

Estate Planning, Inheritance & Implications of the Marriages Act [*Chapter 5:17*]

ABM

INHERITANCE

- ❖ **Inheritance** means the assets a person leaves to others after they die.
- ❖ When a person is born, it is inevitable that they will die.
- ❖ The problem is not in dying itself, but in leaving our families without any form of sustenance because of poor estate planning.
- ❖ It is therefore imperative to plan one's estate, so that one's family is well taken care of, and also to prevent conflict

Estate Planning

- ❖ **Estate planning** broadly refers to the act of managing the division and inheritance of one's personal estate.
- ❖ **Estate** means everything of value that an individual owns.
- ❖ There are a number of ways to plan our Estate. For purposes of the present discussion, I will confine myself to two:
 - i. Writing a **will**;
 - ii. Establishing a **trust**

Writing a Will

- ❖ A will is a legal document which provides instructions on how an individual's property should be handled after their death. It only takes effect at death (*Hebrews 9v17*).
- ❖ The law that governs wills in Zimbabwe is the **Wills Act [Chapter 6:06]**
- ❖ Generally a will must be written, although one can make a verbal will, subject to certain considerations prescribed by the Act.
- ❖ A will must comply with the formalities prescribed in the Act.

Some advantages & disadvantages of writing a will

- ❖ Creates certainty on how your estate is to be distributed.
- ❖ There no disputation, as long as the will is valid.
- ❖ Can be changed before you die.
- ❖ Only becomes effective upon your death.
- ❖ Cannot be changed, once the testator has died.
- ❖ Once property is bequeathed, the testator cannot determine how the beneficiary expends it.
- ❖ A spouse can use it to disinherit another spouse. Previously, the position was that a will that purported to disinherit another spouse is automatically invalid.
- ❖ However, that position was changed by the Supreme Court in December 2020 in the watershed case of ***Chigwada v Chigwada & Others SC 188/20***.
- ❖ To mitigate the effects of disinheritance, spouses must make sure that properties are jointly registered in both their names.

Trusts

- ❖ A **trust** is a legal relationship created by a settlor/founder when assets are placed under the control of a trustee for the benefit of a beneficiary, or for a specified purpose.
- ❖ There are essentially two types of trusts:
 - i. Living trust, which is created in one's lifetime.
 - ii. Testamentary trusts, which is created by a will upon death.
- ❖ A trust outlives the founder. It creates perpetual succession.
- ❖ Property owned by a trust continues to benefit beneficiaries through generations. Once donated, the property now belongs to the Trust. It does not belong to individuals. Even the founder does not own the property.

Administration of Estates (Succession)

- ❖ Broadly speaking, succession is the orderly passage of property from the deceased to another person..
- ❖ There are a number of laws governing administration of Estates (succession) in Zimbabwe. These are:
 - ✓ Administration of Estates Act [*Chapter 6:01*]
 - ✓ Deceased Estates Succession Act [*Chapter 6:02*]
 - ✓ Deceased Persons Family Maintenance Act [*Chapter 6:03*]
 - ✓ Wills Act [*Chapter 6:06*]

There are two forms of succession:

- i. **Testate succession**, which is in terms of a will (testament);
- ii. **Intestate Succession**, where the deceased has not left a will.

Registration of Estate

- ❖ When a person dies, the first port of call is to register the estate of the deceased at the Master of the High Court offices.
- ❖ Ordinarily this should be done within **fourteen (14) days** of the death.
- ❖ When registering an estate, the death certificate and marriage certificate (where appropriate) are required.
- ❖ Once the Estate is registered, the Master of High Court will thereafter invite at least **five (5)** members the family of the deceased to an edict meeting where they will appoint an **executor/executrix** of the deceased's estate at an edict meeting.
- ❖ If the family does not agree, the Master will appoint an Executor.
- ❖ The Master will then issue a document called **Letters of Administration** to the Executor/Executrix.
- ❖ The letters of administration empower the Executor of Executrix to act for and on behalf of the Estate.
- ❖ An Executor/Executrix is a person appointed to carry out the obligations of the deceased.

Duties of the Executor/Executrix

- ❖ The Executor is required to list all the property of the deceased (estate) in an inventory;
- ❖ He she must then publish the Estate in the Government Gazette and a newspaper circulating in the district where the deceased resided at the time of his death to inform debtors and creditors. This will enable the Executor to pay creditors and collect debts for the Estate.
- ❖ The Executor must then prepare an Account, showing what the deceased had and what he/she owed creditors. He/She then distributes the estate property to the beneficiaries.
- ❖ If the beneficiaries are not satisfied with the way the Executor is discharging his/her duties, they are at large to apply for his/her removal.
- ❖ The Executor's costs for administering the Estate are **4.3 per centum** of the net estate value.

