



INTERIM REPORT ON ADMINISTRATION OF ESTATES



South African Law Reform Commission: Project 134

INTERIM REPORT ON
ADMINISTRATION OF ESTATES

Report: August 2008

TO MRS BS MABANDLA, MP, MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act, 1973 (Act 19 of 1973 as amended), for your consideration, the Commission's interim report on administration of estates.



Madam Justice Y Mokgoro
Chairperson: South African Law Reform Commission
August 2008

SOUTH AFRICAN LAW REFORM COMMISSION

The South African Law Reform Commission was established by the South African Law Commission Act 19 of 1973.

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Executive Summary

Introduction

The main thrust of the Commission's investigation into the administration of estates is to consider a unitary system of administration of estates for all South Africans. Measures to improve the administration process and reduce the work of the supervising authority and executors, as far as can be justified, are also considered.

In January 2002 the Commission submitted a progress report to the Minister for Justice and Constitutional Development. In this report the Commission requested the Department of Justice and Constitutional Development (the "Department") to advise the Commission as soon as possible of policy decisions on matters such as the involvement of magistrates in the administration of estates and the establishment of satellite offices to deal with the administration of estates. In December 2002 the Department published a document, entitled **Policy and Procedural Manual: Administration of Intestate Deceased Estates at Service Points**, which reflected its policy on the role of magistrates and the establishment of satellite offices. In October 2005 the Commission published a discussion paper which called for comment on a discussion of the policy of the Department and other developments since the progress report.

Need for an interim report

It would take a considerable time for the Commission to approve a report on the comprehensive review of administration of estates and for the enactment of the legislation recommended in a report. Two matters require urgent resolution and are dealt with in this interim report, namely, administration of "small" estates and streamlined procedures for other estates.

Administration of "small" estates

The administration of "small" estates in terms of section 18(3) of the Administration of Estates Act 66 of 1965 is problematic and urgent measures are required to protect beneficiaries in these estates:

- A "small" estate is an estate with a value of less than the amount fixed by the Minister from time to time — at present R125, 000.
- Measures to protect beneficiaries in small estates are necessary because these beneficiaries are often less able to protect their own interests than beneficiaries in large estates. There is a laudable practice in the Master's office and service points at magistrates' offices to assist beneficiaries to report and finalise small estates without delay or costs. This practice should be continued or expanded and protective measures in large estates should rather be relaxed in order to ease the Master's burden.
- Small estates in which minors, incapacitated or other vulnerable persons have an interest deserve special consideration. Resources should be devoted to the protection of such persons and the Master should play a role from case to case to safeguard their interests without causing delays or costs for the beneficiaries.
- The Administration of Estates Act endows the Master with wide powers to act against executors who fail to comply with their duties, but contains no express powers to act against persons given directions in terms of section 18(3):
 - » It is advisable to appoint an executor in all cases but to dispense with compliance with requirements where circumstances warrant it. The Chief Master should issue a directive for dispensing with

requirements which strikes a balance between the protection of beneficiaries and the speedy and cost effective finalisation of estates.

- » The size of the estate remains a factor when deciding on the requirements to be complied with during the administration of an estate, but other factors, should also be taken into account:
 - ~ whether an account of assets, liabilities and intended distribution signed by or on behalf of beneficiaries has been lodged,
 - ~ the nature of the relationship between the beneficiaries and the executor, and the sophistication of the beneficiaries,
 - ~ whether the estate appears to be solvent and uncomplicated.

It is recommended that—

- the Administration of Estates Act should be amended to provide that an executor must be appointed in each estate with assets and that the Master may in accordance with guidelines issued by the Chief Master dispense with compliance by an executor with any of the requirements of the Act;
- provision must be made for the appointment by the Master of a suitable person to receive information about an estate and where advisable to take control of assets before the appointment of an executor.

Streamlined procedures for other estates

Some procedures can be streamlined without the need for statutory amendment.

After the decision in **Bhe and Others v Magistrate, Khayelitsha and Others** 2005 (1) SA 580 (CC) all customary law estates must be administered under the supervision of the Master. This and other factors have placed severe pressure on the Master's Office to deal with its workload. It was submitted above that protective measures in large estates should rather be relaxed in order to ease the Master's burden.

The procedures to be followed in cases where protective measures are relaxed must contain safeguards to ensure a balance between the streamlining of procedures and the protection of beneficiaries.

The Chief Master could issue directives in this regard.

It is recommended that—

- the Chief Master should consider issuing directives on the following:
 - » examination of accounts in deceased estates;
 - » follow up of requirements after a final account has been advertised;
 - » removal of executors.

Examination of accounts in deceased estates

Examination of accounts is a serious bottleneck. It represents a substantial percentage of the work of the Master's office and leads to delays experienced in the Master's office.

The Master should not be forced to ignore blatant errors that come to the Master's attention. The role of the Master to act as guardian of the legalities and to protect the interests of minors or other persons with limited capacity and to decide on objection against accounts and investigate complaints cannot be criticised. The Master will have more time to concentrate on these duties and other duties if responsibilities exercised on behalf of persons of full legal capacity are limited.

The advantages of examining all accounts must be weighed against the disadvantages of delays and costs caused by the examination of all accounts.

It is recommended that—

- the Chief Master consider issuing a directive on the examination of accounts in deceased estates along the following lines;
 - » the examination of accounts by the Master should concentrate on matters such as the correctness of distribution and administration costs; accounts where examination is necessary to enable the Master to deal with complaints, objections or disputes; accounts where it appears that there are absentee, unborn, minor or other vulnerable beneficiaries, like illiterate people, beneficiaries with limited capacity; accounts where the Master has been requested by beneficiaries to examine the account; and accounts where it appears that there is a possibility that estate duty is payable;
 - » a liquidation and distribution account should be considered to have been examined by the Master without preconditions before the account is advertised for inspection if a list of requirements is not issued by the Master within a specified number of working days after receipt of the account.

Follow up of requirements after a final account has been advertised

Standard procedures lead to the follow up of requirements where it serves no purpose in protecting beneficiaries. The application of rigid rules is inappropriate and compliance with statutory requirements requires flexible supervision by the Master. The disadvantage that a discretion for the Master creates uncertainty, can be managed by prescribing clear guidelines in a Chief Master's Directive.

It is recommended that—

- the Chief Master consider issuing a directive on the follow up of requirements after an account has been advertised along the following lines:
 - » The Master should not follow up on compliance with legal requirements after a final account has been advertised free of objections except in circumstances such as reason to believe that the estate is insolvent; there are absentee beneficiaries, minor beneficiaries or other vulnerable beneficiaries, like illiterate people, or beneficiaries lacking full capacity, or unborn heirs who may become entitled to benefits and provision has not been made in a trust for the administration of the benefits.

Removal of executors

Section 54(1)(b)(v) of the Administration of Estates Act 66 of 1965 provides that an executor may be removed from office, if the executor fails to perform satisfactorily any duty imposed upon the executor by or under the Act or to comply with any lawful request of the Master. Before removing an executor from office the Master must, in terms of section 54(2), forward to the executor by registered post a notice setting out the reasons for the removal and informing the executor that he may apply to the Court within 30 days from the date of the notice for an order restraining the Master from removing the executor from his office.

Section 36 provides that the Master may after not less than one month's notice apply to the court for an order to lodge an account or vouchers in support thereof with the Master, or to perform a duty imposed by the Act, or to comply with any reasonable demand by the Master for information or proof required by the Master in connection with the liquidation or distribution of the estate.

If an executor fails to comply with these requirements, the Master must send out a "final reminder" in terms of section 36 which threatens a court application if the executor does not comply before a date stated in the notice.

The reminder refers in passing to section 54 (removal of executor). The Master's notice to make application to court is mostly an idle threat because of the costs and delays involved and the further steps required to enforce the court order. Removal of the executor and appointment of another executor is a speedy and usually much more practical solution.

In terms of section 36 the Master may only apply for a court order after "not less than one month's notice". In addition it is advisable to allow for the time which it would take in the ordinary course of post for the notice to be delivered. If an executor fails to comply with the final reminder, the Master usually gives notice that he or she intends to remove the executor from office, unless the executor applies to Court within 30 days from the date of the notice for an order restraining the Master from removing the executor from office.

There is no legal requirement that a "final reminder" must be issued before the Master may remove an executor from office. There is also no requirement to give notice that the Master intends removing the executor from office. This wording, which is used in existing forms, may imply that the Master must still give the executor 30 days to apply to court once it has been decided to remove the executor. All that is required is that the Master must forward a notice setting out the reasons for the removal and informing the executor of the possibility of applying to court within 30 days for an order restraining the Master from removing the executor from office.

It is recommended that—

- the Chief Master considers issuing a directive on the removal of executors along the following lines;
 - » if a legal duty has not been complied with by an executor (for instance a liquidation and distribution account has not been lodged) or a lawful request of the Master has not been complied with after a final reminder, appropriate action should be considered;
 - » if the executor or person who assists the executor belongs to a professional body, the matter must be reported to the professional body;
 - » steps must be taken against a professional body, or preferential treatment of members of the professional body must be suspended if the professional body does not follow up properly on reports that its members have failed to comply with legal requirements;
 - » application may be made to court for an order directing the executor to comply with outstanding requirements; but this is costly, time consuming and may not be effective to finalise the estate;
 - » where appropriate, give notice of removal of the executor and follow up by removing the executor and taking steps to appoint another executor, after giving beneficiaries an opportunity to nominate a successor.

Recommendations

1. The practice in the Master's office and at service points to assist beneficiaries to report and finalise small estates without any delay or costs should be continued. Protective measures in large estates should rather be relaxed and processes improved in order to ease the Master's burden. Resources should be devoted to the protection of minors and incapacitated persons and the Master should play a role from case to case to safeguard the interests of minor beneficiaries or incapacitated persons. The cost, however, of such protective measures should not consume a large part of the benefits due to these beneficiaries. (Paragraph 3.3.6)
2. Executors should be appointed in all estates with assets and the Master may in accordance with guidelines issued by the Chief Master, dispense with compliance by an executor with any of the requirements of the Act. If the executor has been exempted from complying with certain requirements, this should then be indicated clearly on the certificate of appointment. The representative should be referred to as an "executor with exemptions" or something similar. Legislation is required to provide that the Master must appoint an executor in each estate and that the Master may dispense with certain requirements in terms of the Act. The envisaged legislation should be promoted as a matter of urgency. (Paragraph 3.4.11 and 5.1.)
3. Concerns about the quality of work at service points should be addressed but these concerns should not determine the way in which appointments with exemptions are dealt with. (Paragraph 3.4.13.)
4. In the case of an appointment with exemptions the assets should be listed on the certificate of appointment. Depending on the circumstances the assets may be typed as part of the appointment or a copy of the inventory, authenticated by a date stamp and signature corresponding with the appointment, can be attached to the appointment. (Paragraph 3.6.5.)
5. Some form of account must be submitted in all estates. A Chief Master's Directive can indicate the circumstances where an account must be lodged before the appointment is made. (Paragraph 3.7.10.)
6. A Chief Master's Directive should prescribe a simple form of account for executors with exemptions. (Paragraph 3.8.4.)
7. It is submitted that-
 - executor's remuneration, if any, should be reflected in an account, signed by beneficiaries or their legal representatives;
 - consultation should take place to determine a reasonable and realistic minimum tariff instead of the R350 fixed in 1991 (a Ministerial amendment of the regulation would be required);
 - the minimum tariff should be the starting point for the determination of remuneration for an executor with exemptions. (Paragraph 3.9.4.)
8. **Immovable property:**
 - The position regarding transfer of immovable property in estates is a practical matter which should be discussed with the Chief Registrar of Deeds in order to arrive at a satisfactory solution to the practice that transfer to a purchaser is allowed without the Master's consent.
 - Section 42(1) (which deals with cases where immovable property has not been sold) should be amended to include transfer in accordance with any account lodged with the Master and not necessarily a liquidation and distribution account in terms of section 35.
 - It would assist if the Master had access to the records of the deeds office to check whether property was registered in the name of the estate.

