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Fiduciary Matters

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Rational mindset required when drafting a will

Most people only consider making or amending a will when there has been some emotional event such as the death of someone close, a family fallout and almost invariably, when a breakup such as divorce is looming. Unfortunately an emotional mindset may lead to irrational decision-making but the reality is that very often it is only when an emotional event occurs that people are prompted to attend to their affairs. It is for this reason that the testator should seek unemotional professional advice in the making of the will. Possibly the worst thing to do is to draft the will yourself since your executor may find it difficult or impossible to execute. This article explains how this may be the case.

Although there is freedom of testation under South African law, this 'freedom' is not absolute and has definitive limitations. The drafting of a will is deceptively complex, no matter how simple your affairs may seem and hence the need to consult with an expert. In many instances these limitations are overlooked, the consequences of which could be dire when it comes to your executor having to administer the estate. Indeed, the ultimate distribution or what is left for distribution may be entirely different to what was intended in terms of the will. Factors to consider would include:

- The effect of divorce or annulment of a marriage on the will. In terms of the Wills Act, you have a three month window following a divorce to amend your will to nominate alternative beneficiaries instead of your former spouse, failing which the former "spouse" will inherit.
- In similar vein, there may be obligations in terms of a divorce settlement which may provide for the delivery of certain assets at some future date. **A divorce settlement invariably takes precedence over a will**, so this needs to be borne in mind when drafting a will.

Ante-nuptial contract

– this contract also takes precedence over the will.

In many instances one may find that substantial donations were made by the one spouse to the other in terms of the ante-nuptial contract and these assets (or in some instances replacement assets) must be delivered prior to the distribution of the estate.

The ante-nuptial contract may also further regulate the patrimonial (property) consequences of the marriage as between the spouses by virtue of the accrual regime which may result in a certain measure of 'rebalancing' of the testator's estate to give effect to the provisions of the ante-nuptial contract before a distribution in favour of beneficiaries can take place. Conversely, the estate may have a claim against the estate of the survivor.

- If the testator signed any suretyships during his lifetime, these too will impact on the administration of the estate since the executor may wish to give notice under such suretyships. The administration of the estate may well be delayed in that the executor may have to find

Collation is an obligation imposed by law upon descendants who are heirs, either testamentary or in intestacy, to account to the estate for the purpose of distribution for certain kinds of gifts received from or debts owing to the deceased during his or her lifetime.

substitute sureties so that the deceased estate can be released under its obligations under any suretyship.

- The will drafter is also required to take a careful look at all the assets and liabilities of the testator, including contingent liabilities of the estate in order to arrive at a net value. It is also essential to take into account any potential estate duty payable (apart from normal liabilities) in order to determine whether there will be sufficient liquidity in the estate to prevent the forced sale of any assets belonging to the estate and earmarked for the beneficiaries. Alternatively beneficiaries may be required or choose rather to introduce the required liquidity into the estate to prevent the sale of assets.
 - Certain policies may have nominated beneficiaries and these policies would be paid directly to the nominated beneficiaries. By implication these funds or policy proceeds will not flow through the estate.

The trustees of pension and provident fund policies or vehicles also have the discretionary power to determine to whom the benefits will flow, irrespective of any contrary nominations in terms of a will.

- Maintenance claims – minor children have a common law right to claim maintenance against a parent's estate and similarly a surviving spouse also has a claim for maintenance in terms of the Maintenance of Surviving Spouse's Act. Such claims will first have to be satisfied before any benefits can flow to beneficiaries.

Not all of the above factors can be considered as direct limitations on the freedom of testation but nevertheless they must be considered and analysed to determine how various scenarios or events will play out, how this should be catered for in terms of the will and what would ultimately remain as part of the free residue available for distribution.

There are also other factors such as the doctrine of collation which is often overlooked. Collation is an obligation imposed by law upon descendants who are heirs, either testamentary or in intestacy, to account to the estate for the purpose of distribution for certain kinds of gifts received from or debts owing to the deceased during his or her lifetime.

By law a parent is presumed to have intended to benefit his or her children equally and in the absence of a suitable clause in the will

which dispenses with the requirement of collation, any of the siblings could claim that any of the other siblings who may have received more, 'add back' such difference for the purpose of distributing the estate.

This may result in an unintended consequence. It must be borne in mind however that only descendants may be required to collate and then only if they are heirs of the deceased and if they would have been heirs in intestacy but for the existence of a will.

The above is merely a synopsis of various issues that need to be taken into account when drafting a will. The need for any testator to take expert advice on the drafting of his or her will should be obvious!

This article was written by Alfred Bester, FPSA®, FISA member and Director, Legacy Fiduciary Services..

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