

Estate Planning Essentials

30 June 2011 COMPILED BY: CLIVE HILL OF GLACIER FIDUCIARY SERVICES

VOLUME 38

The danger of appointing an Executor who faces a conflict of interest

We hear a lot nowadays about the importance of avoiding a conflict of interest, and a recent court case illustrates, somewhat dramatically, the effects of an unresolved conflict. This case is Elena van Niekerk v Kathleen van Niekerk and the Master of the High Court 2011 (2) SA 145 (KZP).

Mr Basil van Niekerk divorced his wife Kathleen in 1987, and in 2005 travelled to Russia where he married Elena Karipova in Volgograd according to Russian law. Returning to South Africa, the couple got married in 2008 under SA law by ante-nuptial contract. Mr van Niekerk died late in 2009, and in his Will it was found that he had appointed his former wife Kathleen as his executrix and sole heiress. She obtained an appointment as executrix from the Master. Elena lodged two claims against the deceased estate, one for half the estate based on an allegation that they had married in community of property, and a second claim for maintenance in terms of the Maintenance of Surviving Spouses Act.

The deceased left a substantial estate. The executrix rejected Elena's first claim outright, and offered an amount described by the court as 'parsimonious'. Hence the widow Elena's application to court. She alleged that the executrix had disagreed with an opinion from her own (the Executrix's) attorney which was in favour of her (the widow's) claim. She alleged that the executrix and her son had attempted to evict her and her school-going daughter from the family home and had damaged and removed certain property, and had threatened her life. Indeed, she appears to have experienced the truth of the old adage "Hell hath no fury like a women scorned."

The Administration of Estates Act 1965, in section 54 thereof, specifies the circumstances in which the court may remove an executor. Firstly, if the executor attempts to obtain for any heir, debtor or creditor of the estate any benefit to which that person is not entitled, he may be removed by the court. Secondly, if he has by way of misrepresentation or offer of any reward tried to persuade someone to facilitate his appointment as executor. Thirdly, if he has indicated that he is willing to accept a benefit/reward from anyone he employs to perform work on behalf of the estate. Finally, a catch-all paragraph allows the court to remove an executor if it is satisfied that it is not desirable he should act in that capacity.

The court was not impressed by the obvious conflict of interest faced by the executrix who would benefit personally as heiress if she could reject or diminish the claims of the widow. Since it was satisfied that this was not a desirable situation, the court removed the executrix.

The problems caused by not taking professional advice and not using a professional executor when finalising one's Will are well illustrated by this case.