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Estate Planning Essentials

ESTATE PLANNING ESSENTIALS
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10 reasons why your will may be out of date

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According to the Supreme Court of Appeal in Raubenheimer v Raubenheimer your Will is the most important document you will ever sign.

Yet many of us pay scant regard to this important document. Once signed (hopefully signed!) it is ticked off the to do list and then forgotten. It is just as important to review your Will regularly as it is to have one drafted in the first place. Having an outdated Will can in some instances be more harmful than having no Will at all.

Here are 10 reasons to have another look at your Will.

1. Children nominated by name

If you have nominated your children by name (for example "I leave my estate to my son John"), and in the mean time you've had another child, say, a daughter Mary, Mary will be disinherited because she has not been appointed as an heir.

Unless there is a specific reason for nominating children by name it is recommended that children be nominated as "my children" – this will include any adopted children.

2. A bequest to "our children" or "the children born from our marriage"

A bequest to "our children" or "children born from our marriage" could also lead to problems of interpretation. By way of example, Paul and Jane in a joint Will leave their estate to "our children" or "children born from our marriage". Paul and Jane later divorce and Jane has two further children from her second marriage. Many years later Paul dies without having amended his Will. How will "our children" be interpreted? Will Mary's two children from her later marriage also inherit? Alternatively in the event of Mary's death, her two children from the later marriage may be disinherited because of the reference to "the children born from our marriage".

It would be better to ensure that your Will is worded correctly than to leave the destination of your estate to the interpretation placed on your Will by a court.

3. A bequest to "my spouse"

You may have bequeathed your estate to "my spouse" – without naming your spouse. If you have divorced and re-married, the question of which spouse then arises. Did you mean the spouse to whom you were married at the time of drafting the Will, or your present spouse? In this regard it is best to name your spouse.

4. Divorce

The Wills Act provides that if a person dies within three months of becoming divorced his/her Will must be implemented as if the spouse from whom the deceased was divorced predeceased him.

After three months the old Will revives and an ex-spouse from whom you are now divorced will inherit.

It is probably advisable to amend your Will at the commencement of divorce proceedings – it is highly unlikely that you would want someone who you are divorcing, often in the most acrimonious circumstances, to inherit from you.

5. Bequest to a "family trust"

If you have bequeathed your estate to a "family trust", you need to ensure that:

- The trust is a valid trust, and still in existence;
- The trustees are empowered to accept the inheritance; and
- The trust will continue after your death for the benefit of the beneficiaries nominated in the trust deed.

We recommend that alternate heirs be nominated in case the trust cannot inherit – for whatever reason.

6. The accrual claim

Your Will must take account of an accrual claim.

On dissolution of a marriage subject to the accrual system, the accruals of each estate is calculated according to a statutory formula and an equalisation takes place. Equalisation takes place by granting the spouse with the smaller accrual a claim for half of the difference in the respective accruals. If the spouse with the smaller accrual leaves his estate to a child without taking his accrual claim into account - and he dies first - his surviving spouse will have to find the means with which to settle the accrual liability.

For example, Elise and Bradley are married with the accrual. Bradley owns a motorcycle and a small bank account. Elise, on the other hand, owns and runs a very successful business. In addition to the business, she owns their primary residence and several other properties.

Bradley, mistakenly, believes that if he leaves his estate to his son Michael, he will only inherit the motorcycle and the cash in the bank account. However, because of the accrual claim in Bradley's favour, Michael will inherit several million rand. Elise will be forced to liquidate part of her estate to settle the accrual debt which will be inherited by her son.

The fortunes of spouses may also have reversed over time. A spouse who once had the accrual claim may now be the spouse who has the bigger accrual and is liable to settle the accrual claim.

If you are married subject to the accrual system you should ensure that you have an accrual calculation done before finalising your Will.

If you have had a Will drafted without specifically ensuring the extent of the accrual claim, your Will may be out of date.

7. Trusts created for minor beneficiaries

Did you intend a minor beneficiary to be someone under the age of 21? The Children's Act was amended in 2005 to reduce the age of majority from 21 to 18 years. If your Will indicates that your beneficiaries only inherit once they reach majority, then they may inherit three years earlier than you actually intended.

