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BLUE CHIP

ESTATE PLANNING

2C or not 2C

When to apply Section 2C of the Wills Act 7 of 1953 and when not to.

Uncertainty has always been the pet peeve of any legal system. This is even more so in the case of an inheritance or legacy being made in a will to family or friends, where the will has not provided substitutions and the deceased testator cannot be called in to clarify.

Let us consider the following scenario for some context. Christof bequeathed his estate in equal shares to Elsa and Anna. Elsa repudiated the inheritance. Elsa has two sons.

It must be noted first that in terms of section 24 of the General Law Amendment Act 32 of 1952, a provision was made for implied substitution. This had the result that if Elsa was Christof's daughter and she passed away, her two sons would have been entitled *per stirpes* to their mother's benefit unless the will stated otherwise. Section 24 has been repealed by section 1 of the Law of Succession Amendment Act 43 of 1992. However, the effect of this implied substitution was adopted by Section 2C of the Wills Act 7 of 1953.

The first subparagraph (1) of the section has the effect that if the descendant renounced and there is a surviving spouse of the testator, the renounced benefit will go to the spouse of the testator. The second subparagraph (2) has the effect that the legacy or inheritance of a descendant of a testator that is still alive but had been disqualified or renounced (and there is no surviving spouse) will go to the descendants of that descendant *per stirpes* unless the context of the will indicates otherwise.

In this scenario, Elsa renounced her benefit after her father's passing. This would mean that in terms of Section 2C (2), Elsa's two sons will substitute her *per stirpes* for the benefit that she renounced.

How would the outcome differ if Christof was not Elsa and Anna's father, but merely a friend that made a bequest to them in terms of his will? Firstly, it should be noted that Section 2C only applies to descendants of the testator and consequently, that Section 2C will not apply in this scenario. If the will is silent on what should happen to the repudiated benefit, the person who repudiated shall be deemed to have predeceased the testator.

This will have the effect that in the case of a legacy, the benefit will fall into the residue of the estate and devolve however the residue is bequeathed in the will. In the case of an inheritance, it will devolve upon the remaining heirs "unless the *jus accrescendi* has been excluded so that the testator will have died intestate in respect of that portion of his estate" (Meyerowitz 2010: para 5.29 and para 18.11).

The benefit of Elsa would consequently fall into the intestate portion of Christof's estate and devolve upon his intestate heirs. This will also be the case if Elsa was a descendant of Christof but did not have any children of her own to substitute her. In an intestate estate, the person who renounced their intestate share would also have been deemed predeceased and fall back into the intestate estate.

Evidently, the best course of action is not to leave your will open for other interpretations that the legal rules will attempt to clear up after your passing. It is, therefore, best practice to make provision for all contingencies in your will to clear up any possible future confusion. ■

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