- From the point of view of the protection of children, including minors, a market valuation of immovable property should be required. This is a practical matter which should be dealt with in a Chief Master's Directive.
- Problems arise if beneficiaries cannot afford transfer costs. There may also be problems with paying municipal charges in order to obtain a clearance certificate. Practical solutions which may be pursued include the following:
 - » Assistance by the Legal Aid Board, which has indicated an intention to get involved in civil matters.
 - » Pro bono work by attorneys.

(Paragraph 3.10.19.1.)

9. **Personal liability of executor**

- The effectiveness of the undertaking in use in "small" estates at present can be enhanced by a wording similar to bonds of security lodged with the Master (see below).
- Section 50 should be amended to apply to executors with exemptions.

(Paragraph 3.11.6.)

10. Executors with exemptions should be directed by the Master not to open a cheque account but required to open any other account with a bank or the Post Office. This could be done by way of a Chief Master's Directive. (Paragraph 3.12.10.)

11. No Master's fees should be payable unless an executor lodged a liquidation and distribution account in terms of section 35 of the Administration of Estates Act. (Paragraph 3.13.2.)

12. Provision must be made for the appointment by the Master of a suitable person to receive information about an estate and where advisable to take control of assets before the appointment of an executor. The appointment of an interim curator should be amended¹ to make provision for this and to provide that the Master may dispense with security. (Paragraph 3.15.13.)

13. The Chief Master should consider issuing a Directive along the following lines:

- A reasonable period for the Master to examine a liquidation and distribution account in a deceased estate, calculated on the number of working days after the date on which an account is received by the Master, should be determined in consultation with Masters and stakeholders in the industry.
- A Chief Master's Directive should provide that an account is considered to have been examined by the Master, without preconditions for advertisement, if a questionnaire is not sent to the executor or executor's agent within the prescribed number of days after the receipt of the account by the Master. The date of receipt of the account is the date when the account is handed to the Master or 7 days after the account was mailed to the Master by registered mail. The directive should apply only if the account is submitted by hand or registered mail. As soon as it is possible to do so the Global Estate Register should indicate the date on which a questionnaire regarding an account is sent out by the Master.
- The Chief Master's Directive should prescribe that the examination of accounts by the Master must concentrate on the following in the order indicated:
 - » Correctness of distributions and administration costs.

¹ See the proposal in paragraph 5.1.

- » Accounts where examination is necessary to enable the Master to deal with complaints regarding the administration of an estate, or an objection to a liquidation and distribution account, or a dispute which has arisen regarding the administration of an estate.
- » Accounts in estates where it appears to the Master that there are absentee, unborn or minor beneficiaries, or vulnerable beneficiaries, like illiterate people, or beneficiaries with limited capacity. This is particularly important if the beneficiaries are unrepresented and provision is not made for the administration of the benefits in a trust or otherwise.
- » Accounts in estates where the Master has been requested by beneficiaries to examine the account.
- » Accounts where it appears to the Master that there is a possibility that estate duty is payable. This item can be reconsidered if agreement is reached with SARS that the Master should not accept extra responsibilities in cases where it appears to the Master that estate duty may be payable. (Paragraph 4.2.11.)

14. A Chief Master's Directive should provide guidance about follow up concerning legal requirements after advertisement of the account and it should not be dealt with in the Administration of Estates Act. The Chief Master's Directive must provide that the Master does not follow up on compliance with legal requirements after a final account has been advertised free of objection except in the following circumstances:

- There is reason to believe that the estate is insolvent;
- In terms of the liquidation and distribution account there is an absentee beneficiary, minor beneficiaries or other vulnerable beneficiaries, like illiterate people, or beneficiaries lacking full capacity, or unborn heirs who may become entitled to benefits and provision has not been made in a trust for the administration of the benefits;
- There is reason to believe that estate duty may be payable (this can be reconsidered if an agreement is reached with SARS that the Master will not accept extra responsibilities in cases where it appears to the Master that estate duty may be payable);
- There is no circumstance which compels the Master to follow up on compliance with requirements by the executor.
- Any questionnaire which lists requirements after advertisement of an account must be drafted accordingly.

The Master may at any time enforce compliance by an executor with any requirements of the Act.

(Paragraph 4.3.10.)

15. Provision should not be made for a discretionary appointment of a joint executor by the Master. Steps to be taken by the Master when an executor fails to comply with requirements should be dealt with in a Chief Master's Directive along the following lines:

- If a lawful request of the Master is not complied with the Master must send a registered final reminder for the Master's requirements to be complied with within 14 days and diarise the matter for 21 days.
- If a legal duty in terms of the Act is not complied with (eg a liquidation and distribution account not lodged) or a lawful request of the Master has not been complied with after a final reminder, appropriate action, which could be one or more of the following, should be decided on:
 - » Where appropriate, file the matter without follow up (see paragraph 4.3 above).

- » If the executor or person who assists the executor with the administration belongs to a professional body, report the matter to the professional body and diarise the matter for 21 days before the steps below are followed.
- » Steps must be taken against a professional body, or preferential treatment of members of the professional body must be suspended if the professional body does not follow up properly on reports that its members have failed to comply with legal requirements;
- » Consider giving notice that application will be made to court for an order directing the executor to comply with the outstanding requirements (final reminder), but keep in mind that such an application is costly, time consuming and may not be effective to finalise the estate.
- » Give notice of removal in an appropriate form and diarise for 5 weeks to follow up by removing the executor and taking steps to appoint another executor. The notice must be sent to the executor personally with a copy to the agent, if any. Provide beneficiaries with an opportunity to nominate a successor, if it is practicable to do so without too much delay.

Chapter 1:



Introduction

Discussion papers and progress report

2

1. Introduction

1.1 The main thrust of the Commission's investigation into the administration of estates is to consider a unitary system of administration of estates for all South Africans. Measures to improve the administration process and reduce the work of the supervising authority and executors, as far as can be justified, are also considered.

Discussion papers and progress report

1.2 During December 2000 the Commission published Discussion Paper 95 **Customary Law: Administration of Estates** for comment. Comments were received from 34 persons or bodies, including 11 magistrates and 6 Masters of the High Court.

1.3 In January 2002 the Commission submitted a progress report to the Minister for Justice and Constitutional Development. In this report the Commission requested that the Department of Justice and Constitutional Development (the "Department") advise the Commission as soon as possible of policy decisions on matters such as the involvement of magistrates in the administration of estates and the establishment of satellite offices to deal with the administration of estates.

1.4 The Minister for Justice and Constitutional Development has designated all magistrates' offices as service points, in terms of section 2A(3) of the Administration of Estates Act. The Department published a document entitled **Policy and Procedural Manual: Administration of Intestate Deceased Estates at Service Points** (the "Manual") which was discussed in Discussion Paper 110 (published for comment in October 2005). Comments on the Discussion Paper were received from 30 persons or bodies, including 10 Masters of the High Court. A consultative meeting with 30 representatives of the National and Provincial Houses of Traditional Leaders was held on 7 November 2005. A stakeholders meeting on 28 November 2005, attended by 34 persons, discussed some of the recommendations in the Discussion Paper.

Chapter 2:



Need for an interim report

2. Need for an interim report

2.1 It would take a considerable time for the Commission to approve a report on the comprehensive review of administration of estates and for the enactment of the legislation recommended in such a report. Two matters require urgent resolution and are dealt with in this interim report; namely, administration of “small” estates and streamlined procedures for other estates.

2.2 The administration of “small” estates in terms of section 18(3) of the Administration of Estates Act 66 of 1965² is problematic and urgent measures are required to protect beneficiaries in these estates. Protective measures are necessary in small estates because the beneficiaries are often less able to protect their own interests than beneficiaries in large estates. The Administration of Estates Act endows the Master with wide powers to act against executors who fail to comply with their duties, but contains no express powers to act against persons given directions in terms of section 18(3).

2.3 Urgent measures are required to lessen the burden of the Master.

2.3.1 After the decision in **Bhe and Others v Magistrate, Khayelitsha, and Others**³ all customary law estates must be administered under the supervision of the Master.

2.3.2 This and other factors have placed severe pressure on the Master’s Office to deal with its workload.

2.3.3 It is clear from comments that Masters have difficulty in coping with their work. One of the Masters who submits that the present Act should be retained in principle as it works well, makes reference to “the chaotic situation we find ourselves in”.

2.3.4 It is submitted that protective measures in large estates should rather be relaxed in order to ease the Master’s burden.

2.3.5 An attempt should be made to save resources by improving the administration process and by reducing, as far as can be justified, the work of the supervising authority and executors. The procedures to be followed in cases where protective measures are relaxed must contain safeguards to ensure a balance between the streamlining of procedures and the protection of beneficiaries.

2.3.6 The procedure to remove executors can be streamlined.

2.3.7 The following matters, aimed at lessening the Master’s burden and streamlining procedures, are dealt with in this report:

2.3.7.1 Examination of accounts in deceased estates;

2.3.7.2 Follow up of requirements after a final account has been advertised;

2.3.7.3 Removal of executors.

2 Referred to below as the Administration of Estates Act.

3 2005 (1) SA 580 (CC) at 633.

Chapter 3:

Administration of “small” estates

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3. Administration of “small” estates

3.1 Level of control by the Master in terms of the Administration of Estates Act

- 3.1.1 The level of control exercised by the Master depends mainly on whether an executor has been appointed.
- 3.1.2 In terms of sections 18(3) the Master may dispense with the appointment of an executor and give directions as to the manner in which an estate must be liquidated and distributed, if the value of the estate does not exceed the amount determined by the Minister of Justice by notice in the **Government Gazette**. The Minister has determined the amount of R125 000 by notice in the **Government Gazette** 25456 of 19 September 2003. (The Manual still sets a limit of R50,000 as far as service points⁴ are concerned.)
- 3.1.3 In practice the Master, in terms of section 18(3), authorises the surviving spouse or one of the heirs to take control of the assets of the estate, as reflected in the inventory filed with the Master, to pay the debts and to transfer the residue of the estate to the heir or heirs entitled thereto by law. There is usually no accounting to the Master by the representative.⁵ The following are special cases:⁶
- 3.1.3.1 If the estate has substantial assets, but is insolvent, the Master will appoint an executor.
- 3.1.3.2 The Master may decide to appoint an executor (and a service point must refer the matter to the Master) in the following cases:
- 3.1.3.2.1 At least one of the beneficiaries is a minor, not assisted by a legal guardian.
- 3.1.3.2.2 At least one of the beneficiaries is a minor and the estate consists of cash of more than R20,000.
- 3.1.3.2.3 Disputes between heirs.
- 3.1.4 Even though the Master’s role has been reduced somewhat,⁷ the Master is still entitled to exercise extensive control over executors. Section 35(4) provides that the liquidation and distribution account shall lie open for inspection **after the Master has examined it**. In terms of section 35(9) the Master may, even in the absence of an objection to an account by interested parties, instruct the executor to amend the account, if in the opinion of the Master the account is in any respect incorrect and should be amended. If an executor fails to lodge an account with the Master, or to lodge vouchers in support of the account, or to perform any of his or her duties, or to comply with any reasonable demand of the Master for information or proof, the Master or an interested person may apply to court for an order directing the executor to comply.⁸ When magistrates dealt with estates in terms of the Regulations to the Black Administration Act the supervisory role of the magistrate was more flexible than the Master’s and depended largely on what the magistrate deemed fit or considered necessary.⁹

4 All magistrates’ offices have been designated as service points.

5 Practice Manual par 6.4.

6 Practice Manual paragraphs 4 and 9.

7 Section 47 was amended in 1983 in order that consent by the Master is not necessary for a sale if major heirs agree on the method. Pursuant to an amendment to section 35(12) in 1984, the Master may accept an affidavit by the executor that heirs have been paid and need not insist on receipts.