You may even have stipulated that a beneficiary will not inherit until he or she reaches the age of 25, or any age over 18. A bequest to a minor may be claimed by that erstwhile minor as soon as he or she reaches the age of 18 (even

though you stipulated 25) unless there is some form of “sanction” stipulated in the Will which prevents the beneficiary from claiming the inheritance. Imposing an age restriction on a bequest without any form of sanction is known as a “nude restriction”. The “sanction” usually states that: if the beneficiary, after reaching majority, takes steps to claim an inheritance being held in trust for his/her benefit, that beneficiary will forfeit the inheritance in favour of someone else.

Careful reading of your Will will reveal whether the age restriction imposed on a bequest will be enforceable or not.

8. Bequest of loan accounts

It is no longer necessary to use the somewhat contrived construction of “bequeathing an amount equal to a loan account, due by a trust, back to that trust”. This construction was used to avoid having to paying capital gains tax on the “writing off of a loan account”. Paragraph 12(5) of the Eighth Schedule - the provision which made this construction necessary – was deleted, with effect from 1 March 2013. It is now possible to bequeath the loan account to the trust. If you still have the old construction in your Will you should consider updating the Will particularly if your estate does not necessarily have the cash flow to deal with the bequest of cash to the trust, albeit temporarily.

9. The R3 500 000 Abatement Bequest

The dutiable value of an estate is calculated by first deducting allowable deductions, including liabilities, from the gross value of an estate, which leaves the net value of the estate.

An abatement (now referred to as a deduction) of R 3 500 000 (Section 4A) is deductible from the net value of each estate to arrive at the dutiable estate. Previously this was a “use-it-or-lose-it” provision, meaning that if a deceased person left his entire estate to a surviving spouse he/she would not have enjoyed the benefit of the estate duty relief on the R3,5 million. The surviving spouse was also only entitled to a deduction of R3,5 million. In order to ensure that both spouses benefited from the R3,5 million concession, the first R3,5 million was bequeathed to a trust, for obvious reasons referred to as an abatement trust.

All of this changed in 2010 and a second dying spouse is now entitled to a deduction of R7 million, reduced by the portion of the deduction used by a predeceased spouse.

The changes to the Estate Duty Act have prompted a number of testators to abandon the idea of using an abatement trust.

If you have rejected the concept of an abatement trust on the strength of the roll-over formula, then here are three reasons to reconsider that decision:

- The abatement trust could protect assets from the creditors (one could add predators) of a surviving spouse.
- By leaving assets to an abatement trust, the growth on the R3,5 million is removed from the estate of the surviving spouse.
- The R7 million roll-over concession has in effect become a use-it-or-lose-it provision. This can be explained by way of the following example:

  John and Elizabeth are married to each other but are the surviving spouses of marriages terminated by the death of their spouses. In each case John and Elizabeth inherited the entire estate of their predeceased spouse.

  The couple will now be entitled to a deduction of R7 million each – together, R14 million.

  If John bequeaths R7 million to an abatement trust and the balance of his estate to Elizabeth, he will not pay any estate duty. In her estate, Mary would also qualify for her own R7 million concession. Together they have benefited from a R14 million concession.

  If John does not use an abatement trust and leaves his entire estate to Elizabeth, he will not be liable for estate duty but Elizabeth will still only qualify for a R7 million concession. Together they now only use R7 million of the

R14 million available to them. They will have squandered R1 400 000 in unnecessary estate duty (20% of R7 million).

10. Your will does not reflect your wishes

It is important that you remember that it is your Will, and as such it must reflect your wishes. It is fairly common to meet clients who have had Wills drafted on the basis of some "clever" estate duty avoidance scheme, and who, sadly, have no idea of the exact nature of the bequests in their Will. It may be worth pointing out at this point that, very often, the avoidance schemes have been motivated on the basis of unsustainable assumptions and while they may look good in theory, they don't work in practice.

Please ensure that you understand your Will. Make sure that you understand each clause in your Will. Read the Will and then re-read it and question the draftsperson until you are absolutely certain that the Will meets your specific requirements.

Conclusion

October is Wills month - a timely annual reminder to have another look at your Will. Please speak to an expert to ensure that your Will – "the most important document you will ever sign" - is signed, up to date, and meets with your wishes.

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