

Legal Alert – April 2016 - The Law on Debts After Death

Introduction

One of the longest held business Quote is from Benjamin Franklin who said; “In this world, nothing can be said to be certain except death and taxes”. Also true is the fact that most people will during their lifetime incur some debt(s) which could become problematic and difficult to manage when the Debtor dies.

The above concern is especially so if the Debtor during his lifetime, and his or her Administrators and the beneficiaries of the Debtor’s estate, are not familiar with the basic applicable Laws and Regulations on the subject of Debts after a Debtor’s demise.

General Principles on Debts after Death

Generally, the beneficiaries of the estate of a deceased Debtor are not personally liable or responsible to settle a deceased Debtor’s personal debts. The exception to this general rule include (i) where the beneficiaries co-owed the asset from which the debt arose during the lifetime of the Debtor; or (ii) a beneficiary or all the beneficiaries guaranteed the debt with the deceased Debtor; or (iii) as in some jurisdictions, especially in some States in the United States of America, where any property acquired by a spouse during marriage are considered community property to which both spouses have joint rights and liabilities irrespective of one spouse’s death.

Once a person passes away, the first step that his or her Administrators and beneficiaries must take is to apply for Probate, whether or not the deceased person prepared and executed a Will. Part of the Probate application process is the notification to members of the public, which includes the Debtor’s creditors, usually via newspaper publications and government gazette, of the application for Probate of the deceased Debtor’s Estate.

Probate, Death and Debts

Probate is the legal and formal transfer of a deceased affairs’ to his or her nominated Administrators. Administrators hold the deceased estate assets as Trustees for the beneficiaries of such estate.

The first applicable Law on Probate matters is the Administration of Estate Law. Each State in the Federation of Nigeria has its Administration of Estate Law.

The provisions of the Administration of Estate Law do not however apply to the administration or management of the Estate of a deceased person whose affairs were during his lifetime governed or regulated by Customary Law.

Administrators, Beneficiaries and Creditors must also be aware that in the order of priorities, the real and personal properties of a deceased Debtor are assets for the discharge of (I) the deceased funeral and testamentary expenses; (II) the deceased debts and other liabilities with the secured debtors having first charge or priority in this group; (III) the residue of the estate is to be distributed to the beneficiaries as instructed in a signed Will; and where there is no Will, in accordance with the provisions of the Administration of Estate Law.

Any testamentary instructions that seek to vary the above order of priorities in the discharge of a deceased estate liabilities will by the provisions of the Administration of Estate Law, be held to be null and void.

Where however the Administrators of an Estate, in good faith and without notice of the debts, or of the creditors of the deceased, disposes off the assets of the estate for the benefit of the beneficiaries, the beneficiaries will still be liable to the Creditors to the extent of the benefit that each beneficiary received once notice of the debt is brought to the attention of the Administrators and the Beneficiaries.

Administrators are also allowed to invest any surplus funds of the Estate, not immediately required, provided such investment are in accordance with the applicable statute on the investment of Trust assets. In Nigeria, the latter Law is the Trustee Investments Act.

Deceased Debtors and the Bankruptcy Act

Creditors also have a legal right to resort to the reliefs provided for in the Bankruptcy Act when a Debtor becomes deceased.

Bankruptcy arises when a person cannot pay his or her debts out of his or her liquid, unencumbered assets, to a single or multiple Creditors. By the provisions of the Bankruptcy Act, a Creditor of a deceased Debtor whose debt would have been sufficient to support a Bankruptcy Petition had the deceased Debtor been alive, may present a Bankruptcy Petition to Court

praying for the administration of the estate of the deceased Debtor under the Bankruptcy Regulations.

Where a Court grants a Bankruptcy Order, the deceased person's properties shall become vested in an Official Receiver, who shall serve as a Trustee, to collate, sell and distribute the proceeds of the sale of the deceased Debtor's assets.

The Official Receiver cum Bankruptcy Trustee shall however, before distributing the proceeds of sale, be mindful of any claim by the deceased personal legal representatives regarding proper funeral and testamentary expenses incurred, as such funeral debts shall be given preferential treatment and settlement. See *Section 109 (5) of the Bankruptcy Act*.

Any surplus remaining in the hands of the Official Receiver cum Trustee, after the payment of all debts, creditors and testamentary costs included, shall be paid over to the Administrators or Legal Personal Representatives, of the deceased Debtor's estate, or falling such Administrators, to the appropriate Administrator General of the State where the estate resides.

Retirements and Life Insurance Benefits

Under the Pension Reform Act 2014, retirement and other benefits arising from the mandatory Group Life Insurance schemes are payable to the deceased named beneficiaries.

In some other jurisdiction outside Nigeria, retirement and life insurance benefits are protected from Creditor's recovery actions where the deceased assured dies.

Conclusion

Very many people, physiologically and understandably, avoid contemplating, discussing and preparing for death and events after death. Death is however an unavoidable departure from this world. Preparing for death by, among other things, writing a Will, is a fantastic wealth creation behavior as the latter exercise enables the maker of the Will to know his or her exact assets and liabilities; among other things.

Debtors should also ensure that they do not leave for their loved ones an unsettled and financially bankrupt estate as only third party Consultants benefit the most from such a state of affairs.

Creditors on their part should be proactive in managing and monitoring their Debtors. Curing support in the bad times to a Debtor could enable a quicker recovery of the debt. This is especially as the demise of the Debtor could leave the Creditor out-of-pocket during the Probate exercise; there is no modern day online Probate Registry in Nigeria which enables the Creditors and other interested parties to monitor probate applications. Mischievous Administrators and Beneficiaries could publish the Probate Notice in cheap municipal newspapers that many Creditors do not read thereby jeopardising any actual notice of an unsecured debt to the Creditor.

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