

# RIGHTS **AND WRONGS** **WHEN** DRAFTING A WILL

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## **SALOCHANA PACKERY**

Salochana Packery is an Admitted Attorney of the High Court of South Africa. Salochana also holds a LEAD -Law Society Certificate in Deceased Estate Administration and has in excess of fourteen years of specialised Deceased Estate Administration experience both in Corporate and the Private Sector. In her current role as the Head of the Deceased Estates and Wills Department at our firm, Salochana leads, manages and develops staff and internal processes to achieve the highest possible standards of service delivery. Her role also involves the personal interaction with clients at which time various aspects of the estate administration process are discussed.



# JAN L JORDAAN INC. ATTORNEYS



## WE ARE SPECIALISTS IN:

- Administration of deceased Estates.
- Deceased Estates Property Transfers
- Wills.
- Transfer of Properties.
- Registration of Bonds.
- Cancellation of Bonds.
- We are on the panel of Absa, FNB, Nedbank and Standard bank.
- Antenuptial Contracts.
- Trusts.
- **We act as INDEPENDENT TRUSTEES.**





# OVERVIEW

- Drafting Tips.
- Formalities.
- Details in the Will.
- Agricultural Land.
- Do's.
- Don'ts.





# DRAFTING TIPS

- Plain, easy-to-understand English.
- The testator is not around to explain.
- Avoid “legal jargon”.
- Trust/co. beneficiary = already registered.
- Insert company/trust registration number.



# DRAFTING TIPS

- Wording and spelling.
- Typing error = serious consequences, e.g. “I leave my house contents and my house to...”
- compared to:  
“I leave my house contents or my house to....”
- State who inherits residue and balance.



# MUST COMPLY WITH THE WILLS ACT 7 OF 1953 OR ELSE INVALID:

- Testator sign at the end.
- More than one page, sign each page.
- In the presence of 2 or more competent witnesses. (Independent witnesses)
- Witnesses sign on the last page.
  - \*Good practice to sign each page.**
- If signed by making of a mark or another person, certified by – Commissioner of Oaths.
- Remember to date the will.







**DETAILS IN THE WILL**

# DETAILS IN THE WILL



- Don't get the facts wrong, e.g., assets are trust's and not testators.
- Cannot state what should happen to assets that are not testators.
- Spell beneficiaries' names correctly.
- If names are the same, then specify the relationship to the testator, e.g. "my son....", "my brother...", etc.



# DETAILS IN THE WILL

- Must be in writing.
- The court can declare valid i.t.o. Section 2(3).
- Good practice to state witnesses' details.
- Assets to minors: TRUST after death?
- Nominate Trustees and specify when the trust is to terminate.



# DETAILS IN THE WILL

- If heirs don't get along, specify who should inherit and what.
- Leaving estate to heirs equally = potentially many issues.
- Nominating executor/trustee: waive security, failing, the estate is liable to pay for and obtain a bond of security.





# PRACTICAL TIPS



- Always have a succession clause.
- Protect heirs married in community of property by adding a “marital” protection clause.
- Depending on circumstances, consider a collation condition.







# AGRICULTURAL LAND

Agricultural and Farmland cannot be registered in name of 2 or more people without consent from local authority.

E.g., father bequeaths agricultural land to 2 sons.





# AGRICULTURAL LAND



Section 5(2) of the Agricultural Holdings Registration Act provides that an agricultural holding may not be transferred to more than one person, if such owner's portion will be smaller than 8565 square meters **on division** thereof.

The transfer of an agricultural holding to two or more transferees is permissible, provided it is not contrary to section 5(2).

Thus, by way of example, where a Agricultural Holdings is for example 4,0680 ha in extent and the holding is transferred to 3 transferees, the transfer would not be contrary to section 5(2), because  $4,0680 \text{ ha} \div 3 = 1,3560 \text{ ha}$ . In other words each co-owner's portion would not be smaller than 8565 square meters **on division** thereof.

Where the holding is, however, transferred to 5 transferees, the transfer is indeed contrary to section 5(2) as  $4,0680 \text{ ha} \div 5 = 8136$  square meters. In other words each co-owner's portion would be smaller than 8565 square meters **on division** thereof. The transfer can thus not be registered unless the *Local Authority's* consent is lodged.

# SECTION 2B

- Statutory disqualification i.t.o Section 2B:

If the testator dies within 3 months of divorce,

executed a WILL before divorce, and

nominated ex-spouse as beneficiary,

the WILL shall be implemented as if the ex-spouse had died before the date of divorce,

unless it's clear from the WILL that the testator intended to benefit ex-spouse despite divorce.





# WITNESSES

- The role is to witness the signature of the testator.
- The beneficiary/executor should not sign as a witness.

may be disqualified from inheriting,

validity will not be affected,

only inherit as much as would have if Testator died intestate.

- Rather get two 'independent' witnesses.



# EXECUTOR AND TRUSTEES



- Executors/trustees must be chosen wisely.
- The executor will administer the estate.
- The testator must choose someone he trusts.
- If the nominated Executor cannot serve as the Executor (e.g. no longer of sound mind, died), change the nominated executor in the will, **OR** nominate an alternative Executor in your will.
- Make sure your nominated Executor will accept the responsibility.





# UNBORN HEIRS

- If unborn beneficiaries are nominated,  
e.g. “to all my grandchildren”
- Rather add:  
“grandchildren that are alive at  
the time of my death”
- Otherwise, won’t be able to  
finalise the estate until physically  
not possible to have more  
grandchildren.





# HEIRS VS LEGATEE



- Understand the difference.
- Legatee inherits a specific sum of money/asset.
- Heir inherits the residue of the estate after all debts, costs and estate duty have been paid in full and all legacies have been distributed.

A photograph showing the word 'HEIR' spelled out using four light-colored wooden blocks with black lettering. The blocks are arranged in a row on a dark, textured wooden surface. Other wooden blocks with letters like 'W' and 'A' are visible in the background, and a block with the number '7' is in the bottom left corner.

HEIR





DO's



# CODICIL

- Rather re-do a will instead of codicil.
- Easy for a beneficiary to destroy codicil and no one will know better.
- Same requirements as valid will.





# AMENDMENT AND REVOCATION



- If the testator amends his will -  
must sign next to it.  
in the presence of two witnesses.  
and date it.
- Not necessary that the same witnesses sign.
- Always revoke previous wills.



# MULTIPLE WILLS



- If the testator has assets in two or more countries = separate wills in the different countries.
- Update will on a regular basis.







**DON'Ts**



# COST IMPLICATIONS

Be aware of –

- taxes, debts and other financial considerations.
- debts (e.g., home loans) could mean beneficiaries inherit less than intended.
- potential fees, costs and disbursements, e.g. executor & master's fees, advertising costs, bond cancellation costs, tax consultants, etc.







**THANK YOU**

Thank You