8 Section 36.

9 R200 Government Gazette 10601 of 6 February 1987, regulations 3(1), 4(3) and 7(1).

3.2 Discussion Paper 110 of the Commission and comments thereon

- 3.2.1 The discussion of "small" estates in Discussion Paper 110¹⁰ is repeated below with a summary of comments¹¹ on "recommendations" in the Discussion Paper. This is followed by a discussion of the comments or the statements in the Discussion Paper.
- 3.2.2 A "small" estate is an estate with a value of less than the amount fixed by the Minister from time to time — at present R125, 000.

3.3 Protection of beneficiaries, especially minors, in small estates

- 3.3.1 It is logical to enforce measures to protect beneficiaries in small estates because these beneficiaries are often less able to protect their own interests than beneficiaries in large estates. Formalities to protect beneficiaries may cost beneficiaries money. Protective measures have no merit if the cost thereof consumes a substantial part of the estate. It is therefore advisable for a regulating authority to spend more time protecting the interests of beneficiaries in small estates than protecting beneficiaries in large estates.
- 3.3.2 There is a practice in the Master's office and at service points to assist beneficiaries to report and finalise small estates without any delay or costs. This is a good example of taking the law to the people.¹² If this practice can be afforded at all, such assistance should continue and protective measures in large estates should rather be relaxed in order to ease the Master's burden.
- 3.3.3 Small estates, in which minors or incapacitated persons have an interest, deserve special consideration. There is no question that beneficiaries with limited capacity deserve protection. However, protective measures serve no purpose if the cost thereof consumes any benefit from an estate or a substantial part thereof. In many cases the interests of incapacitated persons are well protected by representatives like natural guardians or curators. It may benefit incapacitated beneficiaries for their inheritance to be paid into the Master's guardian's fund or kept by a guardian or other representative without the need or advisability of other protective measures, such as advertising a full liquidation and distribution account. Circumstances differ from one case to the next and it seems highly desirable to leave the question of the protection of minors and persons of limited legal capacity in the hands of the Master. The Master fulfils many functions on a level just below the court as upper guardian of all minors.

Comments received

- 3.3.4 A commentator submits that it is empirically flawed to presuppose that there is an unqualified and widespread appreciation among interested persons other than minors and incapable persons of their rights, as the majority of South Africans are not necessarily equipped with the required legal and financial skills to fully appreciate their rights; the likelihood that interested persons would of their own accord raise objections is so remote that they may suffer significant financial harm without ever knowing that their rights have been detrimentally affected; it is arbitrary to accept without empirical proof that there is a connection between a substantial inheritance and possession of the necessary legal and financial skills required to identify and impeach improper conduct by an executor; very often, and especially in large deceased estates, the risk of dissipation of assets is particularly prevalent.

Discussion

10 Paragraphs 5.2.19 to 5.2.36 on page 21 and further; paragraphs 5.4.3 to 5.4.6 on page 36 and further and paragraphs 6.4.1 to 6.5.5 on page 55 and further.

11 The complete comments are available at the Commission.

12 Cf Arthur Nonyongo "Allow magistrates to administer *all* estates" October 2001 *De Rebus*.

- 3.3.5 It is true that many beneficiaries, including beneficiaries in large estates, are ill equipped to protect their own interests. As professionals usually assist in the administration of "large" estates, the protection of beneficiaries in these estates can be improved by the better regulation of professionals who administer estates, (a topic to be dealt with in the broad review of administration of estates). From a policy point of view it is correct to apply more resources to protect the vulnerable and the poor. It is accepted, albeit without empirical evidence, that minors and other incapacitated beneficiaries are more vulnerable than other beneficiaries.

Recommendation

- 3.3.6 ***It is submitted that the practice in the Master's office and at service points to assist beneficiaries to report and finalise small estates without any delay or costs should be continued. Protective measures in large estates should rather be relaxed and processes improved in order to ease the Master's burden. It is also submitted that resources should be devoted to the protection of minors and incapacitated persons and that the Master should play a role from case to case to safeguard the interests of minor beneficiaries or incapacitated persons. The cost of such protective measures should not, however, consume a large part of the benefits due to these beneficiaries.***

3.4 Appointment of executors in all estates

- 3.4.1 When the Master gives directions in terms of section 18(3) (value of estate less than R125, 000) no executor is appointed. The Master usually regards the estates as finalised once directions have been given to a person to deal with estate assets.
- 3.4.2 Consideration needs to be given to cases where heirs or creditors complain that they have not received their share, or if it appears that the Master has been misled, perhaps grossly, about the position in the estate? As a "creature of statute" the Master has the powers conferred upon him or her by the Act, either expressly or by necessary implication.¹³ The Administration of Estates Act endows the Master with wide powers to act against executors, but contains no express powers to act against persons given directions in terms of sections 18(3).
- 3.4.3 Commentators agree with the principle that it is advisable to appoint an executor in all cases and dispense with compliance with requirements according to the circumstances. This enables the Master to use the extensive powers in the Act against executors who fail to fulfill their duties.
- 3.4.4 ***Comments were invited on a recommendation that an executor should be appointed in all estates, regardless of the value of the estate, although special rules might apply to executors appointed in estates under a prescribed value.***

Comments received on the recommendation that executors should be appointed in all estates, with special rules in estates under a prescribed value

- 3.4.5 One commentator does not agree that section 18(3) appointments should be abolished for the following reasons:
- 3.4.5.1 It would be too easy to commit fraud when small estates turn out to be bigger.
- 3.4.5.2 He is concerned about service points using the same letters of executorship; identification in the Master's Office might be more difficult. Section 18(3) should be expanded to make provision for disputes and problems because more and more people approach the Master, who can only assist wealthier people. The Master will be forced to become involved in applications to sell immovable property and call for security.

- 3.4.6 Another commentator proposes that the problems with section 18(3) could be solved by making provisions and sanctions applicable to appointments in terms of the subsection.
- 3.4.7 It was also suggested that section 18(3) appointees should be distinguished by calling them "Master's representative", or "summary liquidator", giving them all the powers of an executor and exempting them from complying with certain formalities, unless specifically called on to do so by the Master.
- 3.4.8 A further suggestion was that the Master should use a code to entitle the Master to know that the file can be closed with impunity.
- 3.4.9 A strong majority of commentators support the recommendation that an executor should be appointed in all cases with special rules for certain estates. They mention the following:
- 3.4.9.1 it will bring all estates under the same discipline and potential oversight;
 - 3.4.9.2 it will go a long way to prevent leakage of assets in small estates;
 - 3.4.9.3 it has previously been thought that the increased duties were too burdensome for small estates, but special rules can apply to certain estates;
 - 3.4.9.4 there has been little supervision of the undertaking not to administer any assets not reflected in the inventory;
 - 3.4.9.5 instruction on how a small estate should be distributed must be given to the representative or executor so that they may be legitimately held to their responsibilities;
 - 3.4.9.6 the practice of giving low values to avoid the appointment of an executor, occasionally leaving minors without an inheritance, will no longer be viable;
 - 3.4.9.7 the special rules must ensure that executor's expenses do not deplete a small estate of a relatively large amount of money as happened in the **Bhe**¹⁴ and **Shibi** cases;
 - 3.4.9.8 an executor in a small estate should within a very short time submit a list of assets to the Master who should then indicate whether security should be given or not;
 - 3.4.9.9 factors to be considered, in order to decide whether special rules should apply, include, the nature of the estate, the needs of beneficiaries and creditors, complexity, whether estate duty is payable, and whether there are interested persons under disability.

Discussion

- 3.4.10 There is strong support for the appointment of executors in all cases. Some commentators suggest that the same results could be achieved in a different manner, by making provisions which apply to executors applicable to summary appointments in terms of section 18(3).

Recommendations

- 3.4.11 **It is submitted that executors should be appointed in all estates with assets and that the Master may, in accordance with guidelines issued by the Chief Master, dispense with compliance by an executor with any of the requirements of the Act. If the executor has been exempted from complying with certain requirements, this should then be indicated clearly on the certificate of appointment. The representative should be referred to as an "executor with exemptions" or something similar. Legislation is required to provide that the Master must appoint an executor in each estate and that the Master may dispense with**

certain requirements in terms of the Act. The envisaged legislation¹⁵ should be promoted as a matter of urgency.

- 3.4.12 Concern was expressed that service points would issue letters of executorship and it would therefore be difficult to distinguish between appointments issued by Masters and those issued by service points. This is probably a valid concern, but the real cause for the concern is the quality of work done on behalf of the Master at service points. Also, because of the absence of qualified persons at service points they do not deal with estates of deceased persons who left a will. In reality members of the public who deal with many of the service points are receiving sub standard treatment. This is unacceptable and must be addressed urgently. The present thinking on this topic is to address the problem by deploying Assistant Masters in offices with enough work to justify it and to set up a back office where appointments can be made by qualified and experienced people for those estates reported to service points where there is no Assistant Master.
- 3.4.13 **It is submitted that concerns about the quality of work at service points should be addressed but that these concerns should not determine the way in which appointments with exemptions are dealt with.**
- 3.4.14 Practical measures should be taken to avoid fraud and protect beneficiaries. Protective measures should not cause unnecessary delays or expense. The following topics, discussed below, deal with measures to avoid fraud and protect beneficiaries:
- 3.4.14.1 list assets on certificate of appointment;¹⁶
- 3.4.14.2 require an account in all cases;¹⁷
- 3.4.14.3 how to deal with immovable property, including the issue of section 42(2) certificates;¹⁸
- 3.4.14.4 personal liability of representative.¹⁹

3.5 Special rules for small estates

- 3.5.1 The Discussion Paper invited comments on the following recommendations:
- 3.5.1.1 *If it appears to the Master or designated official that—*
- 3.5.1.1.1 *the estate is solvent;*
- 3.5.1.1.2 *no estate duty is payable;*
- 3.5.1.1.3 *the value of the assets in the estate is less than an amount determined by the Minister by notice in the Government Gazette (say R125,000);*
- 3.5.1.1.4 *unborn beneficiaries, minors or other beneficiaries with limited legal capacity will not be prejudiced; and*
- 3.5.1.1.5 *the beneficiary or beneficiaries, or a legal representative of a beneficiary, have signed a statement of assets and liabilities, including the executor's remuneration, if any, which shows the intended distribution of the balance of the estate, the Master or designated official must appoint an executor with authority to deal*

15 See the proposal in paragraphs 5.2 and 5.3.

16 Paragraph 3.6.1 and following.

17 Paragraph 3.7.1 and following.

18 Paragraph 3.10.1 and the following.

19 Paragraphs 3.11.1 and the following.

with the assets set out in the appointment and exempt the executor from compliance with all other requirements under the Administration of Estates Act. The Master or designated official may hold a meeting of beneficiaries, but can dispense with such a meeting or a notice in the Government Gazette if in the Master's opinion it is not necessary or expedient to hold a meeting or publish a notice. The Master should retain the right to direct any executor to comply with any of the provisions of the Act and this should be stated on the certificate of appointment.

