ORARO & COMPANY
ADVOCATES
An Affiliate Member of AB & DAVID AFRICA

FRESH THINKING WEBINAR ON SUCCESSION LAW AND ESTATE PLANNING IN KENYA FREQUENTLY ASKED QUESTIONS (FAQS)

LEGAL ALERT

MAY 2023

Fresh Thinking Webinar on Succession Law and Estate Planning in Kenya FAQs

JOINTLY OWNED PROPERTY

Q: Does the doctrine of survivorship apply to joint bank accounts?

A: Yes, it does. When joint owners hold a property as joint tenants, the property (whether moveable or immoveable) automatically goes to the surviving owner (or owners) upon the death of one of the joint owners, regardless of the deceased joint owner's will. Assets pass by "survivorship" in this sense. However, regard would also be had to the mandate given to the Bank, which governs the contractual relationship between the Bank and the account holders.

TESTACY

Q: Does unequal distribution of an estate invalidate a Will?

A: Section 5 of the Law of Succession Act, (Cap. 160) Laws of Kenya (the "Act") provides for testamentary freedom, which allows every adult of sound mind to dispose of any of his/her free property as he/she pleases. This entails the freedom to distribute his/her estate in whatever ratio and to whoever he/she wishes.

A Court can only interfere with testamentary freedom if a testator has failed to make reasonable provision for his/her dependants. Even then, the Court would not invalidate the Will, but would instead make an Order for the reasonable provision of the dependant who has been left out.

Therefore, while unequal distribution may result in a sense of unfairness, it does not invalidate a will.

Q: Can a beneficiary waive their bequest under a Will?

A: Yes. A beneficiary cannot be forced to claim an inheritance if they do not wish to do so. A good example of this is the case of Rita Field-Marsham, the late Hon. Nicholas Biwott's daughter.

After Mr. Biwott's death in 2017, Ms. Field-Marsham requested to be delisted from the list of beneficiaries of her late father's inheritance. Ms. Field-Marsham wrote a disclaimer letter to the Court requesting to release all her rights, title and interest of the one-fourteenth share allocated to her in her father's Will.

In such instances, the usual practice is for such a beneficiary to file a deed or instrument of renunciation disclaiming such a right (In the Matter of the Estate of Elizabeth Wanjiku Munge (Deceased) [2015] eKLR).

Q: Does section 7 of the Act apply to Oral Wills?

A: Yes, it does. Section 7 of the Act deems void any Will that is created under fraud, coercion, importunity or mistake. The definition of a Will under section 3 of the Act encompasses both Written and Oral Wills. As such, Oral Wills will also be voided upon proof of fraud, coercion, importunity or mistake.

INTESTACY

Q: Can a life interest be waived?

A: Yes, it can. Similar to an heir disclaiming a bequest under a Will, a survivor in intestacy cannot be compelled to take a share in the estate against his/her wish. In other words, it is not mandatory that a survivor in intestacy take up the share proposed to be distributed to them. There is liberty to renounce or disclaim the right to the share.

As is the case in testacy, the usual practice under intestacy as well is for such a survivor or heir to file a deed or instrument of renunciation disclaiming such a right.

Q: How is an intestate estate distributed in cases where the deceased was polygamous?

A: Section 40 of the Act provides that in cases of polygamy, the deceased's personal and household effects

Fresh Thinking Webinar on Succession Law and Estate Planning in Kenya FAQs

and the residue of the net intestate estate should be divided among the houses according to the number of children in each house but adding any wife as an additional unit to her children.

Such that if X had 2 wives, A and B, with A having 3 children and B having 4 children, the property would be distributed among a total of 9 units, taking into account the foregoing provisions, such that the ideal ratio would be 4:5. The rationale is that house A has a total of 4 units, while house B has a total of 5 units.

However, the Court of Appeal in the case of Rono v Rono (2005) eKLR noted that equity is not necessarily equality, such that the Court would consider each case on its facts, including the peculiar needs/positions of each child in each house, e.g. a young or yet-to-be educated child would probably require a greater share than a child who is well settled in life.

Q: How is an intestate estate distributed in cases where the deceased had no spouse(s) or children?

A: Section 39 of the Act provides that where the deceased is neither survived by a spouse nor children, his/her net intestate estate will devolve upon his/her blood relatives in the following order: father, or if dead; mother, or if dead; siblings and any of their children in equal shares, or if dead; half-siblings and any of their children in equal shares, or if none; any other relatives up to the sixth degree of consanguinity.

