The general principle of freedom of testation is one of the cornerstones of the South African law of succession, which in turn sets out the rules for how an estate is dealt with upon death. Freedom of testation allows people to do with their worldly possessions whatever they choose (provided that their actions are legal). However, there are a few important exceptions of which clients should be aware when drawing up their wills.

South Africans can allocate their assets freely in their wills

Freedom of testation means that a client has full discretion when it comes to choosing who to leave their assets to in their will. This is in stark contrast to some European and other jurisdictions, where civil law forms the basis of succession law. In these jurisdictions, civil law imposes forced heirship. This prevents citizens from disinheriting certain people, such as a spouse or a child. If such a person is excluded from a will, they can claim a specified share of the deceased's estate irrespective of the actual provisions in the will.

Freedom of testation means that a client can effectively disinherit any person, including a spouse or a child. However, there are certain important exceptions to this rule. In addition, the provisions of any will must always be legal and moral, and it must be possible to implement these provisions practically.

Exceptions to freedom of testation

Exceptions to freedom of testation are all based on the generally accepted duty of support that a person has towards their spouse and dependants. There are three general exceptions:

1. claims for the maintenance of dependants
2. claims by a surviving spouse (in terms of the provisions of the Maintenance of Surviving Spouses Act)
3. claims in terms of the accrual system created by the Matrimonial Property Act

Another limitation to freedom of testation is that all wills must comply with the provisions of the Constitution of South Africa. Any provision that is contrary to the requirements for an open and just society will be invalid.

Maintenance obligations

Your client’s obligation to maintain and support a child or spouse will be determined by considering their particular circumstances. The Children’s Act provides for the maintenance of minor children and states that it is obligatory to pay maintenance for children until they reach the age of 18 years. After this age, the child can approach the court to extend maintenance payments if they can show with good reason that the need still exists. A case in point would be a student at university, or any other acceptable reason such as a mental or physical impairment that prevents the child from adequately providing for their own needs.

Different marital regimes in South Africa

The marital regime of a client’s marriage can have a significant effect on their estate and their spouse’s right to institute a claim for maintenance. There are three marital regimes recognised in South Africa:

1. in community of property
2. out of community of property, without the accrual system
3. out of community of property, with the accrual system

A marital regime may determine a spouse’s right to maintenance

The default marital regime in South African law is in community of property. This means that each spouse has an equal (half) share in the joint estate. Practically, even if a client chooses to disinherit their surviving spouse, the spouse will not be left destitute as they already own half of the joint estate. This will also be taken into account if the spouse makes any further claim for maintenance against the deceased’s estate.

However, if a marriage is out of community of property without the accrual system and the deceased chooses to disinherit their surviving spouse, this could leave the spouse destitute if they have no alternate source of income. For this reason, Government enacted the Matrimonial Property Act in 1984. In doing so, it introduced the accrual system. With the accrual system, assets acquired before the marriage remain those of the individual spouses, but gains made during the marriage are equally shared when the marriage dissolves (either due to divorce or the death of a spouse). This is especially relevant if one of the spouses is not employed full-time, such as a mother who has chosen to run the household and care for the couple’s children.

If clients are married out of community of property and the accrual system applies, they will be unable to disinherit their spouses in their wills.

Assist clients to consider all relevant aspects

When helping a client to draft a will or when referring them to a fiduciary adviser for assistance, take care to make sure that the application takes cognisance of their maintenance responsibilities. For qualified, professional assistance in ensuring that your clients’ wills accurately reflect both their wishes and obligations, please consult any of our specialist fiduciary advisers for guidance.