

WILLS & WORLDWIDE BENEFICIARIES



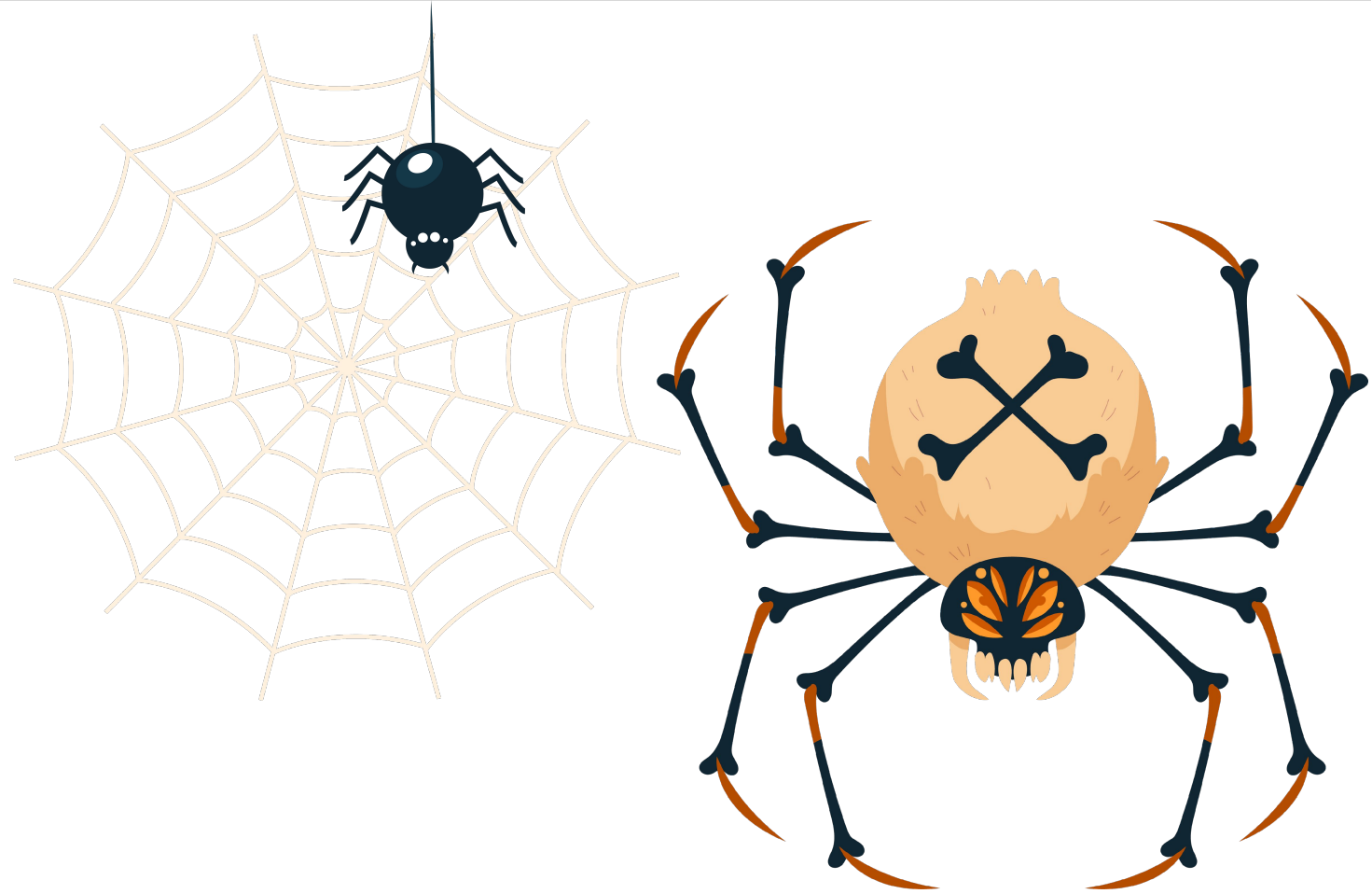
SENTINEL
INTERNATIONAL

WILLS AND DEATH – THE SPIDER IN THE HOUSE

- Harmless
- Dangerous
- Take Action



Picture by Rodrigo | Courtesy of Cartoon Movement



THE TYPICAL SIMPLE WILL

Upon the Testator's death

Spouse inherits the residue of the estate

Upon the Spouse's death

The Testator inherits the residue of the estate

Simultaneous death or death of the last survivor

The children inherit the residue of the estate

**SO WHERE IS
THE THREAT?**

**WHAT CAN GO
WRONG?**

WHAT HAPPENS ON THE FRONTLINE?