What happens pending distribution of the Estate?

- ❖ The law provides that upon the death of a person his/her family, namely his wife/husband and children, shall have the right of use of the immovable property household goods and effects, vehicles, animals and crops, which they were using immediately before the death of the deceased until the estate has been wound up.
- ❖ In fact, it is a criminal offence in terms of the Deceased Family Persons Maintenance Act to deprive the aforesaid of the use and possession of estate property before the estate has been wound up.
- ❖ Scripture itself teaches against oppression of widows and the fatherless (*Exodus 22v21–24* , *Isaiah 1v17*).
- ❖ The law prefers the deceased's spouse as a custodian of the estate's property pending the appointment of an executor.

Implications of the Marriages Act

- ❖ On 27th May 2022, the Marriages Act [*Chapter 5:17*] was passed into law. It however only came into operation on the 16th September 2022, which is the date fixed by the President.
- ❖ Marriages in Zimbabwe were previously regulated by:
 - i. The Customary Marriages Act [*Chapter 5:07*] and
 - ii. The Marriages Act [*Chapter 5:11*]

Chapter 5:17 repealed both *Chapter 5:07* and *Chapter 5:11*

What major changes does the new Marriage law introduce, which previously did not exist under the old marriage laws?

1. Harmonization of marriage laws – All marriages in Zimbabwe are now regulated under a single law. Previously we had separate laws regulating marriages.
2. Equality of all marriages – All marriages are now equal.
3. Minimum age of marriage – in terms of the new law, marriage can only be entered into between individuals who are above the majority age of **eighteen (18)**. It is now a criminal offence to facilitate marriage of persons under the age of eighteen. Previously, a person over the age of **sixteen (16)**, but under the age of **eighteen (18)** could be married off with the consent of their parents.

4. New categories of marriage officers – Previously, only magistrates and Ministers of Religion qualified to be appointed as marriage officers. Under the new law, chiefs and Heads of embassies also qualify to be appointed as marriage officers. There are therefore now four different categories of marriage officers.

5. New categories of marriages over and above the existing ones – The old marriage laws only recognised the civil marriage (strictly monogamous) and customary marriage (potentially polygamous) as marriages. An unregistered customary law marriage was not recognised as a marriage.

The new marriage law recognises the following as marriages:

Civil Marriage [section 5 (1) of the Act]

- ✓ This is a monogamous marriage. It was previously recognised under *Chapter 5:11* and *Chapter 37*. Just like under the old laws, proof of payment of bride price (lobola) is not a requirement.

Registered Customary law union [Section 5 (2) of the Act]

- ✓ This is a potentially polygamous marriage (one man, potentially many wives). It was previously recognised under *Chapter 5:07*. This requires proof of payment of lobola before registration. It can be upgraded to a civil marriage.

Unregistered Customary law union or UCLU [section 17 of the Act]

- ✓ This is also a polygamous marriage. This marriage is characterised by payment of lobola. It is solemnised by a Chief within their area of jurisdiction. It can be upgraded to a registered customary law marriage.

Qualified Civil marriage [Section 44 of the Act]

- ✓ This is a civil marriage which is polygamous or potentially polygamous. It is solemnised by the Minister of religion for Islamic rites.

The Civil Partnership

- ❖ The new law also recognises a civil partnership **[section 41 of the Act]** which is a relationship between a man and woman staying together without payment of lobola (*cohabiting, situationships, small houses*).
- ❖ This applies to a married man or woman well as boyfriends and girlfriends living together (*kuchaya mapoto*).
- ❖ This is not a marriage, but is recognised only for the purposes of determining rights upon death or dissolution of the relationship.
- ❖ Parties can upgrade to an unregistered customary law union if payment of lobola is done.

Proprietary consequences of the new Marriages Act

- ❖ In terms of the Married Persons Property Act [*Chapter 5:12*], all marriages in Zimbabwe are out of community of property. This position has not been changed by the new marriage laws.
- ❖ What the new marriage laws have done is to provide a ready remedy for persons who previously had to sue for unjust enrichment or tacit universal partnership in order to recover property acquired during the subsistence of the relationship now termed “civil partnership”.
- ❖ It is therefore prudent for spouses to jointly register their names on the properties they acquire in order to mitigate the effects of having marriages out of community of property. In this regard, the Supreme Court in ***Chigwada v Chigwada SC 188/20*** is most apposite.