

DRAFTING OF WILLS

2012 Course Notes Page 17 to 32

WHAT IS A WILL ?

Written recordal

of instructions to someone (executor)

representing a person's last wishes

as to what he wants to happen to his assets on death

An expression of gratitude, responsibility & concern for welfare of those left behind.

WHY IS A WILL SUCH AN IMPORTANT DOCUMENT ?

A Will only becomes effective AFTER a person has died.

Formalities – cannot be corrected.

Intention cannot be explained by referring to the testator for interpretation !

NO SET FORM

HAS BECOME PRACTICE TO USE CERTAIN FORMATS

SOME STANDARD CLAUSES

BEAR IN MIND ALWAYS : INTENTION OF TESTATOR & GOOD DRAFTING

TEST

IF THE TESTATOR WERE TO DIE TOMORROW, COULD I ADMINISTER HIS ESTATE ?

Is the Will clear, unambiguous, intelligible & capable of being acted on ?

■ **FRAMEWORK**

HEADING

REVOCACTION CLAUSE

APPOINTMENT OF EXECUTOR

POWERS & DUTIES OF EXECUTOR

LEGACIES

BEQUESTS

APPOINTMENT OF HEIRS

TESTAMENTARY TRUST

APPOINTMENT OF GUARDIAN

EXCLUSION FROM COMMUNITY / ACCRUAL

FUNERAL DIRECTIONS

■ **HEADING**

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IDENTIFY THE TESTATOR

LAST WILL AND TESTAMENT OF ADAM THOMAS

IDENTITY NUMBER 630712 5021 086

UNMARRIED, PRESENTLY OF CAPE TOWN, SOUTH AFRICA

■ **REVOCACTION**

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I revoke all previous Wills.

I hereby revoke, cancel and annul all Wills, Codicils and other Testamentary Acts previously executed by me, and declare same shall be null, void and of no force or effect whatsoever.

■ **NOMINATION OF EXECUTOR**

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I nominate Hazel Sacks as the executor of my estate.

I nominate my brother, ARNOLD LUDGATE, to be the Executor of this my Will. In the event of my brother being unwilling or unable to act for whatsoever reason, or once appointed being unwilling or unable to continue to so act, I nominate my cousin, LENORE JONES, as my Executor.

■ **POWERS & DUTIES OF EXECUTOR**

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1. I give my Executor all such powers and authorities as are required or allowed in law, and especially that of assumption.
2. I specifically exempt my Executor from being called upon or being required to file any security for the due fulfillment of any of the duties which may devolve upon him in terms of this my Will.
3. My Executor shall, in addition to the normal remuneration allowed by law, be entitled to charge such professional fees to which he would be entitled if he were not acting as Executor.
4. My Executor shall have the power to determine whether or not assets, movables or immovables, of my Estate are to be retained in current form or are to be sold (by public auction or private treaty), and if decided that assets are to be sold, he shall have the sole and absolute discretion to determine the time, manner and conditions of realization of all and any such assets which he may determine be necessary or desirable to realize.

Essack v Buchner 1987 (4) SA 53 (N)

The Court held that the approval of the heirs under Section 47 relates only to the mode of sale (manner & conditions) & not to the decision as to whether or not to sell.

Schofield v Bontekoning [2011] JOL 27906 (GSJ)

Heirs must consent to all & any sales.

■ **LEGACIES**

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I give and bequeath the following legacies :

1. To my niece, ANNIE COLE, the sum of R10.000-00 (Ten Thousand Rand).

In the event of my niece predeceasing me or being unable or unwilling to inherit for whatsoever reason, then her inheritance shall form part of the residue of my Estate.

2. The sum of R100.000-00 (One Hundred Thousand Rand) to each of my nephews :

- 2.1. FRANCOIS GREEN ;
- 2.2. BERNARD GREEN; and
- 2.3. JOHAN GREEN;

or their issue *per stirpes*, or if they have no such issue, then the survivor(s) of them.

■ **RESIDUE**

2012 Page 21

I hereby direct that the rest, remainder and residue of my Estate, property and effects shall devolve upon my sister, KATHERINE HOWARD, or her issue *per stirpes*.

■ **GUARDIANSHIP CLAUSE**

2012 Page 23

In the event that my ex-wife, SUSAN BLACK, has predeceased me, and in the event that my son, MICHAEL BLACK, is a minor at the time of my death, then I appoint my cousin, JONATHAN BOWER, as Guardian of my said minor son. If JONATHAN BOWER is unable or unwilling to act as Guardian for whatsoever reason, then I appoint my friend, DEBRA LEWIS, as the Guardian of my minor son.