3.5.2 One commentator supported the recommendation without reservation.

3.6 List assets in the certificate of authority to deal with small estates

3.6.1 Some commentators say the authority to deal with the assets in small estates should list the estate assets reported by beneficiaries. There was a practice²⁰ to list assets in appointments, in terms of section 18(3), which was probably discontinued because of problems or extra work where the assets listed in the authority did not agree with the actual assets. Nevertheless the practice seems sensible because it maintains a record of the assets with which the executor is authorised to deal. (The recommendation with special rules for small estates²¹ proposed that assets should be listed in the authority to deal with such estates.)

Comments on the proposal that assets should be listed in the certificate of appointment

3.6.2 Several commentators support a requirement that assets should be listed in the certificate of appointment. The following reasons were advanced:

- 3.6.2.1 reduce abuse of the summary procedure, although admittedly it requires that the inventory has to be much more accurate and will take longer to compile so that it can form the basis of the appointment;
- 3.6.2.2 ensure that the appointee can only act with the assets in the inventory and must inform the Master should he or she discover any other assets (in comments on another recommendation a commentator pointed out that there is little supervision of the undertaking not to deal with assets which are not reflected on the inventory);
- 3.6.2.3 research has identified a loophole that an individual with a general authority may access assets which are not listed in the inventory. This provides scope for abuse. The representative may gain access to assets left out of the inventory in order to qualify for an appointment at a service point;
- 3.6.2.4 claims of rightful beneficiaries, such as children, may be denied if assets are not listed;
- 3.6.2.5 research has highlighted disparity between the practices of different service points. Some issue a blanket letter and in others assets have been hand written on the certificate of appointment. The best practice involves typing the inventory assets onto the appointment and this serves the recognised need to protect beneficiaries of small estates with all available safeguards;
- 3.6.2.6 unless specified assets are listed, access may be granted to any accounts in the name of the deceased. A statement from the banking account should be filed as a further safeguard to identify whether withdrawals have been made subsequent to death without authorisation from the Master.

²⁰ Cf L A Kernick "The quiet revolution" *De Rebus* January 1991 at 32.

²¹ Paragraph 3.5.1.

- 3.6.3 The Stakeholders' Meeting held on 28 November 2005 concluded that in the case of a summary appointment the assets and changes to assets should be reflected on the certificate of appointment.

Discussion

- 3.6.4 The advantages of listing assets on the certificate of appointment outweigh the disadvantages. The extra work and possibility of delays are justified. A Chief Master's Directive should bring about uniformity.

Recommendation

- 3.6.5 *It is submitted that in the case of an appointment with exemptions the assets should be listed on the certificate of appointment. Depending on the circumstances the assets may be typed as part of the appointment or a copy of the inventory, authenticated by a date stamp and signature corresponding with the appointment, can be attached to the appointment.*

3.7 Accounts in all estates

- 3.7.1 Many commentators feel that there should be some sort of account in all estates.
- 3.7.2 A commentator submits that some formalities should be dispensed with where the account has been signed by beneficiaries.
- 3.7.3 In small estates a simple account signed by beneficiaries seems to be a practical solution, especially if officials at the Master's office or a service point can assist beneficiaries.
- 3.7.4 A requirement that beneficiaries sign an account serves to protect the interest of beneficiaries more effectively than advertisement of the account. To avoid abuse the account should reflect the executor's remuneration, if any. In view of this protection security by the executor can be dispensed with in these cases. (The recommendation with special rules for small estates²² proposed that a signed account should be lodged before an appointment is made.)
- 3.7.5 The Master, Cape Town, submits that perhaps a time limit should be set for executors to distribute assets in terms of the statement in order for creditors and heirs to protect their interests in terms of section 50(2). It seems that beneficiaries or creditors would then be able to protect their interests if they become aware of an incorrect distribution. Alternatively, complaints may be lodged with the Master who can call for an account, in terms of section 35, and insist on compliance with other requirements under the Act.

Comments received on recommendation in the Discussion Paper that a signed account should be required before appointment

- 3.7.6 The following reasons were submitted in support of a requirement that an account should be lodged in all estates:
- 3.7.6.1 An account and Estate Duty Return should be required in all cases. The executor should confirm that all creditors have been settled and beneficiaries satisfied. Proof of transfer of fixed property should be lodged where applicable. Research reveals that many properties are not being transferred where a section 18(3) administration occurs. Deemed property or a foreign estate is seldom dealt with unless an Estate Duty Return is demanded.
- 3.7.6.2 When majors are beneficiaries in large or small estates the Master still has a duty to protect the interest of minor beneficiaries and creditors. An account or statement must be submitted.

- 3.7.6.3 Research has identified that representatives often do not understand their responsibilities and obligations. Officials in the Master's Office and at service points presume the representatives know their obligations under the law of succession, but there is general ignorance coupled with the perception that appointment as a representative equates rights to the entire estate. (This comment was not written in support of the requirement of an account, but supports it.)
- 3.7.6.4 The requirement that all beneficiaries sign an estate account is a practical method of ensuring full disclosure and protecting all beneficiaries. It is a practical mechanism to ensure that the appointment is approved by the beneficiaries.
- 3.7.7 Several commentators reject the requirement that a signed account should be lodged before the appointment on the basis that:
- 3.7.7.1 it is impractical to obtain details of assets and liabilities, put it into a statement and have it signed by beneficiaries quickly. The key to efficient administration is an appointment with minimum delays;
- 3.7.7.2 the requirement of an account would delay things and the Master could perhaps sign the appointment on the strength of a section 9 inventory and request that a statement be lodged in due course without a need to follow it up;
- 3.7.7.3 the requirement of a signed account would wave good-bye to the easy and hassle-free way of dealing with "small" estates. The heirs may be overseas or far away. What purpose would the account serve for the Master? A simple statement of assets and liabilities can be drawn up and handed to the beneficiaries;
- 3.7.7.4 frequently assets and liabilities are not known by the family on the date of death and if the distribution differs from the initial assets and liabilities the Master might end up with a lot of unhappy people.
- 3.7.8 The general feeling at the Stakeholders' Meeting held on 28 November 2005 was that it is important that an appointment be made immediately and it may cause unacceptable delays to insist on an account signed by beneficiaries before an appointment is made.

Discussion

- 3.7.9 If legislation provides that the Master must appoint an executor in every estate and that the Master may dispense with any requirements, the Master will be in a position to direct the proceedings in an appropriate manner, depending on the circumstances.
- 3.7.9.1 If the main consideration is to have an executor appointed urgently, the Master could be requested to appoint an executor immediately and consider exemptions at a later stage.
- 3.7.9.2 It may suit the parties or the Master to delay the appointment in order to comply with requirements such as a signed account before the appointment is made. An example where this would be appropriate is a simple estate where the parties prefer not to or cannot afford to utilise the services of professionals and the Master regards it as necessary for interested persons to comply with certain requirements, like a signed account, before the Master would be prepared to dispense with security and appoint an executor.

Recommendation

- 3.7.10 *It is submitted that some form of account should be submitted in all estates. A Chief Master's Directive can indicate the circumstances where an account must be lodged before the appointment is made.*
- 3.7.11 Estates should be finalised as soon as possible. There are cases where it takes time to obtain details of all assets and liabilities and to have an account signed by beneficiaries or representatives of beneficiaries. Some sort of account should be drawn up sooner or later and it is bad practice not to make the account available to beneficiaries before a distribution is made. If the executor acts according to acceptable practice a requirement that an account must be prepared and signed by beneficiaries or a representative of a beneficiary, should not delay distribution of the estate.
- 3.7.12 The appointment of a representative is urgent so that the representative can obtain details of assets and liabilities, take charge of the assets and decide in consultation with beneficiaries how the assets in the estate should be dealt with. A proposal that the Master should have the right to grant authority to a person to receive information about an estate is discussed below.²³ This authority could include the power to take charge of assets but not to liquidate or otherwise dispose of assets and can be issued without delay.

3.8 Regulation 5 not applicable in small estates

- 3.8.1 Although compliance with regulation 5²⁴ goes some way to ensure that all relevant information is reflected in the liquidation and distribution account it is a formality which causes delay and extra work. All that is required is a list, signed by the heirs, with values of assets, liabilities (including executor's remuneration, if any), totals for the assets and liabilities and the balance for distribution with an indication of how the balance will be distributed. The Master or designated official can assist.
- 3.8.2 Comments were invited on a recommendation that regulation 5 should not apply to the form of account required for estates dealt with in terms of the recommendation for "small estates".²⁵ For these accounts a simple form should be prescribed, as proposed in an Annexure to the Discussion Paper.

Comments received on the recommendation that accounts need not comply with regulation 5

- 3.8.3 One commentator doubted whether an account should be required at all, but three others agreed that an account in a small estate need not comply with regulation 5.

Recommendation

- 3.8.4 *It is recommended that— a Chief Master's Directive should prescribe a simple form of account for executors with exemptions.*

3.9 Remuneration*Discussion*

- 3.9.1 The remuneration of an executor with exemptions deserves special consideration. Although one of the reasons for appointments of executors in all cases is to introduce more oversight and better protection of beneficiaries, the appointments are nevertheless intended to save time

²³ Paragraph 3.15.1 and the following.

²⁴ Regulations in terms of section 103 of the Administration of Estates Act *Government Gazette* 3425 dated 24 March 1972 as amended from time to time.

²⁵ Paragraph 3.5.1.

and dispense with compliance with certain requirements. It follows that the remuneration of executors should as a rule be adjusted downwards from the taxed remuneration to which an executor is entitled in a case which follows the full procedure.

- 3.9.2 Discussion Paper 110 submitted that executor's remuneration, if any, should be reflected in a statement of assets and liabilities signed by the beneficiaries or a legal representative before an appointment is made.
- 3.9.3 Regulation 8 provides for a prescribed tariff of 3.5% on the gross value of assets, provided that the remuneration must not be less than R350. This amount was last adjusted in 1991. In terms of section 51(3) the Master may, if there are in any particular case special reasons for doing so, reduce or increase remuneration according to a prescribed tariff.

Recommendation

- 3.9.4 It is submitted that-
- 3.9.4.1 *executor's remuneration, if any, should be reflected in an account, signed by beneficiaries or their legal representatives;*
- 3.9.4.2 *consultation should take place to determine a reasonable and realistic minimum tariff instead of the R350 fixed in 1991 (a Ministerial amendment of the regulation would be required);*
- 3.9.4.3 *the minimum tariff should be the starting point for the determination of remuneration for an executor with exemptions.*

3.10 Immovable property

- 3.10.1 According to Master's office officials dealing with immovable property in small estates in terms of section 18(3) does not give rise to problems. If there are problems, like disagreement amongst heirs, the short procedure would in any case not be applicable. It seems that an estate should qualify for the procedure for small estates even if the estate includes immovable property.
- 3.10.2 If an executor were appointed in each estate an amendment to section 42(1) of the Act would be required to enable the executor to pass transfer to beneficiaries without a liquidation and distribution account, in terms of section 35 of the Act. Section 42(1) (transfer of immovable property to heirs) applies only when a liquidation and distribution account has been lodged in terms of section 35. Transfer of immovable property should proceed as usual in a small estate if the property is reflected in the statement of assets and liabilities (and in the appointment as executor). For the protection of beneficiaries, section 42(2) should apply to executors in small estates (certificate by Master required before transfer of immovable property in pursuance of a sale).