THE GOOD

Access to Will services

- Client liaisons and support staff meet with clients to take Will instructions – often part of sales targets
- Business development exercises - “Working the client base”
- Initiatives to facilitate Wills – Free Wills week
- Free or low-cost Wills available to the public

WHAT HAPPENS ON THE FRONTLINE?

THE BAD

**Insufficient or NO
advice given**

- Inexperienced individuals take instructions
- The lack of training leads to not enough questions being asked to identify potential pitfalls
- The result is insufficient information to enable proper planning of the Will

THE UGLY

It is too late

- The lack of planning and consideration is identified only once death occurred.
- Execution of the estate is frustrating the family.
- Questions are asked by the administrator which the family find inconvenient and believe it could have been avoided
- To the executor - Unnecessary delays are experienced

YOUR WILL - CRITICAL INFORMATION

- **Marital Regime – Which Law applies**
ANC, COP, Out of Community in terms of the Laws of ?
- **Where is your domicile**
Do you have a choice?
- **Statement of Assets**
Assets of the Estate or Contractual nominations?
- **Where in the world are the various assets**
Probate required or not?
- **Where in the world are the heirs/beneficiaries**

MARITAL REGIME ON HOME GROUND

- Mr & Mrs Mqala (*fictitious persons*) never had a Will and their daughter in the UK is now nagging them to do something about it
- The person who normally meets with them about their personal finances takes the instruction and knows that a very important question is: are you married In Community of Property or with an Antenuptial Contract
- Mr says they do not have a contract so the adviser record that the estate will be In Community of Property with Mrs therefore already owning half of the estate

HOW CAN A “SIMPLE” WILL GO WRONG

**SIMPLE
ENOUGH?
WRONG!**

Had the consultant ask them when they were married, the Wills drafter may have identified the pitfall. The Mqalas were married in 1983 which changes the situation as follows:

In terms of Sect 22(6) of the Black Administration Act 38 of 1927, the marriage of a black person who married before 2 December 1988 without an antenuptial agreement, shall automatically be regarded as being Out of Community of Property, unless they entered into an agreement at least one month prior to marriage that such marriage shall be in community of property.

CASE LAW

Quoted from LexisNexis article by Marilyn Rowen Kader

Sithole and Another v Sithole and Another 2021 (6) BCLR 597 (CC)

The High Court made an order declaring s21(2)(a) of the Matrimonial Property Act 88 of 1984 unconstitutional and invalid to the extent that its provisions maintain and perpetuate the discrimination brought about by s 22(6) of the Black Administration Act 38 of 1927, which provided that marriages of black couples concluded under the Black Administration Act before 1988, would automatically be out of community of property. The High Court declared that all marriages of black persons concluded out of community of property under s 22(6) before 1988 were marriages in community of property. A spouse in a marriage so declared to be a marriage in community of property was, however, given leave to apply to the High Court for an order that the marriage would remain one out of community of property, notwithstanding the High Court's order.

The High Court referred its order to the CC for confirmation. The Constitutional Court confirmed the finding and on 14 April 2021 handed down judgement.

CRITICAL CONCEPTS

Freedom of Testation

- **RSA – Freedom in terms of Common Law, subject to the Constitution**
- **Choice subject to religious principle – Shari-ah Law**

CRITICAL CONCEPTS

Forced Heirship

- **Some countries apply the rules of Forced Heirship**
- **EU Succession Regulation (Brussels IV) 17 Aug 2015 (excl UK , Ireland and Denmark)**
- **Situs of assets**

CRITICAL CONCEPTS

Status of the Heir

- **Citizen**
- **Resident**
- **Domicile**

DRIFTSAND

Mr X was married by ANC (in RSA) and left the whole of his estate to his surviving spouse in terms of his Will.

His Will specifically stated that it pertains to his assets in South Africa and The United Arab Emirates. He was survived by his wife and his two daughters.

Mr X worked in Saudi in construction for a number of years and ended up buying a villa. His contract terminated and he returned to RSA where he sadly died shortly after his return.

- He was clear on the relevance of his Will to UAE assets so there was not a separate Will of the UAE
- His marriage was a registered civil marriage in RSA

IN THE DRIFTSAND THE STRUGGLE

1. The Will was accepted by the Master and the LE issued
2. The executor engaged with a UAE solicitor in Abu Dhabi for guidance as follows:
 - a. Application was made for the MOH bound copies of the Will and LE for use outside South Africa
 - b. These documents had to be translated by a Sworn Arabic translator
 - c. The copies from the Master had to be apostilled

IN THE DRIFTSAND THE STRUGGLE

- d) The High Court had to attach a certificate to confirm that the Notary was indeed registered
 - e) All these documents had to be lodged for certification by the Department of International Relations and Cooperation in Pretoria
 - f) And lastly lodged with the UAE Embassy in Pretoria for Acceptance.
3. And at last sent to the solicitor in Abu Dhabi

IN THE DRIFTSAND DROWNING

After two years of torment and struggle the executors and spouse were advised that all efforts came to nothing.

