Short notes on:

CHALLENGING WILLS IN SOUTH AFRICA

Introduction

As it stands, there is no definitive right to inherit from a deceased estate in South Africa. Seeing that the content of a will is sensitive in its nature, challenging its validity is generally based on some form of fraud, legal non-compliance and misrepresentation of facts.

This article provides some insight and points on how to go about the process of challenging a will.

Burden of proof

The burden of proof lies on the party alleging the irregularity/foul play on a balance of probabilities (Kunzs v Swart and Others 1924 AD 618). This means providing proof such as witness testimony and documents to any allegations that have been made. Historically, courts have erred on the side of caution in this scenario in declaring the will as being invalid. If a will appears to be valid at face value, it will be accepted as valid by the Master of the High Court and the court itself.

Time frame

There are no rigid requirements as to the time frame in which a will should be challenged. The general consensus is that objections are to be made within a reasonable time in order to avoid prescription. Ideally this would occur before the estate is wound up.

Grounds for contesting a will

- **Capacity:**

  A person aged 16 and above is deemed to have capacity to draft a will provided that he/she has the serious intention or *animus intendi* to dispose his/her property to the heirs of their choice. In order to contest a will on this factor, one has to prove that the Testator at the time of executing the will, was not able to appreciate the effect of his or her acts. This means that Testator at the time must have had a sound mind to understand the contents of the will. Persons who were intoxicated or mentally challenged are excluded. Furthermore, the Testator must not have acted under duress or undue influence by another party.

- **Formalities:**

  A will may be challenged on this ground. *The Law of Succession Amendment Act 43 of 1992* has introduced clauses that address non-compliance with formalities in the event that the concerned will has been challenged in court. Apart from that, the biggest consideration is applying *2 (3) of the the Wills Act 7 of 1953* (the Act) which involves assessing if the document concerned was intended to be the last will and testament of the deceased. The court, must be satisfied that this document was intended to be the will of the deceased therefore all the formalities need not apply in every scenario. These formalities have been set out in the Act. This would include: having two witnesses sign to the will; the necessary signatures of the parties involved having been signed at the correct designated spots.

- **Forgery and undue influence:**

  If the concerned party can prove that the will has been forged, the Testator acted under duress or the Testator was misled about the contents of the document, such a testamentary document will be declared invalid. In order to supplement this claim, a party may use other documentary evidence to strengthen their case.

- **Disqualified beneficiaries**

  Certain persons are disqualified from inheriting such as a person signing witness to the will. However exceptions can be made to this if the court is satisfied that this person did not unduly influence the testator. Other persons that would be otherwise excluded from benefiting, would be persons who attributed in a criminal capacity towards the unlawful death of the deceased.

- **Public Policy**

  In South Africa, Testators are afforded the freedom of testation. Testators are, however, also limited by the notion that they should not create clauses in the will that would be considered to be contrary to public policy.

- **Misrepresentation**

  A will may be challenged in its content if particular clauses have been proven to be false in its devolvement for example if clauses benefit the incorrect beneficiary. The court will therefore look in detail as to whether the document displays another party's wishes instead of the Testator's. There are factors that have to be considered by the court which includes questions as to the nature of the relationship between the Testator and the beneficiaries involved.

Physical Revocation

The Testator themselves may revoke a previous will by their own declaration in writing. One may also chose to revoke their will by destroying their copy but this action must be made clear of its intentions. It is advisable to include a revocation clause in any other will drafted after this in the event that the Testator's actions were erroneous.

Conclusion

If one is uncertain about the authenticity of a will, it is imperative that the abovementioned factors are looked into and that legal assistance is obtained immediately.