LAW SOCIETY OF SOUTH AFRICA (LSSA) COMMENTS ON FINAL DRAFT AMENDMENTS TO CHIEF MASTER'S DIRECTIVE 3 OF 2006

The Law Society of South Africa (LSSA) has considered the Final Draft Amendments to Chief Master's Directive 3 of 2006 and wishes to comment as follows:

1. Paragraph 2 of the draft amendments:

   In our view the proposed Directive is to be issued only in terms of Section 2(1) of the Administration of Estates Act 66 of 1965. The Judicial Matters Amendment Acts 2003 and 2005 were merely mechanisms to amend the Administration of Estates Act 66 of 1965. In any event, it appears that Section 14(a) of the Judicial Matters Amendment Act, 2003 was superseded by Section 3 of the Judicial Matters Amendment Act, 2005 and therefore no reference should be made thereto.

2. Paragraph 5 of the draft amendments:

   The definition of "Executor" in terms of the Administration of Estates Act should be incorporated in full. Similarly, the definition of "Master" should be incorporated in full.

3. Paragraph 7.1 (a) of the draft amendments:

   The impression is created that an estate may be reported to any Master's Office and if the Master's Office does not have jurisdiction, that Office "then transfers the estate to the appropriate Master's Office which has jurisdiction". The practice appears to be that estates must be reported to the Master's Office which has the requisite jurisdiction. It appears that the Master is appointed within the area of jurisdiction of a High Court. In order to determine jurisdiction, it is important to compile jurisdictional area schedules for each Master. This would assist Masters, practitioners and the public. The requirement to furnish a declaration in terms of Section 22(2)(c) should also be addressed in the proposed Directive.

4. Paragraph 7.1 (c) of the draft amendments:

We suggest that the provision be adapted along the following lines:

"If it is indicated on the death notice that there is a predeceased spouse, it must first be ascertained from the predeceased spouse's estate if he/she died testate or intestate and, if testate, whether the will in that estate has any effect on the administration of the estate in question."

It is submitted that the procedure, communication channels and the time frame on how each Master's Office is to establish such facts is to be set out in the proposed Directive.

5. Paragraph 7.2 of the draft amendments:

It is our submission that the person reporting the estate or a family member or the nominated executor/executrix should ideally submit a marital status declaration to the Master in every case, as well as acceptable proof of an alleged marriage or permanent same-sex life partnership. A death certificate is proof of death. It is not proof of the marital status of the deceased and is not intended to be such proof. The marital status on the death certificate is in accordance with the information on the notification of death. The marital information contained therein is often incorrect and therefore the death certificate also reflects the incorrect marital status of the deceased. The practice of some Master's Offices is to request for a "personal particulars printout" from Home Affairs to be furnished to them, where the marital status on the death certificate does not accord with the marital status on the reporting documents, notwithstanding the fact that a marital status affidavit/declaration or a next of kin affidavit has been furnished. This requirement is without merit and it is important for this aspect to be fully dealt with in the proposed Directive.

6. Paragraph 7.2 (f) of the draft amendments:

The Muslim Judicial Council is only one such institution dealing with marriages. It is suggested that this paragraph be adapted along the following lines:

"If the deceased was married in terms of religious rites without compliance with the Marriages Act (Muslim and Hindu marriages) the marriage certificate or other acceptable proof of such marriage from the religious body or person who performed such marriage should be called for. "

7. Paragraph 7.2 (g) of the draft amendments and more specifically to footnote 16 thereof:

   We respectfully do not agree that the decision in *Gory vs. Kolver* still stands, notwithstanding the subsequent promulgation of the Civil Union Act. Same sex partners then enjoy greater protection than heterosexual partners. This could not have been the intention of the legislature. It appears that the intention was to make "partners", whether same sex or heterosexual, all equal before the law.

8. Paragraph 7.5 (a) of the draft amendments:

   The reference to "duplicate original wills" should be clarified to mean counterparts of wills originally signed and not certified or photostat copies of the will.

9. Paragraph 7.6 of the draft amendments:

   It is suggested that paragraph 7.6(b) be adapted along the following lines:

   "The next-of-kin affidavit must be completed by a family member or by someone who knew the deceased and his/her family well."

   It is also suggested that 7.6(c) be adopted along the following lines:

   "The next-of-kin must be deposed to before a Magistrate, Justice of Peace or Commissioner of Oaths. All alterations or amendments thereon must be initialled by the Deponent and the Magistrate, Justice of Peace or Commissioner of Oaths, as the case may be."

10. Paragraph 7.7 of the draft amendments:

    It is suggested that paragraph 7.7(a) be amended along the following lines:

    "A provisional inventory must be lodged within 14 days after the death or within such further period as the Master may allow. Master's Offices should accept the provisional inventory notwithstanding that the 14 day period has lapsed."

11. Paragraph 7.8 of the draft amendments:

    Nominations for the appointment of an executor/executrix in intestate estates are not uniform. In some Master's Offices nominations are required from all the heirs whilst in other offices nominations are only required from the majority of heirs. It is absolutely imperative that this aspect be fully dealt with in the proposed Directive.

12. Paragraph 7.9 of the draft amendments:

    Some Master's Offices insist that the signature of a single executor/executrix on the acceptance of trust must be witnessed by two witnesses, whilst others accept a single witness. The proposed Directive must clarify that only a single witness is required for each executor/executrix on the acceptance of trust form. The draft amendments also seem to create the impression that any board of executors or trust company enjoys exemption. This is clearly not the case. The definition of "board of executors" and "trust company" must be fully set out in the footnotes. It is suggested that 7.9 (a) (vi) read along the following lines:

    "A board of executors such as is defined in Regulation 910 or a trust company such as is defined in Regulation 910, public accountant…"

13. Paragraph 7.10 of the draft amendments:

In our view, the provisions of Section 23 of the Administration of Estates Act apply to all estates, including estates administered in terms of Section 18(3) of the Act. In our view, the reference to “(in estates with a value of more than R250 000,00)” in the heading of 7.10 should be omitted.

14. Footnote 28 on page 12 of the draft amendments:

It appears to be established practice at various Master’s Office to insist that a layperson be assisted by a qualified person on pain of security notwithstanding he/she has been exempted from the obligation to furnish security in terms of the will of the deceased. We respectfully submit that it would not be prudent for the Master to interfere with this established practice. The Master has a duty of care and must protect beneficiaries and the public at large. Any failure by the Master’s Office to do so may result in proceedings being instituted against the Master if heirs or other parties are adversely affected and suffer financial or other loss. We submit that the words “offices may thus not insist on him still getting an agent” in the third line of footnote 28 be deleted.

15. General remark:

Chief Master’s Directives are, by their very nature, limited in scope and application. Some of the estate reporting documents require revision and there is a need for legislative reform. The challenge for the Office of the Chief Master is to take urgent steps to overhaul the Administration of Estates Act and the Regulations.