ESTATE PLANNING ESSENTIALS

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The dangers of an unsigned will and intestate succession

A will is essentially a contract one enters into with the person one wishes to take charge of dealing with all one's assets (and liabilities) after one dies. A non-existent, unsigned or incorrectly signed will can cause practical problems and place surviving family members and dependants under immense stress when one is not around to assist them in making financial decisions.

Research shows that most individuals:

- who have a will drafted, never sign the document;
- believe that having a "draft" will means that they have a valid will in place;
- believe that, if they sign the instructions to draft a will, and present this to their bank or trust company, they have a valid will.

However, if the signing requirements as set out in section 2 of the Wills Act are not complied with, the client does not have a valid will.

If the client does not have a valid will, the deceased estate (assets and liabilities) will, on his death, be distributed in terms of the provisions of the Intestate Succession Act 81 of 1987.

These rules may well be contrary to the testator's intentions and/or may not necessarily be beneficial to those left behind, as illustrated by some examples of the rules below:

- The inheritance of minor children has to be paid into the Guardian's Fund (and as recently reported in the media, such funds have been subject to unauthorised individuals having access). If a valid will had been in place, provision could have been made for setting up a testamentary trust for the benefit of minor beneficiaries.
- Without a valid will, no guardian would be appointed for minor children, and it would be left to the family or Social Services to appoint such a person.
- The Master of the High Court will appoint an Executor, as one would not have been appointed without a valid will. This could result in delays, as the normal period of winding up an estate ranges from six to nine months. Where there is no will, this process could be delayed for an indeterminate period.
- Should the testator/testatrix prefer that family members inherit (e.g. parents and siblings), they may be excluded in a scenario where there are no descendants, as the entire estate will pass to the surviving spouse.
- If there are no intestate heirs (living family members) the entire estate may be forfeited to the state after 30 years, after being advertised in the Government Gazette annually for that period of time.
- It is important to note that the law of intestate succession does not cater for common law / life partners as "spouses".

We also warn against using standardised, off-the-shelf type versions or, even worse, drafting your own will. Some of the dangers are the following:

- There could be difficulty in interpreting the intention of the testator. This could lead to having to seek legal advice, which could incur additional costs and lengthy delays.
- Wills could be rejected as they may not comply with certain conditions in the Wills Act. This could lead to intestacy.

Standardised versions will seldom be adequate when it comes to the affluent client's estate.

One's will dictates how one's entire estate is dealt with after one is no longer around to correct any errors. Not only is one's will probably the most important contract one will be party to in one's lifetime, but will drafting is a highly technical specialist area of law. Financial intermediaries will do well by their clients in encouraging them to ensure that their wills are drafted by a specialist, with the client's wider estate planning instruments and considerations taken into account, and that the final will is signed (correctly) and kept in a safe place.

Any queries may be directed to:

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