It is important to note, however, that section 39 of the Act is among the provisions that were recently declared unconstitutional in the case of Ripples International v Attorney General & another; FIDA (Interested Party) (Constitutional Petition E017 of 2021) [2022] KEHC 13210 (KLR) (29 September 2022) (Judgment) for being discriminatory on the basis of gender.

BENEFICIARIES

Q: Is it possible to bequeath part of one's estate to their pets under a Will?

A: Section 5 of the Act provides for testamentary freedom which allows every adult of sound mind to dispose of any of his/her free property as he/she pleases.

Therefore, it is possible to bequeath a part of one's estate to their pets. That notwithstanding, this is a contestable practice in Kenya as the Will would be considered anomalous or of imperfect obligation in the sense that pets lack the capacity to enforce or decline bequests.

In other jurisdictions, however, there are wider-encompassing laws in this regard. In England, for instance, a pet is considered a personal chattel for purposes of succession unless it is a working animal such as a sheepdog, in which case it will be regarded as a business asset. Further, the Courts of England have held that testamentary gifts providing for animals' maintenance are valid (Pettingall v Pettingall (1842) 11 LJ Ch 176).

Q: What happens in instances where the deceased died by the hands of a beneficiary?

A: Section 96 of the Act expressly provides that a person who kills another person while they are still mentally competent is not entitled to any share of the victim's estate, either directly or indirectly. This flows from the legal maxim that one should not benefit from one's own unlawful acts. Instead, the beneficiaries of the victim's estate are determined as though the murderer had passed away before the victim.

For the purposes of this section, a person's conviction for the crime of murdering the deceased is sufficient proof that the person is indeed the one who carried out the murder.

Q: What is the position of illegitimate children?

A: Illegitimate children — those born to a woman out of wedlock, those whom a man has accepted as his child, or those for whom he has accepted permanent responsibility — are included in the definition of a child under section 3(2) of the Act.

Fresh Thinking Webinar on Succession Law and Estate Planning in Kenya FAQs

The term "child whom the deceased accepted as his own or for whom the deceased assumed permanent responsibility" is used here exclusively to refer to a child whom a male deceased person had accepted or taken on personal responsibility for (Willingstone Muchigi Kimari v Rahab Wanjiru Mugo, Nairobi Court of Appeal Civil Appeal Number 168 of 1990).

On this basis, an illegitimate child is capable of inheriting from the estate of the deceased, provided that the deceased regarded the child as his own or assumed permanent responsibility over said child.

GRANTS OF REPRESENTATION

Q: Who is entitled to take out a Grant of Letters of Administration?

A: Section 66 of the Act stipulates that preference is given to the following persons to administer the estate of a deceased person where the deceased dies intestate:

1. The surviving spouses or spouses, with or without the association of other beneficiaries.
2. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests.

This means that, where the deceased is married, their spouse ranks first in priority and would be entitled to apply for letters of administration. In the order of beneficial interest provided for in the Act, subsequently, the next in priority are the children of the deceased. Where the deceased has no surviving spouse or children, the Act provides for the following order of priority as per section 39 of the Act:

"Father; or if dead, mother; or if dead, brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none, half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none, the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund."

As stated in the presentation, in the case of Constitutional Petition No.E017 of 2021: Ripples International vs. The Attorney General & Others section 39 was declared unconstitutional as it discriminatorily gives priority to the father of the deceased over the mother.

As per section 56 of the Act, a minor, person of unsound mind or a bankrupt cannot be an administrator of a deceased person's estate.

A body corporate or trust corporation may be issued with Grant of Letters of Administration in accordance with section 57 of the Act.

It is important to note that when petitioning for a Grant of Letters of Administration, it is important to obtain the consent of all other persons who are ranked in priority or are equal in rank in their entitlement to apply for the Grant.

Q: How many Administrators are required by law?

A: The maximum number of Administrators is a statutorily prescribed four (4) persons. Section 56 of the Act provides that a grant of representation cannot be made to more than four (4) persons in respect of the same property.

Where property is devolving upon a minor and a continuing trust arises, section 58 of the Act provides that no Grant of Representation can be issued to a sole Administrator, there must be two (2) or more administrators in such a case.

Q: What are the powers of Administrators prior to Confirmation of Grant?

A: Section 80 of the Act provided that a Grant of Letters of Administration shall only take effect from the date of such Grant.

Fresh Thinking Webinar on Succession Law and Estate Planning in Kenya FAQs

In the case of intestacy, the power to sell, deal with and dispose of the deceased's property only arises once a Grant of Letters of Administration has been confirmed. Any dealing with property prior to the Confirmation of Grant would amount to intermeddling.