Comments on Discussion Paper 110 which deal with immovable property

- 3.10.3 The "house" is often the most important asset in small intestate estates. Houses are often inhabited by members of the extended family and viewed as "family houses" rather than homes owned by an individual.
- 3.10.4 There is much confusion over what constitutes "registered property" with many people who have acquired ownership from the Council referring to Council offices rather than the deeds office. In some cases the property has not been registered in the deeds office.
- 3.10.5 An agent will need to be appointed where minors are likely to be beneficiaries and there is immovable property.

- 3.10.6 A market valuation of immovable property (independent free valuation from an estate agent) should be obtained to ensure that minors are not left without an inheritance where it is averred that the estate is under R125, 000.
- 3.10.7 There are varied and contradictory views about the person to whom the house should be allocated – the rule of primogeniture still stands, but entitlement is also based on whether the person is capable of looking after the house and caring for children living within the home.
- 3.10.8 Separated widows or a second wife living elsewhere are excluded by omitting them and withholding necessary documents from them.
- 3.10.9 In the case of orphaned children a family member who moves into the house is sometimes motivated by the desire to claim a foster care grant and in the worst cases orphaned children may be left with nothing because property is not transferred to them.
- 3.10.10 Transfer costs of approximately R1, 500 deter registration of immovable property in small estates. Some attorneys apparently advise against registering a small estate where there is no dispute regarding the surviving spouse's right to remain in the house.

3.10.11 *Comments were invited on the following recommendations*

Section 42(1) must make provision for transfer of immovable property to beneficiaries if the transfer is in accordance with the statement of assets and liabilities in a small estate. In terms of section 42(2) a certificate by the Master should be required by the executor appointed in terms of section 13A to effect transfer of immovable property in pursuance of a sale. (Only the part of recommendation 21 dealing with immovable property and comment thereon are reflected here and in the next paragraph.)

Comments received on the recommendations regarding transfer of property in terms of section 42(1) or (2)

- 3.10.12 One commentator agrees with the recommendation.
- 3.10.13 Another commentator does not see why the Master's consent to the sale of land should be required in terms of section 42(2). In comments on recommendation 30²⁶ two commentators submitted that the Master should not be required to consent to the sale of immovable property in small estates.
- 3.10.14 Another commentator was under the impression that the Master's consent to transfer to beneficiaries would be required (as was the position earlier before the amendment of section 42(1)).

Discussion

- 3.10.15 It is not intended to change the position under section 42(1) — a certificate by the Master is not required, but the conveyancer must certify that the transfer to beneficiaries is in accordance with a liquidation and distribution account. In terms of the proposed statutory amendment the same will apply to an account lodged with the Master, even if advertisement of the account has been dispensed with.
- 3.10.16 If immovable property is registered in the name of the deceased the position of beneficiaries, including minor beneficiaries, is reasonably secure. The Registrar of Deeds should see to it that the property is not transferred to any person except the beneficiaries. According to information supplied by Masters this is not always the case in practice. Even though the Master's authority in terms of section 18(3) states that the property must be transferred to the beneficiaries the Deeds

²⁶ An executor must be appointed in all estates regardless of the value of the estate although special rules may apply to executors appointed in estates under a prescribed value.

Office allows property to be transferred to a purchaser without the consent of the Master.²⁷ This prejudices minors in cases where according to the value in the inventory the spouse is the sole heir, but according to the selling price the minors should have shared in the estate. A commentator submits that a market valuation of immovable property (independent free valuation from an estate agent) should be obtained in all cases.

- 3.10.17 With reference to valuations the Chief Master has made known his desire to limit costs for beneficiaries – executors' remuneration is influenced by the valuation:
- 3.10.17.1 municipal valuations often do not reflect market value. Valuations used should not become unrealistic or unfair;
 - 3.10.17.2 a sworn valuation by an appraiser appointed in terms of the Administration of Estates Act should be obtained when the value of property is in doubt or disputed;
 - 3.10.17.3 in terms of section 51(3) the Master may, if there are in any particular case special reasons for doing so, reduce or increase remuneration according to the prescribed tariff. The Master's discretion must be exercised according to legal rules applicable to the exercise of a discretion.
- 3.10.18 If transfer takes place in accordance with an account lodged with the Master, the distribution should be checked to ensure that the correct beneficiaries are reflected. It goes without saying that special care should be taken if there are unrepresented minors or any doubts about persons who claim to be legal representatives.

Recommendation

3.10.19 *Immovable property:*

- 3.10.19.1 *The position regarding transfer of immovable property in estates is a practical matter which should be discussed with the Chief Registrar of Deeds in order to arrive at a satisfactory solution to the practice that transfer to a purchaser is allowed without the Master's consent.*
- 3.10.19.2 *Section 42(1) (which deals with cases where immovable property has not been sold) should be amended²⁸ to include transfer in accordance with any account lodged with the Master and not necessarily a liquidation and distribution account in terms of section 35.*
- 3.10.19.3 *It would assist if the Master had access to the records of the deeds office to check whether property was registered in the name of the estate.*
- 3.10.19.4 *From the point of view of the protection of children, including minors, a market valuation of immovable property should be required. This is a practical matter which should be dealt with in a Chief Master's Directive.*
- 3.10.19.5 *Problems arise if beneficiaries cannot afford transfer costs. There may also be problems with paying municipal charges in order to obtain a clearance certificate. Practical solutions which may be pursued include the following:*
 - 3.10.19.5.1 *assistance by the Legal Aid Board, which has indicated an intention to get involved in civil matters;*
 - 3.10.19.5.2 *pro bono work by attorneys.*

²⁷ The justification of the Registrar of Deeds for registering transfer to a purchaser without a certificate by the Master may be that the Master's certificate in terms of section 42(2) is not required where there is no sale by an executor.

²⁸ See the proposal in paragraph 5.4

3.11 Personal liability of representative

- 3.11.1 Representatives in small estates should be personally liable if they do not distribute the assets in terms of the statement signed by the beneficiaries or fail to pay a claim which is reflected in the statement or of which the representative was aware when the assets were distributed.
- 3.11.2 *Comments were invited on a recommendation that in accordance with section 50 of the Administration of Estates Act, any executor appointed in terms of section 13A (small estate) who makes a distribution contrary to the statement or distributes the estate before payment of a claim must be held personally liable to any heir and anyone whose claim is reflected in the statement or of whose claim the executor was aware when the assets were distributed. (Annexure 1: Sections 30, 42(1) and 50)*

(Only the part of recommendation 21 dealing with personal liability of a representative and comment thereon are reflected in the previous and the next paragraph.)

Comments received on personal liability of an executor with exemptions

- 3.11.3 One commentator agrees with recommendation 21 as a whole and another supports the recommendation that executors appointed in small estates should be personally liable if they do not distribute the assets in terms of the statement signed by the beneficiaries.

Discussion

- 3.11.4 Section 50 applies if a liquidation and distribution account is lodged in terms of section 34 or 35. The section should be amended to apply to executors with exemptions.
- 3.11.5 There is an existing practice to obtain an "undertaking" from a section 18(3) representative before appointment to ensure that the person undertakes to administer the estate, to pay the debts from the estates and to distribute any balance according to the Master's directions in terms of section 18(3) of the Administration of Estates Act, and accepts that he or she is bound by any amendment or cancellation of such directions.

Recommendation

- 3.11.6 *It is submitted that the effectiveness of the undertaking in use in "small" estates at present can be enhanced by a wording similar to bonds of security lodged with the Master (see below).*
- 3.11.7 *Section 50 should be amended²⁹ to apply to executors with exemptions.*

Example of undertaking which creates liability:

I [Name and address] am aware that if I am appointed as Master's Representative in terms of section 18(3) of the Administration of Estates Act 66 of 1965 I must distribute the assets in terms of a statement lodged with the Master and signed by or on behalf of beneficiaries, pay claims according to the statement and pay any other claims of which I am aware when the assets are distributed. I hereby undertake and bind myself to administer the estate and liquidate and distribute the assets thereof properly according to law and to pay to the Master of the High Court) on demand an amount up to R.....rand) as the Master may claim from me in respect of any loss or damage which may be suffered by a beneficiary of the estate or a creditor by reason of the fact that I failed to perform properly my functions as Master's representative or because of any maladministration on my part. A certificate under the hand of the Master or his duly authorized representative to the effect that I failed to discharge my functions as aforesaid and stating the amount of such loss or damage shall be accepted as proof on the face of the certificate of such failure and of the extent of such loss or damage.

²⁹ See the proposal in paragraph 5.5.

3.12 Banking accounts

- 3.12.1 Section 28(1) of the Administration of Estates Act provides that, unless the Master directs otherwise, an executor must as soon as he or she has in hand moneys in excess of R1,000, open a cheque account in the name of the estate and deposit therein moneys which the executor has in hand or may from time to time receive for the estate. The executor may, by transfer from the cheque account open a savings account with a bank or place such money in an interest-bearing deposit with a bank. In terms of section 1 "bank" means a public company registered as a bank in terms of the Banks Act 94 of 1990.
- 3.12.2 Bank charges have increased considerably since the enactment of the Administration of Estates Act in 1965 and also since the amount of R1,000 was substituted for R100 in 2001. In particular, the cost of operating a cheque account and issuing cheques has escalated, moreover other types of accounts have been developed with facilities to draw cheques, pay accounts, or transfer funds to other accounts.
- 3.12.3 A further development was the launch in October 2004 of Mzansi accounts which require a minimum balance of R20 and have low bank charges. Account holders are entitled to one free statement per month. Customers issued with a card can use it, to deposit and withdraw funds, to make balance enquiries, have their salary or government grant paid into their account and pay for purchases using the card instead of cash. No electronic transfers, bill payments or inter-account transfers are allowed.³⁰ These accounts are offered by the four major banks and the Postbank.
- 3.12.4 If, as proposed above,³¹ an executor is appointed in "small" estates which qualify and the executor is exempted from compliance with all the provisions of the Act, such an executor will not be obliged to comply with the requirements of section 28 dealing with the opening and operation of a banking account. How then will such an executor deal with monies payable to the estate? Mzansi accounts are probably not available to an executor of an estate, but a person appointed as executor in a "small" estate who does not have a banking account would probably qualify to open such an account in his or her own name. Problems may be encountered if entities insist on paying funds into a bank account in the name of the estate or on issuing a non-transferable cheque payable to the deceased or the deceased's estate. The attitude of insisting on payment into an estate banking account, in order to avoid fraud, cannot be faulted, but what should be done in cases where it is not economical to open a bank account in the name of the estate?
- 3.12.5 *Comment was invited on the following:*
- 3.12.6 *Will or should banking practice allow an executor authorised in accordance with section 13A (summary appointment) to deal with assets listed in the appointment to pay the proceeds of the assets into a personal bank account in the name of the executor or that the executor should be allowed to cash cheques in the name of the deceased or the deceased estate representing assets listed in the appointment. If not, can any solution be suggested to access payments to the estate other than to open an account in the name of the estate?*
- 3.12.7 *In cases where section 28 will apply, it is submitted that the executor should be allowed to open any account with a bank or the Postbank and should not be obliged to open a cheque account.*

30 Cf http://www.standardbank.co.za/SBIC/Frontdoor_02_01/0,2354,10293765_10297113_0,00.html.

31 Paragraph 3.4.11.

Comments received on the recommendations regarding banking accounts

- 3.12.8 Commentators were unanimous in their rejection of the suggestion that an executor should be allowed to deposit estate money in a personal account:
- 3.12.8.1 It opens the door to mismanagement of estate funds
 - 3.12.8.2 It will increase the opportunity for fraud and theft to the prejudice of heirs.
 - 3.12.8.3 It will have a negative impact on the suspicious transaction profiling required by the Financial Intelligence Centre Act 38 of 2001 as it will become more difficult to identify the source of funds for money laundering purposes.
 - 3.12.8.4 To implement the suggestion would “be dynamite”.
- 3.12.9 Commentators favoured the proposal that executors should be allowed to open any type of account and not be restricted to a cheque account.

