Testators should be careful what they wish for

By Edrick Roux

It was Sun Tzu who said: '[A] wise general in his deliberations must consider both favourable and unfavourable factors. By taking into account the favourable factors, he makes his plan feasible; by taking into account the unfavourable, he may avoid possible disasters' (Tao Hanzhang (Author) Yuan Shibing (Translator) *Sun Tzu's Art of War The Mordern Chinese Interpretation* (New York: Sterling Publishing Company Inc 2007 at 62). Many, without realising it, hold this statement close to their hearts, particularly when it comes to considering how to take care of their loved ones after they pass away.

This, of course, led to the creation of a legal instrument, which we know as a will, to give effect to the intention of a person relating to the distribution of his assets after his death. Ideally, wills are drafted meticulously to suit the needs of the individual and to cater for the needs and wishes that such an individual expresses in respect of how he wishes to care for those he leaves behind. As people grow older, they tend to get involved with others and those relationships may lead to a perversion of what a testator wished to achieve in the first place. Naturally, testators try to avoid such a situation by inserting protective provisions in a will, such as a clause stating that should the beneficiary be married in community of property, the benefit received will form part of a separate estate. However, what happens when this type of protective provision is not sufficient?

Case law

This scenario is illustrated by the decision of *Du Plessis v Pienaar NO and Others* [2002] 4 All SA 311 (SCA) (this case was brought to my attention by A West in 'The registerability and effect of a condition excluding community of property' *GhostDigest* 7-4-2011 (www. ghostdigest.co.za/articles/estate-/conditions/53749, accessed 15-8-2012)). In this matter the appellant had inherited certain farms, livestock and farming equipment, which fell into a separate estate as per a bequest by the testator. Particularly, it was stated that the assets could not fall into 'any possible insolvent estate' of the appellant's husband. The question arose as to whether these assets could be attached by the creditors of the joint estate in order to satisfy the debts of such estate. The appellant launched an application for an order declaring that the property did not form part of the insolvent estate and prohibiting the trustees from selling the property for the benefit of the creditors and subsequently compelling them to restore the property to her. Counsel for the respondents, being the creditors of the estate, stated that debts are not incurred by a person's estate; the estate is merely the source from which the debt can be recovered. Thus, spouses are jointly responsible for the debt and any agreement that the property does not form part of the joint estate is not valid against a third party, but is merely enforceable *inter partes*.

Undesirable consequences

The effect of this judgment is that it essentially nullified the testator's intention with regard to how he wished to have his assets distributed after his death. This, I submit, flies in the face of the principle of freedom of testation, which has been acknowledged as being a wide concept (see *Ex Parte Dessels* 1976 (1) SA 851 (D) in general, which dealt with the factors needed to strike out a bequest from a will), by replacing it with what the law needs it to be rather than what the testator wishes it to be.

This judgment may lead to undesirable and blatantly unfair results. Obviously there is a need for the law to provide mechanisms to allow creditors of an estate to recover their outstanding money, but what happens where a spouse is completely oblivious and unaccountable for the debts incurred by his spouse? A party to a marriage, who may not necessarily have been aware of the spendthrift nature of his

spouse or the dire position of such spouse's finances, will be put in an extremely compromising position. The effect, I submit, can be equated to a person being found guilty of murder for being at the wrong place at the wrong time or a third party being held liable for payment in terms of a contract.

Take for example the following. Two individuals, Mr and Mrs X, recently entered into a marriage in community of property after a lavish function and thereafter departed on an expensive honeymoon. Mr X informs Mrs X that he will bear the entire cost of the wedding and the honeymoon as he is a successful businessman. He convinces Mrs X that he has sufficient means to do so. Mrs X's father passes away and leaves his home to her, subject to the provision that the house falls into a separate estate from the joint estate and can never form part of any insolvent estate of Mr X. When the couple return from their honeymoon, Mrs X discovers that Mr X's business has been doing miserably and that it is impossible for them to cover their debts. They are then jointly sequestrated.

In the above example, Mrs X will suffer because of the conduct of Mr X, which will now be attributed to both of them, solely because of her association with him. She is not at fault for incurring the debt; she did not have any knowledge that they would become indebted to such a degree and she did not persuade him to incur the debt. Now she stands to lose not only whatever she put into the joint estate, but also what the testator left to her, despite the provisions of his will. In such a case, the interests of creditors must be weighed against the testator's last wishes and, in this regard, the question to be asked is whether the testator would still have made the same bequest had he known that this outcome would occur. Moreover, the question must be raised as to whether it can be considered just to allow the creditors to lay claim to the entire joint estate.

An estate is not capable of thought or action without being put to purpose by a person with control over such estate. Further, control is not always in the hands of a single person. The court may have acted correctly purely from a legal point of view, by allowing a creditor greater protection but, while a completely innocent party may be held accountable, did it act in the interests of justice?

