnesses signed.*

*Court: acceptable.*

## **3. Since 1 October 1992: Wills Act**

### **4A. Competency of persons involved in execution of will**

(1) Any person who attests and signs a will as a witness, or who signs a will in the presence and by direction of the testator, or who writes out the will or any part thereof in his own handwriting, and the person who is the spouse of such person at the time of the execution of the will, shall be disqualified from receiving any benefit from that will.

(3) For the purposes of subsections (1), and (2) (a) and (c), the nomination in a will of a person as executor, trustee or guardian shall be regarded as a benefit to be received by such person from that will.

# Statutory exceptions

(2) Notwithstanding the provisions of subsection (1)—

(a) a court may declare a person or his spouse referred to in subsection (1) to be competent to receive a benefit from a will if the court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will;

(b) a person or his spouse who in terms of the law relating to intestate succession would have been entitled to inherit from the testator if that testator has died intestate shall not be thus disqualified to receive a benefit from that will: Provided that the value of the benefit which the person concerned or his spouse receives, shall not exceed the value of the share to which that person or his spouse would have been entitled in terms of the law relating to intestate succession;

(c) a person or his spouse who attested and signed a will as a witness shall not be thus disqualified from receiving a benefit from that will if the will concerned has been attested and signed by at least two other competent witnesses who will not receive any benefit from the will concerned.

# Statutory exceptions: examples

## **In re Estate Barrable 1913 CPD 364**

Daughter wrote father's will from a draft prepared by him.

Court  $\Rightarrow$  daughter gained no benefit and acted with utmost bona fides.

## **In re Estate Maxwell 1949 (4) SA 84 (N)**

Son writes part of will on mother's instruction.

Court  $\Rightarrow$  no indication of any undue influence.

## **Van Rensburg v Van Rensburg 1963 (1) SA 503 (A)**

Disqualification of person writing out will also applies to mutual will.

Court  $\Rightarrow$  spouse cannot benefit unless other spouse subsequently confirmed the will.

# Statutory exceptions: examples

## **Blom v Brown [2011] 3 All SA 223 (SCA)**

Testator executed will leaving entire estate to wife. At later stage, original will could not be found and wife wrote out another will with same contents as before.

Court → confirms section 4A(2)(a) - court may declare person competent to receive benefit if satisfied that person did not unduly influence testator.

## **2B Effect of divorce or annulment of marriage on will**

If any person dies within three months after his marriage was dissolved by a divorce or annulment by a competent court and that person executed a will before the date of such dissolution, that will shall be implemented in the same manner as it would have been implemented if his previous spouse had died before the date of the dissolution concerned, unless it appears from the will that the testator intended to benefit his previous spouse notwithstanding the dissolution of the marriage.

Inserted in 1992 on recommendation of Law Commission.

# DUTIES OF EXECUTOR

- Determining beneficiaries
- Dealing with creditors' claims – section 32
- Realisation of assets – section 47
- Massing
- Taking over by spouse – section 38
- Drafting L&D account

# IMPACT ON EXECUTOR'S DUTIES

## Danielz NO v De Wet 2009 (6) SA 42 (C)

Wife found guilty of conspiracy to assault and do grievous bodily harm and assault with the intention to do grievous bodily harm. In terms of mutual will she inherits residue of deceased's estate. Marriage in community of property.

Old Mutual refused to pay proceeds of life policies to wife as nominated beneficiary and paid proceeds to estate.

Executor applied to court for declaratory order:

1. Did Old Mutual act correctly in not paying proceeds to spouse?

*Court → wife not entitled to proceeds of policies*

2. Was wife entitled to ½ share of proceeds of policies paid to estate?

*Court → proceeds of policies do not form part of joint estate*

3. Was wife entitled to inherit from estate?

*Court → wife unworthy to inherit*

Timeframe: March 2006 to June 2008

# IMPACT ON EXECUTOR'S DUTIES

## Longfellow v BoE Trust Ltd NO and Others [2010] ZAWCHC 117

Deceased signed will in 1990 – Syfrets Trust executor. Husband 1 sole heir. She died 2007, married to husband 2.

Husband 2 approached court with a later unsigned will, written by him, nominating him executor and heir. Application in terms of s2(3) and 4A(1).

Application denied – no intention, undue influence.

Costs to be paid by estate, failing which, by applicant.

Timeframe: September 2008 to April 2009.

# IMPACT ON EXECUTOR'S DUTIES

## E/L P

Wife of sole heir signed as witness.

Will provides for substitution – his children, with provision for trust if they are minors.

Court application to have him declared competent to inherit.

Curator ad litem appointed to represent minors' interests.

Order granted.

Timeframe: April 2012 – December 2012

# IMPACT ON EXECUTOR'S DUTIES

## E/L D

Spouse added handwritten portion to wife's will.

Master ruled him incompetent to inherit residue of estate.

Draft L&D reflects residue < R125 000.

Spouse decided not to proceed with application.

Timeframe: June 2011 to September 2011

# IMPACT ON EXECUTOR'S DUTIES

## E/L S

Deceased killed, surviving spouse implicated and arrested.

State witness fled country and charges against spouse withdrawn.

State prosecutor confirmed spouse will be charged again as soon as state witness located.

Spouse has now lodged application for order that executor must give effect to the will.

Timeframe: Since May 2013

# IMPACT ON EXECUTOR'S DUTIES

## E/L B

X arrested for hiring people to kill his partner B.

Will leaves cash legacy to father, residue to X, failing whom, to their minor child.

X currently on bail.

All assets sold with consent of X.

First L&D drafted to deal with cash legacy and loan account due by deceased.

Timeframe: 2008 to present

# OTHER EXAMPLES

## E/L L

Deceased found dead in house February 2011, son only witness.

Will leaves everything in trust for son until he turns 25.

SAPS contacted executor early in process to advise that they are investigating the son as an interested person in mother's death. They requested that no payments be made to son.

Further contact early 2012 to advise they're still investigating.

Estate since finalised, son still not charged.

# QUESTIONS

Why is person who wrote out will disqualified but person who typed will, not?

What constitutes “writing out” of will or any part thereof?

*e.g. A writes place and date of execution in B’s will – does A become disqualified to inherit?*

*Sterban v Dixon 1968 (1) SA 322 (C)*

