

CASE STUDY 1 – ADMINISTRATION OF ESTATES.

HEADLINE: “THE COST OF SILENCE: WHY FAILING TO DRAFT A WILL COULD LEAVE YOUR LOVED ONES IN A LEGAL LIMBO”

Drafting a will is one of the most important steps individuals can take to ensure that their assets are distributed according to their wishes after they pass away. In South Africa, where complex family dynamics, customary law, and statutory frameworks intersect, having a valid will is crucial to avoid unintended consequences and ensure the proper administration of an estate. Despite its importance, many South Africans die intestate, leading to complications and disputes among heirs. This article explores the significance of drafting a will in South Africa, the legal framework governing wills, and notable case law that highlights the potential challenges of dying without one.

The Legal Framework Governing Wills in South Africa

The primary legislation governing wills in South Africa is the Wills Act 7 of 1953. This Act sets out the requirements for a valid will and provides guidelines for its interpretation, amendment, and execution. In terms of the Act, the testator (the person making the will) must:

- Be at least 16 years of age.
- Be mentally competent to understand the consequences of their actions at the time of drafting the will.
- Ensure the will is in writing, either typed or handwritten.
- Sign the will in the presence of two competent witnesses who must also sign the will.

Failure to comply with these formalities can result in the will being declared invalid, which may lead to the estate being distributed according to the rules of intestate succession.

Importance of Drafting a Will

1. Control Over the Distribution of Assets

A will allows the testator to specify how their assets will be distributed after death. Without a will, the estate will be distributed according to the rules of intestate succession as set out in the Intestate Succession Act 81 of 1987, which may not align with the testator's wishes. Under intestate succession, the surviving spouse, children, parents, or extended family members may inherit in proportions set by law, which could lead to unintended or inequitable outcomes, particularly in blended families or where there are unmarried partners.

2. Appointing Guardians for Minor Children

One of the most significant aspects of drafting a will is the ability to appoint guardians for minor children. If a parent dies without nominating a guardian in a will, the court will decide who should take care of the children, potentially placing them in the care of individuals the deceased may not have chosen. Specifying guardianship in a will ensures that the testator's wishes regarding the care of their children are respected.

3. Minimising Family Disputes

Passing on intestate often leads to conflicts and disputes among family members over who should inherit the deceased's assets. In many cases, these disputes can result in lengthy and costly litigation. By clearly outlining the distribution of assets in a will, the testator can prevent ambiguity and reduce the likelihood of conflict among heirs. Additionally, specifying certain bequests can help avoid misunderstandings or feelings of unfairness that might otherwise arise.

4. Ensuring Business Continuity

For business owners, drafting a will is vital to ensure that their business interests are appropriately handled after their death. Without a will, the future of the business could be left uncertain, potentially causing financial difficulties for employees and family members who depend on the business. A will can outline a plan for the continuation, sale, or transfer of ownership, providing clarity for those involved in the business.

5. Tax Efficiency and Estate Planning

A well-drafted will can assist in tax planning, helping to reduce the estate duty (currently levied at 20% to 25% in South Africa) payable by the estate. By making use of trusts, bequests, and donations, individuals can structure their wills in a way that minimizes the tax burden on their heirs. Without a will, opportunities for such planning are lost, potentially leading to higher taxes and less financial benefit for the beneficiaries.

Case Law: The Consequences of Dying Without a Will.

Several cases in South Africa illustrate the legal and personal complications that can arise when someone dies without a will or with an improperly executed will.

Case 1: Ex Parte Boedel Steenkamp 1962 (3) SA 954 (O)

This case underscores the importance of meeting the formal requirements of a will. The testator, in this case, had written a will but failed to comply with the formal requirements set out in the Wills Act, such as signing the will in the presence of two witnesses. The court found the will to be invalid, and the estate was distributed according to the rules of intestate succession. The case demonstrates the critical importance of adhering to legal formalities to avoid unintended distribution of the estate.

Case 2: Bhe v Magistrate, Khayelitsha 2005 (1) SA 580 (CC)

The Bhe case is a landmark decision that dealt with the intersection of customary law and intestate succession. Under customary law, the eldest male relative traditionally inherited the estate, which often excluded women and children. The Constitutional Court found this customary law practice to be unconstitutional as it discriminated based on gender. The court held that the Intestate Succession Act would apply to estates previously governed by customary law. This case highlighted the need for individuals to draft wills to ensure that their estates are distributed according to their wishes, rather than relying on outdated and discriminatory practices.

Case 3: Friedman NO v Master of the High Court 2005 (4) SA 507 (SCA)

In this case, the testator had attempted to make significant changes to their will but did not follow the proper procedures for amending it. The court found the amendments to be invalid, as they were not properly witnessed and signed. This case illustrates the importance of ensuring that any changes to a will are made in accordance with the Wills Act to avoid disputes over the validity of the document.

Conclusion

Drafting a valid will is not only a legal requirement but a crucial step in ensuring that an individual's wishes are respected after their death. A well-prepared Will provides clarity, reduces potential disputes, and protects the interests of loved ones, particularly in complex family situations. The case law discussed highlights the risks of passing on intestate or with an invalid will, emphasizing the importance of meeting all legal requirements when drafting or amending a will. For South Africans, whether young or old, wealthy or modest, having a will in place ensures peace of mind and provides a clear roadmap for the administration of their estate. Given the intricate nature of estate planning, individuals should seek professional legal assistance to ensure that their wills are properly drafted and reflective of their intentions.

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