Recommendation

- 3.12.10 *It is submitted that executors with exemptions should be directed by the Master not to open a cheque account but required to open any other account with a bank or the Post Office. This could be done by way of a Chief Master’s Directive.*

3.13 Master’s fees

- 3.13.1 No Master’s fees are payable unless an executor lodges a liquidation and distribution account in terms of the Administration of Estates Act. All estates under R15,000 are currently exempted from Master’s fees. The discussion paper recommended that no Master’s fees should be payable in “small” estates.
- 3.13.1 *It is recommended that— no Master’s fees should be payable unless an executor lodged a liquidation and distribution account in terms of section 35 of the Administration of Estates Act.*

3.14 Amendment to provide for sale in execution

- 3.14.1 Section 30(b) (restriction on sale in execution) applies only after the expiry of the advertisement for creditors in terms of section 29.

Discussion

- 3.14.2 Statutory amendment is required to deal with this technical problem. It is not an urgent matter and is not dealt with in this report.

3.15 Authority to receive information about an estate

- 3.15.1 Information about an estate is often needed before the estate is reported to the Master because the way in which the estate will be administered depends on matters, such as the value of the assets and whether the estate is solvent. Some institutions, like insurance companies, refuse to give information about an estate before an executor has been appointed, which can create a catch-22 situation.
- 3.15.2 One option is to make provision for the Master to give authority to a person to receive information before an executor is appointed.
- 3.15.2.1 The Master should have a wide discretion to decide on the person who should be authorised to receive information or to require that the information be made available to the Master.

- 3.15.2.1 Any person who needs the information to report an estate or assist with the reporting of an estate should qualify.
- 3.15.2.1 The letter of authority should make it clear that the person is entitled to information and not to deal with assets or documents. In order to enforce this requirement failure to comply with it should be a criminal offence. Section 101(2) of the Administration of Estates Act provides that a court convicting any person for failure to perform any act required to be performed by or under this Act may, in addition to any penalty which it imposes, order such person to perform such act within such period as the court may fix.
- 3.15.2 A disadvantage of the option that the Master should authorise a person to receive information is that it will place a burden on the Master and cause delays. It could be provided that any person who provides proof of death and has a duty to report an estate should be entitled to information.
- 3.15.3 It was submitted that provision should be made for both options and comments were invited on the following recommendations:
- 3.15.4 *It is recommended that— any person who provides proof of death of a person and who is obliged to submit an inventory in terms of section 9 should be entitled free of charge to information about the existence of assets, the estimated value of the assets, or the outstanding amount of a debt of the deceased person. It is recommended further that the Master may at any time require any person with information about the existence of assets, the value of assets or the outstanding amount of a debt of a deceased person to make the information available free of charge to the Master or to a person indicated by the Master. Failure to comply with this requirement should be a criminal offence.*

Comments received on the recommendation regarding authority to receive information about an estate

- 3.15.5 One commentator agrees with the recommendation without reservation.
- 3.15.6 Another feels that the family will almost always have sufficient information to complete the preliminary inventory and indicate whether it is a section 18(3) estate or not. It would, therefore, be incorrect to interfere with the financial institution's wish to protect unauthorised access to their clients' particulars or to charge for providing information.
- 3.15.7 Another commentator feels that some control may be necessary (in cases where the Master did not issue a direction). A simple process to furnish proof of the duty to submit an inventory should be included in the wording.
- 3.15.8 The policy to prohibit access to an account without a letter of authority has the potential effect whether the estate is a "small" estate. An individual with an 18(3) appointment may not be willing to, or aware of an obligation, to have the status of the estate altered and an executor appointed. There should be a clear distinction between authority to access information and authority to deal with the estate assets.
- 3.15.9 Perhaps a suitably compiled standard form in consultation with the banking sector could be used to gain access to information.
- 3.15.10 Finally, a commentator submits that in appropriate cases the Master should issue an interim letter of authority to obtain details. A similar authority could authorise the nominated executor or person authorised by the Master to take control of the deceased's assets for the purpose of the necessary maintenance of persons entitled thereto and for the payment of funeral expenses.

Discussion

- 3.15.11 The need for accurate information would increase if appointments list the assets³² and an account is required before the appointment is made.³³ If the appointment cannot be issued without delay there may be a need for urgent authority to take charge of assets.
- 3.15.12 The wording of section 18(3) is wide enough for the Master to authorise a person to obtain information about assets and liabilities and take charge of assets, but only if the value of the estate is less than the prescribed amount. Ideally this authority should not be subject to the qualification of estates below a certain amount because one of the reasons for giving a person authority is to determine the value of the estate. No harm would be done if the matter is approached practically and authority granted in appropriate circumstances. Section 12 makes provision for appointment of an interim curator to take an estate into custody until an executor has been appointed and this curator can be authorised to receive information about the estate. The interim curator must, in terms of the existing provision, lodge security. This is not appropriate if the curator is authorised to receive information only or is authorised to take possession of clearly identified assets which are in any case held by someone who has not furnished security.

Recommendation

- 3.15.13 *It is recommended that— provision must be made for the appointment by the Master of a suitable person to receive information about an estate and where advisable to take control of assets before the appointment of an executor. The appointment of an interim curator should be amended³⁴ to make provision for this and to provide that the Master may dispense with security.*

32 Paragraph 3.6.5.

33 Paragraph 3.7 3.7.10.

34 See the proposal in paragraph 5.1.

Chapter 4:



Streamlined procedures for other estates

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4. Streamlined procedures for other estates

4.1 Introduction

- 4.1.1 The Master's office has difficulty coping with its workload, at least in some offices including the largest office situated in Pretoria. The effect of the heavy workload on the morale of staff and everyone involved in the administration of estates should not be underestimated. Beneficiaries and other parties interested in estates endure inconvenience and frustration and suffer losses as a result of delays in the Master's office.
- 4.1.2 The Master's workload increased because estates previously dealt with under customary law, are now also dealt with under the supervision of the Master. In view of all the demands on public funds the deployment of substantial resources to prevent backlogs in the Master's office is not the only solution. Control measures should not be relaxed merely to save money. Alternative ways to ease the workload of the Master and other role-players, should, however, be investigated.

4.2 Examination of accounts in deceased estates

Introduction

- 4.2.1 One commentator notes that the greatest bottleneck in the Master's office is the examination of accounts. The examination of accounts and queries following such examination probably represents a substantial percentage of the work of the Master's office and leads to the delays experienced in the Master's office.
- 4.2.2 Advantages of the examination of all accounts must be weighed against the disadvantage of the delays and costs caused by the examination of all accounts by the Master. In principle, executors should be responsible for the administration of estates³⁵ and beneficiaries or creditors, other than minors or incapable persons, should protect their own interests. This includes checking the remuneration claimed by the executor. Dependence on the Master to protect these interests creates a false sense of security and discourages beneficiaries and creditors from protecting their own interests.
- 4.2.3 Examination of accounts and vouchers by the Master can point out innocent (mostly stupid) mistakes. The role of the Master as an independent adjudicator is compromised if the Master issues instructions on how the account should be drafted before an objection is received.³⁶ The Master cannot by checking the documents lodged with him or her guard against all errors and fraud. It is conceded that reliance on the consent of interested parties or their vigilance may lead to distributions contrary to the wishes of a testator. It can be argued that limitation of a testator's ability to rule from the grave is not an unacceptable price to pay for more effective procedures. For instance, should the Master interfere if the testator provided that property should be sold after the testator's death and the heirs wished to retain the property?
- 4.2.4 The role of the Master to accept wills, to act as guardian of the legalities of the process, to protect the interests of minors or other persons with limited capacity and to decide on objections against accounts or complaints against executors cannot be criticised. The Master will have more time to concentrate on these duties and other duties, such as supervision of the administration of insolvent estates, if responsibilities exercised on behalf of persons of full legal capacity are curbed. The question whether the Master's investigative and associated powers should be expanded is dealt with as part of the general review of the administration of estates.

35 Cf L A Kernick *A The quiet revolution@ De Rebus* January 1991 at 31.

36 The Master is also compromised if it is expected of him or her to give advice to the public, as suggested by A P J Bouwer *Die Beredderingsproses van Bestorwe Boedels* tweede uitgawe Pretoria: Van der Walt 1978 at 9.

- 4.2.5 The Master should not be prohibited from examining any account, but the Master should be able to justify a decision to examine an account in the absence of an obligation to do so.
- 4.2.6 *Discussion paper 110 recommended that the Master should not be obliged to examine accounts or tax the executor's remuneration if-*
- *beneficiaries have no objections or complaints; and*
 - *there are no disputes about the administration of the estate; and*
 - *there are no absentee, unborn, or minor beneficiaries, or other beneficiaries with limited capacity*
 - *there is no reasonable possibility that estate duty is payable.*

Comments on the recommendation that the Master should not examine all accounts

- 4.2.7 The following comments on this recommendation were received by the Commission:³⁷
- 4.2.7.1 One of the Masters submits that all accounts should be examined. Another Master comments that taking into account the questionable quality of work from certain executors and administrators and the extremely limited standard of awareness amongst the general public in respect of the administration process, some form of control, as is currently applicable, should be retained.
- 4.2.7.2 Another Master says literacy should also be considered when considering examination of accounts. Some beneficiaries, although majors, are illiterate and can be cheated easily. It would therefore be wise to examine all accounts.
- 4.2.7.3 One commentator submits that the Master's office should never be reduced to a mere "filing office"; abdicating responsibilities would be a tragedy. It is empirically flawed to presuppose that there is an unqualified and widespread appreciation among interested persons of their rights and that there is a likelihood that interested persons would of their own accord raise objections. It is also arbitrary to accept without empirical proof that there is a connection between substantial inheritance and the legal and financial skills required to identify and impeach improper conduct; very often and especially in large deceased estates the risk of dissipation of assets is particularly prevalent.
- 4.2.7.4 Another commentator submits that the Master should examine accounts if requested by any interested party to do so. This will open the possibility for heirs to rely on the expertise of the Master to make sure on their behalf that the account is correct. It will cover the instances where heirs don't necessarily have an objection or complaint, but do not have enough knowledge of estates to protect their own interests.
- 4.2.7.5 A commentator says the recommendation in the Discussion Paper is acceptable if beneficiaries sign a certificate stating that they have no objections and that any later objections will not be entertained. This will stop them from signing just to get their hands on their inheritances. However, the proposed practice could also open the door to the exploitation of the uninitiated. How many people understand estate accounts and will seek professional help to interpret accounts for them? This commentator is of the opinion that some form of oversight of the executor's work is necessary as part of the checks and balances in the administration of an estate.
- 4.2.7.6 One commentator proposes that the Master should make provision for all estates where Estate Duty is payable be administered and regulated by a special task

³⁷ The full comments are available at the Commission.

group or personnel trained to specially regulate the actions of the executor in order to prevent unanswered, intricate and unsettled questions and to investigate and resolve difficulties in such estates. Another commentator believes that SARS should not be treated more favourably than other creditors and does not believe that dutiable estates should be examined by the Master: An Estate Duty Return is lodged — this can be inspected; therefore the Master need only become involved in the examination where there is a dispute and focus on examining the exceptions rather than the routine.