No Guardian shall be required to furnish security to the Master of the High Court or to any other legal authority for the due performance of his / her duties as legal guardian.

■ **EXCLUSION FROM ACCRUAL AND COMMUNITY ESTATE**

2012 Page 23

No benefit accruing to any Beneficiary in terms of this my Will, nor the fruits derived therefrom, shall form part of the joint estate or any accrual regime of such Beneficiary and any present or future spouse of his / hers. All amounts paid or accruing to my Beneficiary under this Will shall be and remain his / her sole and exclusive property and no spouse of such Beneficiary shall at any time or under any circumstances have or obtain any claim or right thereto.

■ **FUNERAL DIRECTIONS**

2012 Page 23

CREMATION

I direct that upon my death, my body is to be cremated and thereafter dealt with in such manner as my heirs may decide.

■ **ENDING**

2012 Page 24

IN WITNESS WHEREOF I have signed this my Last Will and Testament at CAPE TOWN on this 29TH day of JUNE 2012, in the presence of the undersigned witnesses, who, in my presence and in the presence of each other, have affixed their signatures hereto.

AS WITNESSES :

1. _____

2. _____

ADAM THOMAS

■ **COLLATION**

2012 Page 23

I direct that no Beneficiary under this Will shall be required to collate any gifts, donations or sums of money which I may have given to him / her during my lifetime.

JOINT and MUTUAL WILLS

JOINT WILL = A WILL OF MORE THAN ONE PERSON DISPOSING OF THEIR ASSETS

MUTUAL WILL = IS JOINT WILL, BUT EACH TESTATOR GIVES A BENEFIT TO THE OTHER

■ JOINT & MUTUAL WILLS

JOINT LAST WILL AND TESTAMENT OF ALAN AND BRONWYN WILLIAMS,
SPOUSES, MARRIED OUT OF COMMUNITY OF PROPERTY TO EACH OTHER

■ JOINT & MUTUAL WILLS

The first dying of us nominates the survivor of us as the Executor of the Estate of the first dying of us.

The first dying of us appoints the survivor of us as the sole and universal heir of Estate of the first dying of us.

■ JOINT & MUTUAL WILLS

The Will can just be the Will of the first dying – the survivor must then draft another Will. Alternatively, the Will can be the Will of the first dying & the last dying :

ADD : On the death of the last dying of us, the last dying bequeaths his / her entire Estate to The Nelson Mandela Childrens' Fund.

■ SIMULTANEOUS DEATHS

2012 Page 21

In the event of our simultaneous deaths or in the event of us dying within 30 days of each other, we direct that our respective Estates shall devolve upon our children, in equal shares, share and share alike, or their issue *per stirpes*.

USUFRUCTS AND FIDEICOMMISSA

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USUFRUCT = THE RIGHT TO USE

TESTATOR BEQUEATHS AN ASSET TO SOMEONE, SUBJECT TO SOMEONE ELSE HAVING THE RIGHT TO USE & ENJOY THE ASSET.

I bequeath my immovable property situate at Erf 678 Cape Town (more commonly known as 18 Firmont Road, Gardens) to my son, HAMISH HENDRY, subject to a lifelong usufruct in favour of my wife, SAMANTHA HENDRY.

FIDEICOMMISSUM

TESTATOR BEQUEATHS AN ASSET TO SOMEONE, SUBJECT TO THE CONDITION THAT ON HIS / HER DEATH, THE ASSET MUST GO TO SOMEONE ELSE.

I bequeath my farm BOPLAAS to my eldest son, DAVID ROBERTS, subject to the condition that upon his death, the farm shall devolve upon his eldest son, GARETH ROBERTS.

■ **MASSING**

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WHERE TWO TESTATORS BEQUEATH BOTH THEIR ESTATES TO SOMEONE ON THE DEATH OF THE FIRST DYING OF THEM AND RESERVE A BENEFIT TO THE SURVIVOR OF THEM

- * TWO ESTATES ARE DEVOLVING EVEN THOUGH ONE TESTATOR IS STILL ALIVE
- * THERE HAS TO BE A BENEFIT FOR THE SURVIVOR – SURVIVOR HAS CHOICE TO ADIATE OR REPUDIATE

Example :

On the death of the first dying of us, we direct that our respective Estates shall be massed and shall devolve upon our son, MARCUS KING, or his issue *per stirpes*, subject to a lifelong usufruct in favour of the survivor of us.

