

Short notes on:

CIRCUMSTANCES IN WHICH AN UNBORN CHILD CAN INHERIT FROM A DECEASED ESTATE

Introduction

It is often scary to think about the future wellbeing of one's children and/or grandchildren, once you no longer around. Individuals tend to ensure that their children and/or grandchildren are protected and catered for in their Last Will and Testaments. But what is the position when it comes to unborn children? Are they entitled to inherit? What is the position when there is no Last Will and Testament?

The circumstances in which an unborn child can inherit will be briefly discussed in this article.

Legal Subjectivity

The Law of Persons in South Africa regulates the birth, private-law status and the death of a natural person. It determines the requirements and qualifications for legal personhood or subjectivity in South Africa, and the rights and responsibilities that attach to it.

Legal subjectivity of a child begins at birth. A foetus/unborn child therefore has no rights or duties or capacities. However, there are certain measures in South African law which provide for protection of foetuses/unborn children.

Nasciturus Fiction

Nasciturus fiction, is the legal principle in which foetuses if subsequently born alive, will acquire all of the rights of born children whenever this is to its advantage. *Pinchin and Another NO v Santam Insurance Co Ltd* 1 also confirmed that this principle extends to the law of delict.

Ex Parte Boedel Steenkamp

In *Ex Parte Boedel Steenkamp*², the testator left the residue of his estate to his daughter and to the first generation "wat by datum van dood in die lewe is". The testator's daughter was pregnant at the time of his (the testator's) death and subsequently gave birth to Paul Johannes. The executor to the estate sought a declaratory order on the issue of whether only the children born at the time of the

testator's death would inherit or if Paul Johannes, born after the death of the testator, would also be able to inherit.

Curator ad litem for Gerda and Daniel Johannes (the two children already born) held that the words "wat by datum van dood in die lewe is" is sufficient enough and without ambiguity to exclude the unborn child from the estate. Curator ad litem for Paul Johannes was of the opposite opinion stating that there is no evidence that the testator wished to exclude the unborn child from his will.

The legal questions were as follows:

1. Does the nasciturus have the legal capacity to inherit?
2. Is Paul Johannes entitled to a share of the estate?

Judge De Villiers R held that the nasciturus should be able to inherit by means of the nasciturus fiction subject to being born alive and it being to the advantage of the nasciturus. He further held that Paul Johannes is entitled to share in the estate of the testator in equal amounts to his mother, brother and sister.

Judge De Villiers R referred to the decision of House of Lords in Elliot v Lord Joicey where the court held that if the testator's intentions are not clear, when words as "in lewe" or "gebore" are used in conjunction with a specific time line and there is no other specific statement specifically excluding the child, it should be presumed that the testator had no intention of excluding the child from his/her will.

Testate/ Intestate Succession

In terms of nasciturus fiction, unborn child can acquire rights of succession. An unborn child can therefore inherit by Testate Succession in the case where the Deceased has left behind a Last Will and Testament or Intestate Succession in the case where there is no Last Will and Testament, provided that he or she is born alive and would have come into consideration by the testator as an heir.

For avoidance of doubt and to ensure protection of a foetus/unborn child or children, one can include provisions for an foetus/unborn child or children along with living family members in a Last Will and Testament.

Conclusion

As seen above, there are circumstances in which an unborn child can inherit when subsequently born alive in terms of Testate or Intestate Succession.

It is, however, still important to ensure that provisions are made for your unborn child/children in your Last Will and Testament to ensure that they are protected if born alive.

SchoemanLaw can assist with drafting of all Last Wills and Testaments and the administration of all Deceased Estates.

