

LEGAL ASPECTS IN PLANNING FOR RETIREMENT

Presentation by

Boniface M. Mwangangi

Retirement Benefits Authority

Promised Benefits

- ▶ Early Retirement
- ▶ Normal Retirement
- ▶ Late Retirement
- ▶ Death
- ▶ Immigration
- ▶ Resignation
- ▶ Dismissal
- ▶ Ill-health

Disposal of Benefits

- ▶ Nominated Beneficiary
- ▶ Estate/Charity/Person
- ▶ No Nominated Beneficiary
- ▶ Trustee Discretion:-
 - ▶ amount of retirement benefits payable to a nominated beneficiary;
 - ▶ amount of retirement benefits payable to the children of a member;
 - ▶ the apportionment of a lump-sum benefit amongst all dependants;
 - ▶ the apportionment of a retirement benefit amongst surviving spouses and children;
 - ▶ the reinstatement of a surviving spouse's retirement benefit that had ceased on re-marriage.

Basic Steps in Legal Planning

- ▶ How to find a lawyer:-
- ▶ Friends; Business Associates; Colleagues; People whose judgment you respect; Kituo Cha Sheria; Law Society of Kenya; etc
- ▶ Expectations from a lawyer:-
- ▶ Professional advise; legal guidance; trust; courtesy and quality time.
- ▶ How can a lawyer assist you:-
- ▶ Provide all information and documents needed.
- ▶ Do you always need to have a lawyer:-
Prudence; Adhock.

The Making of a Will

- ▶ Legal declaration of a person of his intentions or wishes regarding disposition of his property duly made and executed in accordance with law
- ▶ Written
- ▶ Unwritten
- ▶ Special arrangement by which a person who wishes to retain absolute or limited control over his property after death arranges to ensure that the property passes to a person of his choice.

Terminology in Wills

- ▶ **Testator/Testatrix** - A person who makes a Will;
- ▶ **Testate** - A state where a person dies after making a Will;
- ▶ **Intestate** - A state where a person dies without executing a Will
- ▶ **Joint Tenancy** - Ownership of property where interests of tenants are united;
- ▶ **Tenancy in Common** - Ownership of property where interests of tenants are clear and distinct;
- ▶ **Legacy** – property/asset.

Types of Wills

- ▶ **Mutual** – where two or more persons express their wishes in favor of each other upon death in different documents;
- ▶ **Secret** - where testator does not want to disclose beneficiary;
- ▶ **Conditional** - operate on happening of some event;
- ▶ **Joint** – where two or more persons express their wishes upon death in one document;

Characteristics of a Will

- ▶ Wishes expressed take effect upon death;
- ▶ Operates as an expression of intention;
- ▶ Ambulatory;
- ▶ Revocable;
- ▶ Personal; and
- ▶ Legally sound.

Why Make a Will - 1

- ▶ Enables testator to maintain control over his property;
- ▶ Avoids Rules of Intestacy;
- ▶ Enables deceased to appoint a personal representative of his choice;
- ▶ Ensures administrative convenience;
- ▶ Enables testator to make a disclosure of his assets;
- ▶ Enables testator to disclose and make provision for beneficiary.

Why Make a Will - 2

- ▶ Avoid disputes over estate;
- ▶ Enables testator to benefit persons outside immediate family;
- ▶ Enables testator to appoint testamentary guardians for children who are minors to take parental responsibility;
- ▶ May give directions on disposal of the deceased's body.

Limitations to passing property

- ▶ Survivorship;
- ▶ Nomination;
- ▶ Gift in contemplation of Death.

Drafting a Will - 1

- ▶ Not statutory requirement for lawyer to do it;
- ▶ Contents:-
- ▶ Revocation;
- ▶ Appointment of trustees;
- ▶ Burial;
- ▶ Special legacies;

Drafting a Will - 2

- ▶ Minor Legatees;
 - ▶ Residuary estate;
 - ▶ Administrative provisions;
 - ▶ Powers of Investment;
 - ▶ Protection of trustees; etc
- Legal guidance necessary.

How to make a valid Will - 1

- ▶ Inventory of assets;
- ▶ Identity of potential beneficiary;
- ▶ Map out clear asset distribution matrix;
- ▶ Clearly identify yourself as maker of Will;
- ▶ State revocation of all previous Wills;

How to make a valid Will - 2

- ▶ State legal capacity to dispose of your property freely and willingly;
- ▶ Set out beneficiaries and what you have bequeathed to each;
- ▶ Sign and date Will in presence of at least 2 disinterested persons.

Process of a Will after Testator's death

- ▶ **Propounding by Court;**
- ▶ **Objective - to rule out**
- ▶ (a) Incapacity; fraud; coercion; duress; mistake, etc. such importunity takes away the free agency of the testator make the Will void.
- ▶ **Grant of Representation – Probate/Letters of Administration**

What can you make a Will on?

- ▶ "estate" means the free property of a deceased person;
- ▶ Immovable Property - regulated by the law of Kenya, whatever the domicile of that person at the time of his death;
- ▶ Movable Property -regulated by the law of the country of the domicile of that person at the time of his death.
- ▶ A person who immediately before his death was ordinarily resident in Kenya presumed to have been domiciled in Kenya at the date of death.

Who can make a Will?

- ▶ Any person who is adult of sound mind;
- ▶ May make disposition by reference to any secular or religious law that he chooses;
- ▶ A female person, whether married or unmarried, has the same capacity to make a will as does a male person;
- ▶ Rebuttable presumption a person making Will is of sound mind;
- ▶ Burden of proof that a testator was, at the time he made any will, not of sound mind rests upon the person who so alleges.

Validity of Oral Will

- ▶ Oral will valid when:-
- ▶ (*a*) made before two or more competent witnesses; and
- ▶ (*b*) the testator dies within a period of three months from the date of making the will.
- ▶ Oral Will made by member of the armed forces or merchant marine during a period of active service valid if the testator dies during the same period of active service;
- ▶ Oral Will not valid if it contravenes written will;
- ▶ conflict in evidence of witnesses - evidence of independent witness to prevail.

Validity of Witten Will – 1

- ▶ Written Will valid when:-
- ▶ (*a*) testator has signed or affixed his mark to the will;
- ▶ or Will signed by some other person in the presence and by the direction of the testator;
- ▶ (*b*) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

Validity of Written Will – 2

- ▶ (c) attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator;
- ▶ or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and
- ▶ each of the witnesses sign the will in the presence of the testator.

Provision for dependants

- ▶ "dependant" means:-
- ▶ (*a*) wife or wives or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- ▶ (*b*) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- ▶ (*c*) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

Guide to making provision

- ▶ Intervention by court – consideration:-
- ▶ (*a*) nature and amount of the deceased's property;
- ▶ (*b*) past, present or future capital or income from any source of the dependant;
- ▶ (*c*) existing and future means and needs of the dependant;
- ▶ (*d*) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
- ▶ (*e*) conduct of the dependant in relation to the deceased - general circumstances - reasons for not making provision for the dependant.

Thank You

Asante

mwangangi@rba.go.ke

www.rba.go.ke