CAN BE IN RESPECT OF THE WHOLE OF BOTH ESTATES OR IN RESPECT OF A SINGLE ASSET

■ **TESTAMENTARY TRUST**

2012 Pages 27, 29

MINORS

PEOPLE UNDER DISABILITY TESTATOR WISHES TO IMPOSE CONDITIONS BEFORE AN HEIR CAN INHERIT TESTATOR WISHES TO PRESERVE ASSETS WHILST PROVIDING AN INCOME FOR SOME ONE ELSE

■ TESTAMENTARY TRUST

FRAMEWORK

BENEFICIARIES

TRUSTEES

POWERS OF TRUSTEES

PAYMENT OF INCOME / CAPITAL

TERMINATION

PRECEDENT ON PAGES 40 TO 43 OF COURSE NOTES

DRAFTING PROCESS & SKILLS

INTENTION OF TESTATOR

EXPRESSION OF TESTATOR'S WISHES

ON THE DEATH OF THE TESTATOR, THE WILL IS FINAL – IT CANNOT BE REVISED OR AMENDED.

■ EXAMPLES OF BAD DRAFTING

I BEQUEATH THE SUM OF R5M TO MY DAUGHTER SUBJECT TO THE CONDITION THAT SHE OBTAINS A LAW DEGREE FROM THE UNIVERSITY OF CAPE TOWN.

I BEQUEATH A USUFRUCT OVER MY IMMOVABLE PROPERTY TO MY WIFE SUBJECT TO THE CONDITION THAT WHEN SHE DIES THE PROPERTY SHALL REVERT TO MY SON.

■ **EX PARTE KOCK 1952 (2) SA 502 (C)**

DRAFTING OF WILL

“There is hardly a material clause in this Will that is clear & unambiguous, either standing alone or when read with other clauses. The Court is left with the impression that the draftsman was not competent to draw the Will in Afrikaans. From the internal evidence of the Will itself, the conclusion is irresistible that the draftman’s knowledge of Afrikaans was of the most rudimentary nature. It may be that the draftsman had sufficient knowledge to take instructions from the testator for the drafting of his Will, but it is quite clear that the draftsman’s knowledge did not stretch so far as to enable him to set these instructions out in reasonably clear and unambiguous language.

In fact, I am of the opinion that the draftsman did not appreciate what he had set out, & under these circumstances he was not competent to explain the meaning & effect of the Will to the testator, with the result that the Will was left in such a confused state that it is hard to tell what the testator’s true intentions were.....

The nett result of all of this is that the testator’s estate could not be wound up without the aid of the Court being sought for a construction of the Will. This has led to unnecessary & heavy legal expenses which fall on the testator’s widow as the residuary heir.

It is highly irresponsible & immoral conduct on the part of anyone to hold himself out as competent to draft a Will in a language with which he is not fully conversant.....

I am informed by the Master that hardly a day goes by when Wills filed in his office for registration have not to be rejected by him as invalid owing to failure to comply with the necessary formalities prescribed for the execution of Wills.

Our Courts are also almost daily approached to construe Wills badly drafted & in which the meaning & intention of the testator is not clearly expressed : when doing so, certain recognised rules of construction are applied, but whether the Courts always succeed in finding the real intention of the testator as to the disposition of his assets after his death is another question.

These are instances which can & should be avoided, &, in their own interests as well as in the interests of those whom they intend to benefit when they die, I urge intending testators to consult only persons who are suitably trained in the drafting & execution of Wills & other deeds containing testamentary dispositions &, when doing so, to make sure that persons are proficient in the language in which they wish their testamentary disposition to be drawn.”

■ BAD DRAFTING

ARKELL v CARTER NO 1971 (3) SA 243

TESTATOR BEQUEATHED ASSETS TO X “TO DISTRIBUTE AS HE SEES FIT”
IS THIS A CONDITIONAL BEQUEST OR SIMPLY A POWER OF APPOINTMENT ?
AFTER MUCH DEBATE, COURT HELD THAT IT WAS A DIRECT BEQUEST – X
INHERITED & COULD DO WHAT HE WANTED WITH THE INHERITANCE

RHODE v STUBBS 2005 (5) SA 104

MASSING UNCLEAR

“ WE APPOINT OUR CHILDREN AS HEIRS OF OUR JOINT ESTATE”
PRESUMPTION AGAINST MASSING

RAUBENHEIMER V RAUBENHEIMER & MASTER

(560/2011) [2012] ZASCA 97 (1 JUNE 2012)

Construction of Will – bequest of immovable property subject to usufruct without identifying beneficiary.

“It 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.”