- 4.2.7.7 One of the Masters says that in cases where a full examination is justified the Master should be required to tax the administration expenses and accept the distribution only. This Master submits that an Estate Duty Return must be lodged in all estates, even the “small” estates, as there might be deemed assets of very high values making the estate dutiable. Another commentator states that each account should be checked to make sure it complies with the regulations as the format in the regulations is very good. The income and expenditure account section should be abolished as this is of concern to SARS and not the Master, except, perhaps, for taxing collection charges on income.
- 4.2.7.8 Another commentator suggests that control should be limited to estates where there are minors or others under disability, and then only if there is no testamentary provision made (like a trust) to look after the benefits accruing to them.
- 4.2.7.9 One of the Masters, commenting on the reporting of estates at the office of the Master, notes that it will not be possible to foresee that no estate duty is payable, or determine whether beneficiaries have no objections or complaints, there are no disputes about the administration and there are no absentees or beneficiaries with limited capacity. A commentator points out that beneficiaries and other interested parties surely object or complain after the account has been advertised — this is in accordance with the fast tracking system. Another states that if an objection or complaint is received the Master would have to examine the account so that he or she could adjudicate the matter. This commentator says it should not be expected of the Master to establish negatives and the criteria should be replaced by something on the lines “if no objection or complaint about the administration has been brought to the Master’s attention”.
- 4.2.7.10 A commentator strongly affirms the recommendation and states that estates where no problems are encountered could take up to 9 months to finalise. Another commentator notes that a few years ago, the Master introduced a fast track system of examining liquidation and distribution accounts. At first, it worked wonderfully. Within two weeks, the administrator received the Master’s questionnaire if the estate had complied with the recommendation in paragraph 4.2.6 above. The commentator states that this is no longer the case and refers to a matter where the spouse was the sole heir, making estate duty impossible, but the Master required an estate duty return, vouchers, cheques and bank statements.
- 4.2.7.11 A commentator says that the Master’s passivity at present is no doubt attributable to a heavy work-load and lack of skilled persons, but the impression is created in the minds of members of the public that the Master appears to be subjective, acting in the interests of the executor and not the testator. Another commentator says that it received information that the number of estates being reported to Master’s Offices and Service Points has increased exponentially. This re-enforces their view that the Master should enjoy greater discretion not to examine accounts in matters where there is no conflict.

- 4.2.7.12 A commentator says section 35(4) of the Administration of Estates Act should be amended to indicate that, where the Master did examine the account, it may only be advertised after such examination, otherwise the appointee may take the opportunity to advertise time after time on the account of the estate.
- 4.2.8 The following views were expressed at the stakeholders' meeting, held to discuss Discussion Paper 110:
 - 4.2.8.1 the Master cannot really check assets or claims, but only the distribution account;
 - 4.2.8.2 objections focus mainly on claims;
 - 4.2.8.3 SARS should take care of estate duty;
 - 4.2.8.4 the Master is already limiting the number of accounts and the need to examine those accounts.
 - 4.2.8.5 The meeting concluded as follows:
 - 4.2.8.5.1 the Chief Master should issue guidelines;
 - 4.2.8.5.2 some form of account should be lodged in all estates;
 - 4.2.8.5.3 the Master should have a discretion to examine accounts and this discretion should be exercised according to the guidelines;
 - 4.2.8.5.4 there must be substantive compliance rather than concern with technicalities.

Discussion

- 4.2.9 The following conclusions in Discussion Paper 110 (paragraphs 5.2.10 to 5.2.17) are supported.
 - 4.2.9.1 Examination of accounts is a serious bottleneck and represents a substantial percentage of the work of the Master's office and leads to delays experienced in the Master's office.
 - 4.2.9.2 The Master should not be forced to ignore blatant errors that come to the Master's attention. The role of the Master to act as guardian of the legalities and to protect the interests of minors or other persons with limited capacity and to decide on objections against accounts and investigate complaints cannot be criticised. The Master will have more time to concentrate on these duties and other duties if responsibilities exercised on behalf of persons of full legal capacity are limited.
 - 4.2.9.3 The matter should be dealt with in a Chief Master's Directive.
 - 4.2.9.4 The advantages of examining all accounts must be weighed against the disadvantages of delays and costs caused by examination of all accounts.
- 4.2.10 The following provisions in the Administration of Estates Act 66 of 1965 refer to examination of liquidation and distribution accounts by the Master:
 - 4.2.10.1 section 35 (2A) deals with lodging of vouchers in support of the account and refers to the performance of the Master's functions "in connection with the examination or amendment of the account";
 - 4.2.10.2 section 35(4) provides that every executor's account must lie open for inspection "after the Master has examined it";
 - 4.2.10.3 section 35(4) implies that every executor's account must be examined by the Master. This cannot prohibit the Chief Master from issuing a directive that accounts

are considered to have been examined by the Master if the Master has not within a reasonable time (to be specified in a number of working days), issued a questionnaire regarding the account. Legislation cannot force the Master to perform the impossible and beneficiaries and executors should not be made to suffer because the Master experiences problems coping with the workload. It is within the powers of the Chief Master to include prescripts regarding the examination of accounts in such a directive. It is important that the examination of accounts should not create a bottleneck to the prejudice of beneficiaries in estates.;

Recommendation

- 4.2.11 It is recommended that— the Chief Master consider issuing a Directive along the following lines.
- 4.2.11.1 A reasonable period for the Master to examine a liquidation and distribution account in a deceased estate, calculated on the number of working days after the date on which an account is received by the Master, should be determined in consultation with Masters and stakeholders in the industry.
- 4.2.11.2 A Chief Master's Directive should provide that an account is considered to have been examined by the Master, without preconditions for advertisement, if a questionnaire is not sent to the executor or executor's agent within the prescribed number of days after the receipt of the account by the Master. The date of receipt of the account is the date when the account is handed to the Master or 7 days after the account was mailed to the Master by registered mail. The directive should apply only if the account is submitted by hand or registered mail. As soon as it is possible to do so the Global Estate Register should indicate the date on which a questionnaire regarding an account is sent out by the Master.
- 4.2.11.3 The Chief Master's Directive should prescribe that the examination of accounts by the Master must concentrate on the following in the order indicated:
- 4.2.11.3.1 correctness of distributions and administration costs;
- 4.2.11.3.2 accounts where examination is necessary to enable the Master to deal with complaints regarding the administration of an estate, or an objection to a liquidation and distribution account, or a dispute which has arisen regarding the administration of an estate;
- 4.2.11.3.3 accounts in estates where it appears to the Master that there are absentee, unborn or minor beneficiaries, or vulnerable beneficiaries, like illiterate people, or beneficiaries with limited capacity. This is particularly important if the beneficiaries are unrepresented and provision is not made for the administration of the benefits in a trust or otherwise;
- 4.2.11.3.4 accounts in estates where the Master has been requested by beneficiaries to examine the account;
- 4.2.11.3.5 accounts where it appears to the Master that there is a possibility that estate duty is payable. This item can be reconsidered if agreement is reached with SARS that the Master should not accept extra responsibilities in cases where it appears to the Master that estate duty may be payable.

4.3 Follow up of requirements after a final account has been advertised

Recommendation in Discussion Paper and comments thereon

4.3.1 Discussion Paper 110 of the Commission contains the following recommendation:

- Except for sections 35(13), 39, 40, 42, 49, 51(4) and 53³⁸ of the Administration of Estates Act, an executor who has advertised for creditors and advertised a final account for inspection free from objections, shall not be required to comply with any requirements in the Act in the following circumstances:
 - » No estate duty is payable; and
 - » The estate is solvent; and
 - » There is no absentee beneficiary, minor beneficiary or other beneficiaries lacking full legal capacity, or an unborn heir who may become entitled to benefits in terms of a liquidation or distribution account.
- Despite this recommendation, the Master may instruct an executor at any time to comply with any requirement of the Act and the Master's authority to do so should be noted on the certificate of appointment.

4.3.2 The Discussion Paper recommended that section 35 of the Administration of Estates Act 66 of 1965 should be amended to provide as follows:

4.3.2.1 if the estate appears to be solvent and no absentee beneficiary, minor beneficiary or other beneficiaries without full legal capacity are entitled to and no unborn heir may become entitled to a benefit in terms of an account, an executor who has advertised for creditors and advertised a final account for inspection free from objections, is not without a directive by the Master required to comply with any requirements of the Act, except:

4.3.2.1.1 section 35(13) – deposit money in Guardian's Fund if unable to pay out in terms of account;

4.3.2.1.2 sections 39, 40, 42 – register rights to immovable property in the names of beneficiaries;

4.3.2.1.3 section 49 – obtain the consent of the Master for the purchase of property by the executor, executor's spouse, etc;

4.3.2.1.4 section 51(4) – distribute estate before drawing remuneration;

4.3.2.1.5 section 53 – obtain Master's consent for absence from the Republic.

4.3.2.2 Despite the provision in the previous paragraph the Master may at any time direct any executor to comply with any of the provisions of the Act.

4.3.3 The recommendation did not elicit much comment³⁹ which is an indication that interested parties agree or do not regard the issue as important.

4.3.4 Two commentators support the recommendation without qualification. A third submits that the recommendations are "brilliant", but warns against notes on the certificate of appointment and submits that the questionnaire used in the current fast track procedure, makes adequate provision for this.

4.3.5 One commentator supports the view that matters such as this could be dealt with in a Chief Master's Directive, which should be of a public nature and posted to a web site.

³⁸ See paragraph 4.3.2.1 below for the contents of these provisions.

³⁹ The full comments are available at the Commission.

- 4.3.6 Another commentator submits that in the case where a trust is the beneficiary, requirements should be dispensed with, whether or not the beneficiaries are minors or are lacking full legal capacity. The reason for this view is that the trustee will be bound by a fiduciary duty and subject to supervision by the Master in terms of the Trust Property Control Act 57 of 1988.
- 4.3.7 It is stated by a commentator that the alleviation of bottlenecks would free Master's Office personnel for work at service points. A probate regime is preferred whereby the Master's intervention is limited to the issuing of Letters of Executorship unless special circumstances justify further involvement.

Discussion

- 4.3.8 The Discussion Paper⁴⁰ mentioned the following disadvantages of affording the Master a wide discretion:
- 4.3.8.1 the exercise of a discretion causes work for the Master and may accordingly cause delays;
- 4.3.8.2 uncertainty will exist about the way in which the Master may exercise a discretion.
- 4.3.9 It seems that the recommendations in the Discussion Paper should be reconsidered for the following reasons:
- 4.3.9.1 as indicated by a commentator the appointment should not indicate that the Master has authority to instruct an executor to comply with requirements notwithstanding that the preconditions for not complying have been met. In cases other than section 18(3) estates the question about insisting on outstanding requirements does not arise at the time of appointment but when the account is lodged and advertised free of objections;
- 4.3.9.2 the application of rigid rules is inappropriate and compliance with statutory requirements require flexible supervision by the Master. The disadvantage that a discretion for the Master creates uncertainty, can be managed by prescribing clear guidelines in a Chief Master's Directive.

