Is a will drafted by someone else, but in accordance with your oral instructions, valid?

Section 2(3) of the Wills Act 7 of 1953 provides that the Court can accept a document which is drafted or executed by a person, who has since died, if the Court is satisfied that such a document was intended by such a person to be his or her will, although it does not comply with all the formalities for the execution of a will.

The question as to what exactly is meant by "drafted" has long been a contentious issue as there was no consensus among the various decisions of the Supreme Court concerning the meaning of the word "drafted" as contained in Section 2(3) of the Wills Act.

Certain Courts held that a very wide interpretation should be given to the word "drafted" so as to include the meaning of "caused to be drafted" which implies that a will need not be drafted personally.

Other divisions of the High Court, however, disagreed with this approach and held that a stricter interpretation should be given to the meaning of the term, "drafted", and that the wording, "… a document drafted and executed by a person…", should mean a document which has been personally drafted, written, typed or created by a personal act.

In the decision of the Supreme Court of Appeal, Bekker v Naude and Another 2003 (5) SA 173, the whole question of the correct meaning of the word "drafted" as contained in Section 2(3) of the Wills Act 7 of 1953 was laid to rest.

The facts of this case were that Mr. Bekker (the deceased) had a joint will with his former wife, Mildred. Three children were born out of their marriage relationship. Approximately three years after the divorce with his first wife, Mildred, the deceased met Mrs. Bekker and soon thereafter they got married.

The deceased and Mrs. Bekker then decided to do a joint will and they gave their bank oral instructions to draft it. The bank drafted the will in terms of the oral

instructions, but also used its own wording and standard clauses in the document. The bank then sent the draft will to the deceased and Mrs. Bekker for their signatures. Before the will could be signed, however, the deceased passed away.

Mrs. Bekker instituted an action in which action she applied for an order to the effect that the draft will be declared the last will of the deceased in terms of Section 2(3) of the Wills Act 7 of 1953.

The question that the Court had to decide, was whether the draft will was "drafted" by the Mrs. Bekker and the deceased as provided for in Section 2(3) of the Wills Act.

In its decision the Court held that it was clear from the history of Section 2(3) of the Wills Act that the Legislator had deliberately incorporated the strict requirement of personal drafting and that "drafted" when compared with "caused to be drafted" could only have a strict meaning of a personal act.

The Court further pointed out that although the deceased had instructed the bank to draft the will, which the bank did by using the deceased's instructions, the bank also used their own wording and standard clauses. The Court therefore held that it could not be said that the draft will was "drafted" by the deceased ", in contrast with "caused to be drafted".

The Court also held that there are no grounds upon which it should deviate from the literal meaning of the word "drafted" as contained in Section 2(3) of the Wills Act. Further that, although the Court does have the discretion to accept a will which does not comply with all the formalities, the Court can only do so if the Will has been drafted by the deceased personally.

The will, which was drafted by the bank on the instructions of Mrs. Bekker and the deceased, was therefore not accepted by the Court as a valid will. The previous will of the deceased, which he drafted with his former wife, Mildred, was held to be valid.

I think it is important to note that the intention of the Legislator in laying down strict formalities, which the drafting and amendments of wills should comply with, was to avoid fraud and also illuminate disputes which might arise after the death of a testator. It seems therefore that a wider interpretation of Section 2(3) of the Wills Act and in particular the term "drafted" would be against the spirit of the

Wills Act as it will be defeating the very purpose of trying to avoid fraud and disputes.

Volker Krüger

You can complete the will instruction sheet here: Testament Instruksievel / Will Instruction Sheet