Section 45 provides that "Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person."

It is therefore prudent to hold off dealing with any property comprising of the deceased's estate without a grant of representation.

Q: What remedies do you have once a Grant of Representation has been made?

A: Where a Grant of Administration has been issued, it may be revoked or annulled on the application of an interested party/ beneficiary in accordance with section 76 of the Act on the following grounds:

1. The proceeding to obtain the Grant were in some way defective
2. The Grant was obtained fraudulently
3. The Grant was obtained by means of an untrue allegation of a fact which was essential
4. The person to whom the Grant was issued has failed to apply for Confirmation of Grant within one (1) year, or has failed to proceed diligently with the Administration of the Estate, or has failed to produce to the Court an inventory or account of Administration as is required by the Act.
5. The Grant has become useless and inoperative through subsequent circumstances.

PRESUMPTION OF MARRIAGE

Q: Is the presumption of marriage still applicable?

A: In the absence of any amendments to the Act, the Act constitutes the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession in relation to the estate of deceased persons. Where there is a contradiction between the Act and any other law in succession matters, the Act will prevail.

Section 3(5) of the Act provides that "notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40, and her children are accordingly children within the meaning of this Act."

This provision is in direct contradiction with sections 6 and 9 of the Marriage Act 2014 (the "Marriage Act"), which provides for the kinds of marriages recognised in Kenya and does not include marriages by presumption or "common law marriages". It requires that all marriages, whether religious or customary, must be registered to be valid. The Marriage Act also states that where one marries under statute, they cannot subsequently conduct a customary marriage.

Recently, in MNK v POM (Petition 9 of 2021) [2023], the Supreme Court of Kenya considered the presumption of marriage in the context of divorce proceedings and the division of matrimonial property and concluded that no inferences about marital status should be drawn from living under the same roof and that the National Assembly ought to formulate and enact laws that deal with cohabitees in long term relationships, their rights and obligations.

However, the presumption of marriage is still applicable in relation to succession. The principles for determining the presumption of marriage from prolonged cohabitation are stated in the famous case of Hortensiah Wanjiku Yawe vs. Public Trustee Civil Appeal No. 13 of 1976 the Court held that for the presumption of marriage to arise, some of the factors to be considered include: whether there were children fathered by the deceased, whether there was valuable property acquired jointly, and whether some form of marriage ceremony was performed.

Fresh Thinking Webinar on Succession Law and Estate Planning in Kenya FAQs

The cohabitation should be deemed to have crystallized into a marriage for the presumption to apply.

NOMINATION

Q: Is a Nominee entitled to take all the funds under a pension fund or scheme?

A: Nominations, particularly in relation to pension schemes and co-operative societies, are regulated by statute i.e., the Co-operative Societies Act, 1997 and the Retirment Benefits Act,1997 and not the law on succession. Funds in such schemes or co-operative societies fall outside the scope of the Act, and would be governed by the instrument of nomination as read together with the applicable statute and the Scheme rules.

In Re Estate of Carolyne Achieng' Wagah (Deceased) [2014] eKLR the Court held that "It is the law that funds the subject of a nomination do not form part of the nominator's estate, and therefore such funds cannot pass under the will of the deceased or vest in his personal representative. Such funds are not subject to the succession process, and should be dealt with in accordance with the law governing nomination. Nominations are statutory, in the sense of them being specifically provided for by a particular statute."

Fresh Thinking Webinar on Succession Law and Estate Planning in Kenya FAQs

Disclaimer

This FAQs is for informational purposes only and should not be taken to be or construed as a legal opinion. If you have any queries or need clarifications, please do not hesitate to contact John Mbaluto, FCIArb, Deputy Managing Partner, (john@oraro.co.ke), Claire Mwangi Senior Associate, (claire@oraro.co.ke) and Madikizela Otieno, Associate, (madikizela@oraro.co.ke) or your usual contact at our firm, for legal advice.

John Mbaluto, FCIArb

Deputy Managing Partner

Claire Mwangi

Senior Associate

Madikizela Otieno

Associate

ORARO & COMPANY
ADVOCATES
An Affiliate Member of AB & DAVID AFRICA

ACK Garden Annex, 6th Floor, 1st Ngong Avenue

P. O. Box 51236-00200, Nairobi, Kenya.

T: +254 709 250 000

E: legal@oraro.co.ke

Oraro & Company Advocates