Recommendation

- 4.3.10 It is proposed that a Chief Master's Directive should provide guidance about this matter and that it should not be dealt with in the Administration of Estates Act 66 of 1965.
- 4.3.11 The Chief Master's Directive must provide that the Master does not follow up on compliance with legal requirements after a final account has been advertised free of objection except in the following circumstances:
- 4.3.11.1 there is reason to believe that the estate is insolvent;
- 4.3.11.2 in terms of the liquidation and distribution account there is an absentee beneficiary, minor beneficiaries or other vulnerable beneficiaries, like illiterate people, or beneficiaries lacking full capacity, or unborn heirs who may become entitled to benefits and provision has not been made in a trust for the administration of the benefits;
- 4.3.11.3 there is reason to believe that estate duty may be payable (this can be reconsidered if an agreement is reached with SARS that the Master will not accept extra responsibilities in cases where it appears to the Master that estate duty may be payable);
- 4.3.11.4 there is no circumstance which compels the Master to follow up on compliance with requirements by the executor.

- 4.3.12 Any questionnaire which lists requirements after advertisement of an account must be drafted accordingly.
- 4.3.13 The Master may at any time enforce compliance by an executor with any requirements of the Act.

4.4 Removal of executors

Discussion Paper

- 4.4.1 It has been suggested that it takes too long for the Master to remove an executor from office in terms of section 54 of the Administration of Estates Act because of the 30 days notice required in subsection (2).⁴¹
- 4.4.2 The Discussion Paper requested comments on the possibilities of empowering the Master to appoint a joint executor or to rely on provisions to remove an executor from office expeditiously.

Comments

- 4.4.3 One commentator supports the appointment by the Master of joint executors without reservation and adds that the initially appointed executor should forfeit fees if the administration was not executed properly.
- 4.4.4 Three commentators support joint appointments by the Master but subject to conditions.
- 4.4.5 Most commentators are opposed to joint appointments and prefer provisions to remove an executor from office expeditiously and appoint a new one. They mention the following concerns:
- 4.4.5.1 a discretion of the Master to make a joint appointment interferes with freedom of testation and can undo the close relationship which may exist between the nominated executor and beneficiaries.
 - 4.4.5.2 the door could be opened to certain undesirable practices which have already manifested themselves in our new democracy;
 - 4.4.5.3 reference is made to the statement in the discussion paper where it is submitted that the joint executors must act jointly and share the remuneration – the original executor is unlikely to cooperate or return the original certificate of appointment for endorsement;
 - 4.4.5.4 no reputable executor will be willing to accept an appointment of a joint executor with someone who is under suspicion. The problem is not one of shared remuneration so much as shared accountability at a later stage;
 - 4.4.5.5 an executor should not be forced to work with a complete stranger;
 - 4.4.5.6 the process for removal should be more streamlined;
 - 4.4.5.7 the notice period for removal of an executor should be reduced and provision should be made for sending final reminders by facsimile or electronic means while keeping proof of successful transmission.

Discussion

- 4.4.6 In line with a large majority of comments and for the reasons set out by the commentators it is submitted that provision should not be made for the discretionary appointment of joint

41 Paragraph 4.4.7.

executors by the Master. Provision should rather be made to remove an executor expeditiously so that a new executor can be appointed.

- 4.4.7 Section 54(1)(b)(v) of the Administration of Estates Act provides that an executor may be removed from office if the executor fails to perform satisfactorily any duty imposed upon the executor by or under the Act or to comply with any lawful request of the Master. Before removing an executor from office the Master must in terms of section 54(2) forward to the executor by registered post a notice setting out the reasons for the removal and informing the executor that he or she may apply to the Court within 30 days from the date of the notice for an order restraining the Master from removing the executor from his or her office.
- 4.4.8 Section 36 provides that the Master may offer not less than one month's notice apply to the court for an order to lodge an account or vouchers in support thereof with the Master; or to perform a duty imposed by the Act; or to comply with any reasonable demand by the Master for information or proof required by the Master in connection with the liquidation or distribution of the estate.
- 4.4.9 If an executor fails to comply with requirements the Master must send out a "final reminder" in terms of section 36 which threatens a court application if the executor does not comply before a date stated in the notice. The reminder refers in passing to sections 54 and 102.⁴² In terms of section 36 the Master may only apply for a court order after "not less than one month's notice". In addition it is advisable to allow for the "time at which the letter would be delivered in the ordinary course of post".⁴³ If an executor fails to comply with the final reminder the Master usually gives notice that he or she intends to remove the executor from office, unless the executor applies to Court within 30 days from the date of the notice for an order restraining the Master from removing the executor from office.⁴⁴
- 4.4.10 There is no legal requirement that a "final reminder" must be issued before the Master may remove an executor from office. There is also no requirement to give notice that the Master intends removing the executor from office. This wording, which is used in existing forms, may imply that the Master must still give the executor 30 days to apply to court once it has been decided to remove the executor. All that is required is that the Master must forward a notice setting out the reasons for the removal and informing the executor of the possibility of applying to court within 30 days for an order restraining the Master from removing the executor from office.
- 4.4.11 In theory it is possible to give a single notice that either an application to court will be made to enforce compliance or that the executor will be removed. These two steps are diametrically opposed and it is awkward to combine them in one notice.
- 4.4.12 It seems that the Master's notice to make application to court is mostly an idle threat because of the costs and delays involved and the further steps required to enforce the court order. Removal of the executor and appointment of another executor is a speedy and often much more practical solution.
- 4.4.13 It is advisable that the Master should decide on the appropriate action when an executor fails to comply with requirements and give notice of the action envisaged should the executor fail to comply within a stated period.

42 Eg form J179. Section 54 provides for removal of an executor and 102 for criminal penalties.

43 Section 7 of the Interpretation Act 33 of 1957.

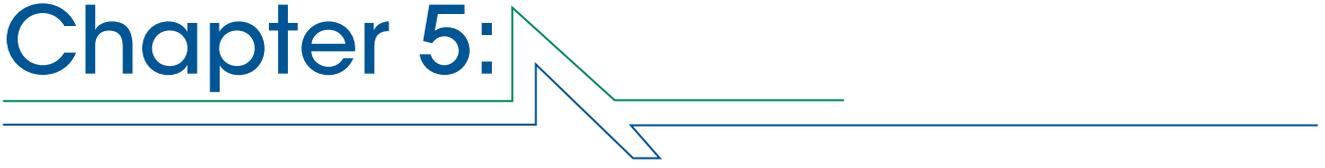
44 Eg form J188.

Recommendation

- 4.4.14 It is submitted that provision should not be made for a discretionary appointment of a joint executor by the Master.
- 4.4.15 It is submitted that steps to be taken by the Master when an executor fails to comply with requirements should be dealt with in a Chief Master's Directive along the following lines:
- 4.4.15.1 if a lawful request of the Master is not complied with the Master must send a registered final reminder for the Master's requirements to be complied with within 14 days and diarise the matter for 21 days;
- 4.4.15.2 if a legal duty in terms of the Act is not complied with (eg liquidation and distribution account not lodged) or a lawful request of the Master has not been complied with after a final reminder, appropriate action which could be one or more of the following, should be decided on:
- 4.4.15.2.1 where appropriate, file the matter without follow up (see paragraph 4.3 above);
- 4.4.15.2.2 if the executor or person who assists the executor with the administration belongs to a professional body, report the matter to the professional body and diarise the matter for 21 days before the steps below are followed;
- 4.4.15.2.3 steps must be taken against a professional body, or preferential treatment of members of the professional body must be suspended if the professional body does not follow up properly on reports that its members have failed to comply with legal requirements;
- 4.4.15.2.4 consider giving notice that application will be made to court for an order directing the executor to comply with the outstanding requirements (final reminder), but keep in mind that such an application is costly, time consuming and may not be effective to finalise the estate;
- 4.4.15.2.5 give notice of removal in an appropriate form and diarise for 5 weeks to follow up by removing the executor and taking steps to appoint another executor. The notice must be sent to the executor personally with a copy to the agent, if any. Provide beneficiaries with an opportunity to nominate a successor, if it is practicable to do so without too much delay.
- 4.4.16 The following matters deserve consideration, but as part of the general reform process and not the urgent interim reforms:
- 4.4.16.1 electronic notices;
- 4.4.16.2 reduction of 30 day period for notices.



Chapter 5:



Draft legislation

5. Draft legislation

It is proposed that the following amendments to the Administration of Estates Act 66 of 1965 should be promoted as a matter of urgency:

5.1 The following amendments to section 12:

- (1) The Master may appoint an interim curator to perform one or both of the functions-
- (a) _____ to take any estate or the assets of an estate indicated in the appointment into his custody until letters of executorship have been granted or signed and sealed, ~~or a~~ person has been directed to liquidate and distribute the estate; or
- (b) _____ to receive information about any estate.
- (2) Unless security has been dispensed with by the Master, Every person to be so appointed shall, before a certificate of appointment is issued to him, find security to the satisfaction of the Master in an amount determined by the Master for the proper performance of his or her functions.

5.2 The addition of the following section:

13A Dispensing with requirements

- (1) The Master may in accordance with guidelines issued by the Chief Master dispense with compliance by an executor with any of the requirements of the Act.
- (2) The Master may, despite dispensing with requirements, at any time instruct an executor to comply with any of the requirements of the Act.

5.3 The deletion of section 18(3) and the following consequential amendments:

- 5.3.1 *Remove the reference to section 18(3) in section 18(2);*
- 5.3.2 *Remove the references to "direct" and "direction" -*
- 5.3.2.1 *in sections 11(1)(b) and (c), 12(1) and 13(1); and*
- 5.3.2.2 *in the heading of section 13.*

5.4 The following amendments to section 42(1):

- (1) Except as is otherwise provided in subsection (2), an executor who desires to have any immovable property registered in the name of any heir or other person legally entitled to such property or to have any endorsement made under section 39 or 40 shall, in addition to any other deed or document which he may be by law required to lodge with the registration officer, lodge with the said officer a certificate by a conveyancer that the proposed transfer or endorsement, as the case may be, is in accordance with the liquidation and distribution account or another account lodged with the Master by an executor appointed in terms of section 13A.

5.5 The following amendments to section 50:

50 Executor making wrong distribution

- (1) Any executor, other than an executor appointed in terms of section 13A, who makes a distribution otherwise than in accordance with the provisions of section 34 or 35, as the case may be, shall-
- (a) be personally liable to make good to any heir and to any claimant whose claim was lodged within the period specified in the notice referred to in section 29, any loss

sustained by such heir in respect of the benefit to which he or she is entitled or by such claimant in respect of his or her claim, as a result of ~~his~~ the executor's failure to make a distribution in accordance with the said provisions; and

- (b) be entitled to recover from any person any amount paid or any property delivered or transferred to him or her in the course of the distribution which would not have been paid, delivered or transferred to him or her if a distribution in accordance with the said provisions had been made: Provided that no costs incurred under this paragraph shall be paid out of the estate.

(2) Any executor appointed in terms of section 13A who makes a distribution contrary to an account signed by beneficiaries or representatives of beneficiaries or distributes the estate before payment of a claim reflected in such an account or before payment of a claim of which the executor was aware when the executor distributed the assets-

- (a) shall be personally liable to make good to any heir and to any claimant any loss sustained by such heir in respect of the benefit to which he or she is entitled or by a claimant in respect of his or her claim, as a result of the executor's failure to distribute the assets in terms of the account or to pay the claim; and
- (b) shall be entitled to recover from any person any amount paid or any property delivered or transferred to him or her in the course of the distribution which would not have been paid, delivered or transferred to him or her if a distribution in accordance with the said account had been made or the said claim had been paid: Provided that no costs incurred under this paragraph shall be paid out of the estate.

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