

Short notes on:

## **NASCITURUS FICTION – INHERITANCE FOR AN UNBORN CHILD**

### ***Introduction***

Since the start of the Covid-19 pandemic, many South Africans have been forced to become more aware of their own mortality. As a result, they had to start making profound choices about their future and think more about the well-being and future of their children.

To provide for the necessary protection of their children's futures, many set out to have a last will and Testament drawn up. This is, however, easy to do when one already has children. What if your wife is pregnant with your unborn child or your daughter with your unborn grandchild? How would the interests of this child be protected if you pass before they are born?

### ***The Law of Succession in terms of an Unborn Child***

The rules that dictate how a person's estate is devolved after their passing is set in the South African Law of Succession. These rules include who may inherit, what they may inherit, and the different duties and obligations they will have in terms of the deceased's estate. However, going back to the initial question. How would the interests of this child be protected if you pass before they are born?

South African law says that the beneficiary should be alive or conceived on the day of the testator's death. Since the transfer of rights is a requirement for succession and an unborn child cannot inherit or bear rights, what happens to the bequest? The bequest is held over and vests once the child is born alive. This is in terms of the common law concept of *nasciturus fiction*.

### ***What is Nasciturus Fiction?***

*Nasciturus fiction* is the common law principle in which a child that was born alive and conceived prior to the testator's death is considered to have obtained rights from the moment it was conceived. Therefore, a conceived yet unborn child is not regarded as a legal subject; however, this principle in our law caters for the eventuality that the child will become a legal subject if benefit accrues to a child that was conceived at the time of accrual and is subsequently born alive the *nasciturus fiction* states that the unborn child has the required legal personality to inherit.

## **Conclusion**

In conclusion, an unborn child has the ability to inherit in terms of Testate Succession where there was a Last Will, and Testament drafted and Intestate Succession where there is no will if the principle of *nasciturus fiction* is applied, provided that the requirements are met for the principle to apply. Therefore, it is essential to make sure that when considering the protection of your unborn child or grandchild's future in terms of the South African Law of Succession, you are aware of your rights, the rights of the unborn child and what is required by the law. Therefore, consult with a legal professional before attempting to start any process or responding to any process yourself.

Contact an attorney at SchoemanLaw for your legal needs!