Above and beyond property issues, there are also issues of status that must be taken into account when sequestration is involved. Being sequestrated has the effect that the control over an estate is removed from a person and is vested in a third party, who will ensure that as many of the outstanding creditors are paid as is possible. Meanwhile, subjects of sequestration also stand to suffer if they were practising in a profession at the time, such as attorneys, who in certain circumstances may no longer be allowed to practise in their professional capacity if they are sequestrated (see s 22(1)(*e*) of the Attorneys Act 53 of 1979). Referring back to the example above, if Mrs X was a practising attorney, the implications of a combined sequestration, for which she was not responsible, are even further reaching than originally stated.

Essentially, a person is being punished for exercising his right to enter into a marriage and for not being explicitly aware of any potential pitfalls, or for being deceived by the other spouse, with virtually no legal remedy available to him. The protection that a testator, as the owner of the property, attempted to provide to the beneficiary is rendered void in that the law places a higher value on the rights of creditors than the original intentions of the owner of the property.

Limited protection

In addition to the potential infringements with regard to the status of the innocent spouse – which are inherent and are not linked to anything bequeathed in terms of the will, but flow directly from the marriage – there are only a limited number of ways to protect a potential legacy from being attached by creditors in order to satisfy the debts of the joint estate, namely:

• Through the creation of a limited real right, such as a *fideicommissum* or a usufruct over the bequeathed property, in favour of the beneficiary, rather than bequeathing it to him directly.
• Through the creation of a discretionary trust, which will take ownership of the property, thus making it form part of an entirely different estate not linked directly to the spouses, which, as a result, cannot be subject to a creditor’s claim.

• Where the beneficiary decides to repudiate the benefit in order to allow the property to go to the next person in the chain of succession, rather than lose it to the creditors, which is allowable per the decision of *Wessels NO v De Jager NO en 'n Ander NNO* 2000 (4) SA 924 (SCA).

I suggest that the wording of a will should be altered in order to protect the property to be bequeathed. Albeit that the innocent spouse will still bear the burden of insolvency, at the very least the property will not be capable of attachment. The following alternative clauses have been put forward by my colleague Michelle Nel (estates manager at law firm MacRobert Inc) to assist in this regard:

Clause 1:
'Any inheritance, legacy or other benefit that would, but for the ensuing provision, have vested in an insolvent estate at any time in terms of this, my will, shall not so vest but shall instead vest and be dealt with in all respects as if the insolvent person concerned had died immediately prior to the time at which the vesting in his/her estate would otherwise have taken place.'

Clause 2:
'In the event of an heir's estate being declared insolvent or him/her committing an act of insolvency as defined in the Insolvency Act 24 of 1936, such heir shall forfeit his/her right to receive his/her inheritance and my executor shall in his/her absolute discretion, during such heir's lifetime, retain the inheritance in trust and utilise same for the maintenance of such heir and his/her dependants for as long a period as he/she considers necessary and, on his/her death, such inheritance shall devolve on his/her descendants.'

In terms of the first clause above, the insolvent loses any right that vested in him as a beneficiary, thus at least protecting the property bequeathed. In terms of the second clause, the executor of the estate/the trustees of the trust created has/have the option to use the income from the trust for the maintenance of the insolvent and, because it is a discretionary trust and the insolvent does not have a claim for maintenance, theoretically the trust should remain safe from attachment by creditors.

In respect of creating a trust, there may also be issues that arise in respect of the test to determine whether the trust has a lawful object. It has been found that a trust that is aimed at frustrating either the founder's creditors (*Ex Parte Executor Testamentary Estate Boulton* 1958 2 PH G24 (C)) or the beneficiary's creditors (*Ruskin NO v Sapire NO* [1966] 2 All SA 11 (W)) where an enforceable right to the trust property has vested will not be upheld. A trust found not to have a lawful object will be void or voidable in accordance with normal delictual principles. Therefore, although it is theoretically safe to use a discretionary trust where there is no enforceable right to the income in future, even using a discretionary trust may no longer be a feasible option.

Conclusion

Knowledge is power and a lack thereof is a vulnerability that could lead to disastrous consequences. The above scenario illustrates that the law, as it stands, may well lead to a situation where an innocent party will bear the burden of the 'guilty' due to ignorance and, with increased legislation relating to privacy making it harder to obtain information relating to the financial circumstances of others, it seems that being aware of the complete financial position of a spouse is nearly impossible.

Therefore, since one cannot truly be informed of every aspect of life in order to make an informed decision, it would seem that the only way a testator can protect his loved ones from such potential threats is to attempt to circumvent them in the first place. However, when the law itself is unwilling to acknowledge attempts at protection, other routes must be discovered to deal with this predicament.

In my opinion, this situation is a ticking time bomb as, in my experience, the courts are often inclined to find in favour of commercial entities as they are the lifeblood of the economy and, as such, of the country. How long will it be until the courts find that the rights of creditors are absolute and that repudiating the benefit constitutes a voidable disposition or decide to ignore the protection provided by a *fideicommissum* in favour of satisfying creditors instead?

Until a new judgment supersedes that of the *Du Plessis* decision or, at the very least, provides sound guidelines and exceptions to the general rule relating to the attachment of goods clearly intended to form part of a separate estate, testators should be careful what they wish for.

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