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The importance of a properly drafted will

Fiduciary Matters

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Although very few people will disagree that their will is one of the most important documents that they are ever likely to sign, many do not fully appreciate the importance of taking proper care when having their wills prepared and end up opting for the cheapest (often free) option.

The perception that wills are little more than a commodity may be fuelled by the fact that many wills look similar; however, it is only when one is required to examine their content in detail that it emerges that this is not the case. A competent wills drafter must understand the law relating to wills and must also be in a position to construct the will so that it accurately reflects the wishes of the testator.

The list of different permutations that can apply to the distribution of deceased estates is virtually endless and two recent court decisions indicate what can happen when an individual fails to take the time to ensure that their will is appropriate to their circumstances and accurately reflects their wishes.

Conclusion

Both of these cases emphasise the importance of taking care when preparing a will and highlight the fact that the failure to take proper care may well be a classic case of being "penny wise and pound foolish." Although the actual price paid for a will is not necessarily indicative of the quality of the final product, it is better to be prepared to pay a suitably qualified professional for something that is well drafted than simply to look for the cheapest option.

Any additional cost will be insignificant when compared with the costs of litigation that may ensue and this is before one even considers the delays that lengthy and protracted litigation will cause in the finalisation of the deceased estate.

Structures referred to in a will need to be valid and properly set up

In Raubenheimer v Raubenheimer [2012] ZASCA 97, Leach JA commences his judgment by stating that "[i]t 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." He points out that this is not a recent phenomenon and that the judge in Ex Parte De Kock NO 1952 (2) SA 502 (C) expressed similar concerns over 60 years ago. One of the issues before the court in Raubenheimer v Raubenheimer was what was meant by the following provision:

I bequeath my estate to my spouse, CHRISTEL RAUBENHEIMER. She shall have a usufruct over our residence in Pretoria until her death or remarriage.

The problem was that even though the will referred to a usufruct, the usufructuary and bare dominium holder were the same person. In order for a usufruct to be valid there must be a separation in the ownership of the bare dominium and the right to the usufruct. The question was what the testator had meant by naming his wife as his residuary heir and usufructuary of the Pretoria residence. The court concluded that the testator's intention was that his surviving spouse should have the use of the residence during her lifetime but that she was not to alienate it. It found that the testator had actually intended to create a fideicommissum in respect of the Pretoria residence, which was to pass to the testator's children on the death of the surviving spouse. In coming to this conclusion, the court relied on the fact that his children were named as heirs in the event of the testator's spouse predeceasing him or not surviving him for at least thirty days.

Invalid clauses

Siebert and another v Barker NO [2013] JOL 29827 (GNP) is another example of where a poorly drafted clause in a will had to be referred to the courts for interpretation. An extract from the relevant clause read:

I bequeath the residue of my estate ... to LORAINE ANTOINETTE MIESSMER. It is my intention that LORAINE distribute the residue among those of my children and close family members and or friends at her discretion according to my wishes made known to her during my lifetime.

"The issue was whether the clause was invalid because testator had delegated his powers to the residuary heir to dispose of his estate. The court was required to determine whether or not the testator had meant for Loraine to be bound by the stated intention or not. The golden rule is to interpret the language of the testator used in the will and the question was not what the testator meant but what the words used by him meant. The court ultimately found that the testator had appointed Loraine as his residuary heir and that the subsequent clause was not binding her. If the testator had intended to place the beneficiary under an obligation, he could quite easily have used appropriate language to do so.

This article was written by Jeffrey Wiseman, a member of FISA and Head of Advisory at Absa Wealth.

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