The ownership of the villa, a situs asset, resulted in the UAE court enforcing Islamic Shari’ah Law and not recognising the authority and directions of the Will.

BEWARE!

CASE NUMBER 01

- Jakes went overseas to do his MBA in UK. He met the love of his life and remained in London to live happily ever after
- Jakes got his citizenship and they bought a house in the outskirts of London worth 225 000 GBP. He also invested in mutual funds which is now worth 100 000 GBP
- After a long dreadful winter Jakes and his wife decide to make South Africa their home and soon thereafter there is an addition to the family. They are now living in Faerie Glen in a property left to him by his mother.
- Jakes's wishes are simple as he wishes to bequeath the residue to his wife, failing his wife then to Baby Jake

CASE NUMBER 01

How many Wills are required?

- Consider the nature of the assets
- Consider the situs of the assets
- Consider the value of the assets - IHT & Estate Duty
- Consider the beneficiaries
 - minor, guardianship, trust
 - major, tax status
- Consider the practical administration

EVERYBODY KNOWS SOMEBODY – CHOOSE YOUR WEAPONS CAREFULLY

CASE NUMBER 01

Answer = Two

1. A separate Will addressing South African assets or Worldwide assets **excluding assets in the United Kingdom**
2. A separate will addressing assets in the United Kingdom
 - The United Kingdom does not subscribe to the Brussels IV regulation.
 - Like South Africa the United Kingdom allows for Freedom of Testation
 - Inheritance Tax (325 000 GBP) will not be payable in this estate but the assets will be included in the RSA estate for estate duty calculations.

CASE

NUMBER 02

- Helga, a former colleague of Jake in the UK, was born in Germany and came over to RSA to visit Jake and Jacqui. Her family fell in love with our country and traded the Bratwurst for Boerewors on a permanent basis. She also likes waterblommetjies and before her husband could stop her, she spent a few Euros and bought a modest place on the banks of the Hartebeespoort Dam.
- Helga owns a house in Germany which she inherited from her mom and operates a Deutsche Bank current account which is registered in her name jointly with her husband.
- She hears that South Africa allows for freedom of testation and therefor wants to keep it simple by leaving her whole estate to her husband, failing him then to her two children

CASE

NUMBER 02

How many Wills are required?

- Consider the nature of the assets
- Consider the situs of the assets
- Consider the beneficiaries
 - minor, guardianship, trust
 - major, tax status
- Consider the practical administration

EVERYBODY KNOWS SOMEBODY – CHOOSE YOUR WEAPONS CAREFULLY

CASE NUMBER 02

Answer = Two

1. A separate Will addressing South African assets or Worldwide assets **excluding Germany**
2. Germany subscribes to the Brussels IV regulation and it is advisable to include a Statement of Domicile
 - It is very important to establish to what extent the forced heirship laws will override/recognize the stipulations of Helga's Will and the Statement of Domicile.
 - Where forced heirship is involved, matters can be simplified by re-balancing bequests from the RSA estate or other asset types during the planning stages.
3. Ensure to meet the requirements of the German Court for the document to be regarded as a valid Will.

REVOCATIO N

**Possibly the single MOST POWERFULL
paragraph in a Will**

- **Very important that ALL Wills be read together in order to avoid revocation in error**
- **The power of this clause in a copy of a Will, even though the Will is not accepted as a valid Will**

SURPRISE OF FOREIGN LAW

A German couple have been life partners living in South Africa for 15 years. Mrs was previously married and her husband passed away in Germany 20 years ago, bequeathing to her the residue of his estate. A few years after his death she sold all her assets in Germany and came to live in South Africa with her new life partner. The children of Mrs were very upset and broke all contact with their mother.

The couple had their Wills drafted in RSA and Mrs bequeathed the residue of her estate to her life partner, failing him then 50% to her children and 50% to his children. Their Wills contained the standard revocation clauses and the Wills were duly signed.

It is now 7 years later and the estate is not distributed or wound up!

1. Neither the client nor the person taking the instruction for the new Wills, were aware of the far-reaching implications of the German Law. The acceptance of the inheritance by the spouse, resulted in massing of their estates on the grounds that she had a joint will with her late husband in Germany.
2. The children brought an application claiming the residue of the now deceased mother in terms of forced heirship, rejecting the revocation of the previous joint Will by the later Will drafted in South Africa and the matter went to court.
3. The life partner was also a nominated co-executor. Two different German solicitors had different interpretations of the German Law and the life partner subsequently passed away.
4. Settlement out of court was proposed but is yet to be reached between now two sets of children.

THANK YOU

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